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FREEDOM OF INFORMATION APPLICATIONS AND THE CONFIDENTIALITY OF UNIVERSITY RESEARCH AND RESEARCH REVIEW PROCESSES

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There have been a number of disputed freedom of information (FOI) applications concerning research conducted at Australian universities. This article explores how FOI legislative principles favouring disclosure and the legislative exemptions operate where the content, methodologies, funding and ethics processes of university research are being questioned. It examines several decisions, identifying the types of research related information being sought by FOI applicants and the main grounds relied upon to refuse disclosure. It focuses on the balancing of the disclosure required under FOI legislation and the confidentiality that many argue is an essential element of the university research environment.

I INTRODUCTION

The current university research environment is a competitive and at times controversial place. Competition for the available research funds, in particular those from the two main research funding bodies the Australian Research Council (ARC) and the National Health and Medical Research Council (NHMRC), is fierce. The research funding application numbers are increasing but the funding 'is largely unchanged'.[1] This not only means disappointment for the researchers, but lack of funding success also carries the potential for reputational damage for their universities, as both funding organisations publish on their websites data on 'institutional success and failure rates'.[2] With competition for research funds so strong, researchers are being encouraged to seek funding from sources other than the main government funding organisations, for instance from business. At the same time government is promoting engagement between universities and business 'as a means of contributing to stronger innovation and commercial outcomes from research'.[3] The partnering of university research with business raises the risk that business may seek to influence how the research is conducted or its outcomes.

The research conducted at universities can be controversial and if it is, it is bound to attract the attention of other researchers working in the field, as well as the news media and the general public. Some of those other researchers will hold strong views about the nature of the research conducted in their area of expertise. A few will see themselves as responsible for alerting the research community and the public to practices they consider adversely affect that research. Some researchers may query the processes by which funding is determined by the main

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[1] Ian Watt, *Review of Research Policy and Funding Arrangements* (Department of Education and Training (Aust), 2015) 45 <https://docs.education.gov.au/node/38976>. These problems have led to a recent restructuring of the NHMRC research funding programmes to be opened in 2019 for 2020 funding: Greg Hunt, Minister for Health, 'Medical Research Reforms to Improve Future Health' (Media Release, 25 May 2017) <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarel-yr2017-hunt053.htm?OpenDocument&yr=2017&mth=05>.

[2] Watt, above n 1.

[3] Ibid 41.

government grant funding organisations. Commercial enterprises are interested in university research where the research findings may affect their businesses. They may question the research, and some may respond by funding competing research programmes. The general public is understandably concerned about public moneys being used appropriately for research supported through the government grant funding bodies and public universities.

The university research community is aware of the increasing scrutiny of its activities and has responded by adopting a number of measures to encourage a greater degree of transparency. Among these are efforts to facilitate open data sharing, open peer review of research and open access journals.[4] In some instances, open access is mandated by funding organisations. For instance, from 2013 the ARC and NHMRC have required publications resulting from research projects benefiting from their funds 'to be freely accessible to the public within 12 months of publication'.[5]

Given the considerable interest in university research, the use of freedom of information (FOI) applications to obtain details about university research activities should come as no surprise. The information being sought under FOI legislation includes not only details about the content and methodologies of the research and the sources of its funding but also details about the progress of research projects through peer review of grant applications, ethics approval and post-approval complaints procedures and reviews. Despite the trend towards more transparency in research, there remain aspects of university research activities that are argued to be confidential and in respect of which universities seek to oppose disclosure sought under FOI legislation.

This article contributes to the literature on FOI applications and universities by focusing on FOI applications concerning university research activities.[6] The first section provides a brief outline of the operation of FOI legislation. The next section examines a number of disputed FOI applications targeting university research.[7] They illustrate the range of research related information being sought by applicants, either directly from universities or indirectly through government organisations supporting the research, and the main grounds relied upon to refuse disclosure. The following section explores the balancing of the disclosure required under FOI

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[4] For example, Productivity Commission, *Public Support for Science and Innovation: Research Report* (2007), 227–43; Mark Ware and Michael Mabe, *The STM Report: An Overview of Scientific and Scholarly Publishing* (4th ed, International Association of Scientific, Technical and Medical Publishers, 2015) 88–131 <https://digitalcommons.unl.edu/scholcom/9/>.

[5] Watt, above n 1, 63.

[6] For example, Graham Greenleaf, 'Freedom of Information and Universities: In the Courts?' (1987) 1 *Australian Universities Review* 19; Rosalind Croucher, 'Confidentiality, Shadow Boxing, and Proper Processes — The FOI Challenge in Recruitment and Promotion Processes in Australian Universities' (2007) 38 *University of Toledo Law Review* 599; Helen Fleming, '"The Next Two Decades are Going to be Transparency": Regulatory Challenges for Universities' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 64. These issues are also relevant in other jurisdictions, see, eg, Marsha Woodbury, 'Freedom of Information Laws Affect the Autonomy of American Universities' (1994) 1(4) *E Law: Murdoch University Electronic Journal of Law 28*; Marsha Woodbury, 'A Difficult Decade: Continuing Freedom of Information Challenges for the United States and its Universities' (2003) 10(4) *E Law: Murdoch University Electronic Journal of Law* 31; and Michael Taggart, 'Freedom of Information and the University' (1988) 6 *Otago Law Review* 638. Graham Greenleaf recognised aspects of university activities that were 'unusual enough to deserve special consideration' under the FOI framework and 'research activities' was one of these (16-17). See also Tammy Lewis and Lisa Vincler 'Storming the Ivory Tower: The Competing Interests of the Public's Right to Know and Protecting the Integrity of University Research' (1993–1994) 20 *Journal of College and University Law* 417.

[7] Greenleaf, above n 6, 27, notes, '… disputed cases are only the tip of an iceberg of requests which are granted (or if refused, not contested)'.

legislation and the confidentiality argued to be crucial for the conduct of university research, as well as the potential effect of such FOI decisions on the various stakeholders involved. The final section examines what the decisions reflect about how the FOI legislative principles favouring disclosure and the legislative exemptions operate, in the context of university research activities.

II FREEDOM OF INFORMATION

FOI legislation first appeared in Commonwealth and Victorian legislation.[8] It provides a right of access to information in the possession of government agencies and Ministers (Commonwealth and state).[9] Its aims are enhancing openness and transparency in government, enabling citizens to be better informed so they can 'participate more fully in government processes', and making information gathered by government using public funds 'more widely available'.[10] Public universities and the main federal government grant funding bodies fall within its scope.[11]

The legislation reflects a public interest in favour of disclosure of government information. The right of access is generally not affected by the motives of the applicant,[12] although under some state FOI legislation 'personal factors', such as the applicant's motives, in certain circumstances can be a factor in considering whether there is an overriding public interest

[8] Introduced first in 1982 at the federal level: *Freedom of Information Act 1982* (Cth) ('FOI Act (Cth)'); and in Victoria: *Freedom of Information Act 1982* (Vic) ('FOI Act (Vic)'), and then in the other states. A package of reforms amending the federal FOI framework significantly was implemented in 2009 and 2010: '[t]he reforms emphasized increased access to government information and proactive disclosure of information by agencies': Allan Hawke, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (Attorney General's Department, 2013) 11 (the 'Hawke Review'). Among the changes were the abolition of application fees, the reduction of charges and amendment of some of the exceptions: James Popple, 'The OAIC FOI Experiment' (2014) 78 *AIAL Forum* 31, 31. Similar changes have been adopted in some state jurisdictions.

[9] The Commonwealth legislation provides a right of access to a 'document': *FOI Act* (Cth) s 11. The NSW legislation provides a right of access to 'government information', defined to mean 'information in a record held by an agency'; a record is 'any document or other source of information …': Government Information (*Public Access) Act 2009* (NSW) ss 4, 9, sch 4 item 10 ('*GI(PA) Act* (NSW)'). The Queensland legislation provides a right of access to 'documents of an agency' and 'documents of a Minister': *Right to Information Act 2009* (Qld) s 23 ('*RtoI Act* (Qld)').

[10] Office of the Australian Information Commissioner, Guide to the Freedom of Information Act 1982 (2011), 6–7 <https://www.oaic.gov.au/freedom-of-information/foi-resources/foi-guide/>. Charges for access are imposed under the regulations, for example at the Commonwealth level, Freedom of Information (Charges) Regulations 1982 (Cth), reg 11. More recently an information publication framework has been added to the right of access, to maximize the proactive publication of government information. This has occurred under the Commonwealth FOI legislation, and in several states including NSW and Queensland: Hawke, above n 9, 11; Productivity Commission, Data Availability and Use, Inquiry Report No 82, (2017) 478 <http://www.pc.gov.au/inquiries/completed/data-access#report>.

[11] See, for eg, FOI Act (Cth) s 11 provides a right of access to a document of an agency or an official document of a Minister other than an exempt document; s 4 defines agency as meaning 'a Department, a prescribed authority or a Norfolk Island authority'. A prescribed authority under s 4 includes 'a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment or an Order-in-Council…'. At the state level, see for instance the GI(PA) Act (NSW), s 9, which provides for a right of access to government information unless there is an overriding public interest against the disclosure. Government information is defined in s 4 to mean 'information contained in a record held by an agency'. The definition of agency in s 4 includes a public authority, defined in sch 4 as including '…(b) a body (whether incorporated or unincorporated) established or continued for a public purpose by or under the provisions of a legislative instrument', eg, the University of New England now operating under the University of New England Act 1993 (NSW): *Battin v University of New England* [2013] NSWADT 73 [10].

[12] *FOI Act* (Cth) s 11(2). There are provisions dealing with vexatious applicants: pt VIII div 1.

against disclosure of the information and can also be taken into account as a factor in favour of disclosure.[13]

The right of access to information is subject to exemptions. Under Commonwealth FOI legislation some exemptions operate without regard to any overriding public interest test and some are conditionally exempt, that is, access must be granted unless disclosure would be contrary to the public interest.[14] There is an inclusive list of factors favouring access.[15] The operation or scope of an exemption is not limited by any other exemption that might apply in the circumstances.[16] Some states, like NSW, rather than outlining a list of exemptions, provide for a right of access unless there is an overriding public interest weighing against disclosure.[17] There is a non-exhaustive list of considerations in favour of disclosure and a closed list of considerations against disclosure.[18] The public interest factors in the Commonwealth FOI legislation are considered on a case by case basis, so '[w]hat is relevant in one case may not be relevant in another case where additional or different factors require consideration'.[19] Similarly, in states such as NSW, there is a weighing up of factors in favour and against disclosure in the particular circumstances, so the decisions made in prior applications do not operate as 'precedents in any strict sense'.[20]

There is no express exemption or consideration weighing against disclosure that relates specifically to the full range of activities involved in university research. These activities include funding applications and administration, ethics approval processes (where the research involves human or animal subjects), the conduct of the research, the publication of the research results in academic journals or research reports and in some cases, the commercialisation of the research. However, several jurisdictions have an exemption or consideration that addresses research data. For instance, the Table of 'Public interest considerations against disclosure' in section 14 of the *Government Information (Public Access) Act 2009* (NSW) includes item 4, 'Business interests of agencies and other persons'. This provides for 'public interest ... against disclosure ... if the information could reasonably be expected to have one or more of the following effects: … (e) prejudice the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results (whether or not commenced and whether or not completed)'. Similarly, in Schedule 4 Part 3 of the *Right to Information Act 2009* (Qld), item 15 indicates a factor favouring nondisclosure in the public interest is that the disclosure 'could reasonably be expected to prejudice trade secrets, business affairs or research of an agency or person'.[21] Section 47H of the *Freedom of Information Act 1982* (Cth) provides a public interest conditional exemption for a document containing uncompleted research being undertaken by an officer of an agency specified in Schedule 4 (ie the Australian National University or the

[13] *GI(PA) Act* (NSW) s 55(1)(b), (2), (3).
[14] *FOI Act* (Cth) pt IV.
[15] Ibid ss 11A, 11B. Under s 93A the Australian Information Commissioner may issue guidelines, to which decision-makers under the Act must have regard. Part 5 of the guidelines relates to exemptions.
[16] *FOI Act* (Cth) s 32.
[17] *GI(PA) Act* (NSW) ss 5, 13. This is also the model in Queensland: *RtI Act* (Qld) s 48(1).
[18] *GI(PA) Act* (NSW) ss 12, 14
[19] Hawke, above n 9, 43.
[20] *McKean v Department of Justice* [2016] NSWCATAP 93 [72].
[21] For a more detailed form of exemption, see, eg, *FOI Act* (Vic) s 34(4)(b) which provides that a document is an exempt document if '(b) it contains the results of scientific or technical research undertaken by an officer of an agency, and— (i) the research could lead to a patentable invention; (ii) the disclosure of the results of an incomplete state under this Act would be reasonably likely to expose a business, commercial or financial undertaking unreasonably to disadvantage; or (iii) the disclosure of the results before the completion of the research would be reasonably likely to expose the agency or the officer of the agency unreasonably to disadvantage…'.

Commonwealth Scientific and Industrial Research Organisation) where disclosure before completion would be 'likely unreasonably to expose the agency or officer to disadvantage'.

The decision to refuse disclosure requested under an FOI application is subject to review, both internal review within the agency refusing the application and independent external review. In some jurisdictions the external review is conducted by an information commissioner (IC) and in some jurisdictions an administrative tribunal, for example the NSW Civil and Administrative Tribunal (NCAT). All jurisdictions provide for a right of appeal on a question of law to specified courts.[22]

FOI matters are administrative proceedings rather than court proceedings, except where there is an appeal to a court on a question of law. Administrative proceedings are intended to be less costly and more informal than court processes, meaning applicants are likely to be self-represented and there are less strict rules of evidence.[23]

III INFORMATION SOUGHT AND EXCEPTIONS RELIED UPON

There have been a number of disputed FOI applications seeking details about university research. This section of the paper examines a selection of these disputes in order to illustrate the various types of research related information being sought by applicants and the main grounds relied upon by universities and government bodies funding the research to refuse disclosure.[24] The disputed FOI applications discussed below reflect a wide range of research related information that has been sought by applicants. Some applicants wanted to obtain details of the content of the research, while others were looking for information about who was funding the project. Applications have also requested disclosure of information about peer review of the research, either by grant funding bodies or for the purposes of university ethics approval, as well as the university's response to any ethics complaints received. Some applicants sought the information from the university directly and others sought it indirectly, through an FOI application made to the grant funding organisation or sponsoring government body.

A *Content of Research*

1 *Watts and Department of Veterans' Affairs*

An example where an FOI applicant sought information about the content of university research from the sponsoring government agency is the application brought by David Watts (W). His application, made in 2014 under the *Freedom of Information Act 1982* (Cth), sought details about the research from the sponsoring Commonwealth government agency, the Department of Veterans' Affairs (DVA).

[22] LexisAdvance, *Halsbury's Laws of Australia* (online) [10.1116]; see for example *FOI Act* (Cth), ss 56, 56A.
[23] See, eg, *Civil and Administrative Tribunal Act 2013* (NSW) s 45; *Administrative Appeals Tribunal Act 1975* (Cth) s 33(c); *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1); *Johnson v Cancer Council of Victoria* [2016] VCAT 1596 [208]–[209].
[24] As mentioned above, n 8, the Federal FOI legislation underwent significant revision in 2009 and 2010. Most of the FOI applications discussed in this section relate to the period after the changes. For those few instances that pre-date the changes, while the exceptions may have undergone some revision, the cases nevertheless provide useful examples of the types of research information being sought and the response to the applications.

W applied to the DVA for access to the draft research report chapters of Monash University researchers from their 2003 and 2009–14 Australian Gulf War Veterans Health Studies, and copies of all correspondence between the DVA and the university relating to DVA proposed changes to the draft research. Among other matters, W was concerned the university's Gulf War health research project 'was designed to meet outcomes sought by the DVA'.[25] W was raising allegations of 'errors in findings' and also alleging 'incompetence' against the university 'in its capacity in this field'.[26]

When the DVA undertook third party consultations with the university,[27] the university argued that disclosure of the draft reports would unreasonably affect its business, commercial and financial affairs within section 47G and there were issues affecting the personal privacy of university staff within section 27A.[28] The DVA gave W access to 21 documents but only in part, relying on the exemptions for deliberative processes (section 47C), personal privacy (section 47F) and business affairs (section 47G). W then applied to the IC for review of the DVA decision.[29] The university was identified as a party in the matter.

W's application for review was unsuccessful for the most part. The Acting IC decided the draft reports were conditionally exempt under section 47G (business affairs of the university and professional affairs of the individual researchers) and granting W access would, on balance, be contrary to the public interest. Among the matters weighing against disclosure was the preliminary nature of the documents. They were in draft form and subjecting draft research to peer review prior to completion 'is a long standing scientific process' which is 'at the heart of the scientific integrity, quality and performance' of the university's research programmes.[30] Another matter was that the draft reports represented 'unsettled early views and findings of researchers' that could potentially damage the reputation of the university 'as a research intensive university',[31] potentially affect its ability to obtain future research funding and potentially 'discredit' the 'published research reports outcomes'.[32] There was also potential for damage to the 'morale of research staff' and a risk of discouraging them from 'research in contentious areas'.[33] Another matter given 'substantial weight' was the public interest in 'ensuring that legitimate and ethical research is undertaken and funded' (referring to *'GO' and National Health and Medical Research Council* discussed below).[34] The Acting IC also took into account the argument that disclosure would reduce the commercial activities of a public institution and potentially lead to loss of research expertise.[35] If, as claimed by W, there were 'improper research practices' being adopted, this was not a matter for the IC to investigate. There were 'other bodies and processes' available to W through which he could pursue his claims.[36] However W was granted access to the unedited emails he requested as they were not exempt under section 47F (personal privacy). Although the emails contained personal information (names and contact details of university staff and researchers involved in the

[25] *Watts and Department of Veterans' Affairs* [2016] AICmr 26 [13].
[26] Ibid [15].
[27] The *FOI Act* (Cth) provides in certain circumstances for third parties to be consulted about the release of documents affecting their interests, see, eg, ss 26A, 27 and 27A.
[28] *FOI Act* (Cth) s 27.
[29] Ibid s 54L.
[30] *Watts and Department of Veterans' Affairs* [2016] AICmr 26 [24].
[31] Ibid.
[32] Ibid.
[33] Ibid [25].
[34] Ibid [32].
[35] Ibid [34].
[36] Ibid [22].

research),[37] most were 13 to 14 years old and the names of the researchers were published in the final reports.[38]

B *Funding Sources*

1 *Whitely and Curtin University of Technology*

The involvement of commercial interests in university research is another area that has attracted FOI applications. In one such instance Martin Whitely (Wh),[39] then a member of the Western Australian Parliament,[40] attempted to obtain disclosure of information from Curtin University (then Curtin University of Technology) about the ethics approval and the details of funding arrangements for a project about attention deficit hyperactivity disorder (ADHD). The project involved comparing the effects of stimulant medication (for example Dexamphetamine or Ritalin) with the non-stimulant Strattera medication, 'on cognitive, educational and social outcomes in boys and girls, diagnosed with ADHD'.[41] It was funded by an ARC Linkage project grant and with further support from the Association of Independent Schools of Western Australia Incorporated, the Child Development Unit of the Children's Hospital at Westmead, and Ely Lilly Australia. Strattera, the non-stimulant medication used in the research, is manufactured by the US-based Ely Lilly and Company.[42]

In 2007 Wh applied to the university under the *Freedom of Information Act 1992* (WA) seeking access to documents relating to the submission made by the researchers to the university's Human Research Ethics Committee (HREC),[43] documents provided by the researchers to the parents of the children participating in the study and documents relating to private sector funding of the research.[44] The university gave access to some documents but refused access to a number of documents arguing exemptions under Schedule 1, items 4(3) (commercial or business information), 6(1) (deliberative processes), 8(2) (confidential communications), and 11(1) (effective operation of agencies). The university later added a further exemption claim under item 10(5) (state's financial or property affairs). Wh sought internal review of the

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[37] Ibid [37].
[38] Ibid [44], [40].
[39] Another example of an FOI application where funding and sponsorship was at issue is *Lonsdale v University of Sydney* [2016] NSWCATAD 176. The university's refusal to disclose the information was based mainly on its commercial-in-confidence nature rather than issues of research confidentiality and integrity, so it is not discussed in detail in the article.
[40] *Whitely and Curtin University of Technology* [2008] WAICmr 24 [1].
[41] Ibid [2].
[42] Ibid [4].
[43] The major Australian research funding bodies require universities to establish a framework for the ethical oversight of their research activities. See: Australian Research Council ('ARC'), National Health and Medical Research Council ('NHMRC') and Universities Australia, *National Statement on Ethical Conduct in Human Research* (NHMRC, 2007) <https://www.nhmrc.gov.au/guidelines-publications/e72>. Section 5 sets out the responsibilities of universities for the ethical review of human research to be conducted in accordance with the Australian Code for the Responsible Conduct of Research (2007). These include establishing a Human Research Ethics Committee with oversight over research projects involving human participants. There is extensive literature, both domestic and international, on the role and operation of university research ethics committees. Especially controversial is the extension of their operation from scientific research to include research in the humanities; see, eg, Robert Cribb, 'Ethical Regulation and Humanities Research in Australia: Problems and Consequences' (2004) 23(3) *Monash Bioethics Review* 39; Philip Hamburger, 'The New Censorship: Institutional Review Boards' (2004) *Supreme Court Review* 271; Adam Hedgecoe, 'Reputational Risk, Academic Freedom and Research Ethics Review' (2016) 50 *Sociology* 486; John Mueller, 'Ignorance is Neither Bliss Nor Ethical' (2007) 101 *Northwestern University Law Review* 809.
[44] *Whitely and Curtin University of Technology* [2008] WAICmr 24 [5].

university decision to refuse access in relation to some of the documents but this review confirmed the university's decision.[45]

Wh then applied to the Acting IC for review of the university's decision. During an attempted conciliation, Wh partially reduced the scope of his request and agreed to the names of HREC members being deleted from the documents to which he was to be given access. Further documents were then made available to him. Wh persisted with his application and he was ultimately successful. The Acting IC determined the documents were not exempt. They contained 'a small amount of personal information about third parties', for example their names, contact telephone numbers and/or email addresses within item 3(1) but this material could be deleted by the university and access given to edited copies (section 24).[46] The exemption under item 4(3) (information about the business, professional, commercial or financial affairs of a person and disclosure could reasonably be expected to have 'an adverse effect' or 'prejudice' future supply) did not apply because information about Eli Lilly's participation in the project was already available on the project website, in information available to project participants and in documents previously disclosed to Wh and the funding contract between the university and the ARC was a pro-forma document available on the ARC website.[47]

The university sought to rely on the exemption under item 6 (opinion/advice in the course of/for deliberative processes) in relation to the deliberations of the HREC (discussed in more detail below in *Battin v University of New England* and *Raven v The University of Sydney)* but this was also rejected. Although the disclosure of some of the documents was found to come within the terms of item 6(1)(a), the university had not satisfied the additional requirement that the disclosure be contrary to the public interest. The Acting IC considered a 'substantial amount of information' about the HREC procedures was available on the university website and it found that in fact none of the documents in dispute contained a record of the HREC's deliberations.[48] The university's claim there was potential for damage to its reputation as a research university from the disclosure of documents that have 'traditionally' been treated as confidential, was 'unsupported speculation and conjecture'.[49] The Acting IC was of the view that members of the HREC did not require the 'cloak of confidentiality' before they would make 'honest, and sometimes adverse comments and criticisms' about the research proposals being reviewed and to make such a claim would be 'inconsistent with the ethical standards expected of professionals in the academic world and elsewhere…'.[50]

In relation to the information sought by Wh, the Acting IC found much of it was already in the public domain and not confidential within the item 8 exemption. For example it was available on the university's website for the project and in the documents made available to parents, doctors, school principals and students when they were being asked to consider participating.[51] For the information that remained confidential, the second of the two required elements in item 8 (if the confidential information was disclosed it would reasonably be expected to prejudice the future supply of that kind of information to the agency) was not supported by the evidence.

[45] Ibid [9].
[46] Ibid [150].
[47] Ibid [51]–[53].
[48] Ibid [78].
[49] Ibid [80].
[50] Ibid [86]–[87].
[51] Ibid [93], [112].

The Acting IC stated that universities in Western Australia had been subject to the FOI legislation from 1993 and 'many university documents have been released on numerous occasions' but there was no evidence of any reduction in the 'quality or quantity' of information provided by researchers and 'participating industry partners' to universities, nor was there evidence of a reduction in research projects being undertaken at Western Australian universities in that time.[52]

In relation to the exemption under item 10 (state's financial or property affairs), the first element was established (disclosure would reveal information relating to research being/to be undertaken by an officer of an agency) but there was no evidence to establish the second element (disclosure of the information would be likely, because of premature release, to expose an officer or agency to disadvantage).[53] There was also no evidence to support the item 11 exemption (impairment of the effective operation of tests/examinations/audits by the agency).[54]

C *Ethics Review and Complaints*

Another area that has attracted FOI applications is the ethical review of university research. In the decision of *Whitely and Curtin University of Technology* discussed above, the FOI application in part sought information about the ethics review of a university research project but this section explores two examples where the ethics review was the central matter identified in the application.

1 *Battin v University of New England*

The applicant in *Battin v University of New England* was attempting to obtain information about complaints made to the university's HREC in respect of a research project that had received ethics approval and the HREC's subsequent decision to revoke the approval. Rather than a third party seeking the information, in this instance the university researchers themselves were trying to obtain the information.

In March 2011, the university's HREC had approved the project Perceptions of Bullying in the Workplace, involving an internet-based survey. The survey was first made available on 1 April 2011.[55] From 4 to 12 April, the HREC received 'complaints and questions' about the survey.[56] While attending an already scheduled meeting on 7 April, the Chair and one member of the HREC decided to suspend ethics approval for the project and the following day the researchers were notified of the suspension.[57] Three grounds for the suspension were identified: one of three logos used on an information sheet and the online survey had to be removed; concerns had been raised about the potential bias of one of the researchers, a former employee of the university; and some survey questions were considered to raise the potential for participants to be identified (the researchers had promised anonymity 'in the reporting of the research') and so had the potential to 'lead to adverse consequences'.[58] The researchers were instructed to

[52] Ibid [124], [126].
[53] Ibid [137].
[54] Ibid [147].
[55] Tim Battin, Dan Riley and Alan Avery, 'The Ethics and Politics of Ethics Approval' (2014) 56 *Australian Universities Review* 4, 4.
[56] Ibid 6.
[57] Ibid.
[58] Ibid.

destroy the data already collected and remove reference to the ethics approval from the information provided to participants.[59] Later, the HREC demanded the website for the survey (external to the university) be 'taken down'.[60] A further demand was for reference to 'research' to be deleted from the information statement relating to the project and for the project to be treated as 'an inhouse quality assurance exercise'.[61]

The researchers met with the university Vice-Chancellor on 11 April. The next day the lead researcher for the project was notified by the university's legal office that the Deputy Vice-Chancellor (Research) had received a complaint, later claimed to be a complaint of alleged research misconduct, and that the legal office had advised the Vice-Chancellor an inquiry should be held under the university's *Code of Conduct for Research*.[62] The university did not proceed with this inquiry.[63] A meeting between two of the researchers, the HREC Chair, the Deputy Vice-Chancellor (Research) and a representative of the university's legal office occurred on 14 April. On the following day the researchers put forward two proposals to facilitate the project going forward but both were rejected.[64] The researchers asked to see the complaints made to the HREC and the allegation of research misconduct but the university refused the requests.[65]

The researchers then sought access to information relating to the complaints under the *Government Information (Public Access) Act 2009* (NSW). Access was given to six of the 44 documents identified by the university as falling within the scope of the FOI request.[66] The university's decision was reviewed by the IC on 14 May 2011 and some recommendations were made to the university.[67] A decision about access was made by the university on 23 May.[68] Tim Battin (B), one of the researchers involved in the project, then applied to the New South Wales Administrative Decisions Tribunal (ADT) for review of the university's decision. In his application to the tribunal, B was self-represented, while the university was represented by its legal officer.[69] Both sides were successful in part in the ADT.

In the ADT, the university raised a number of grounds to support its decision to deny access. In relation to nine documents it relied on Schedule 1 item 5 (legal professional privilege). The tribunal rejected this claim in respect of some of the documents (those created prior to the revoking of the HREC approval) because the university had not provided evidence the dominant purpose of the communications was the provision of legal advice.[70] In respect of some documents (those created after the revocation of HREC approval), the tribunal found legal professional privilege was established, so there was a conclusive presumption their disclosure was not in the public interest.[71] For the documents not falling within the legal professional privilege exemption, the factors argued to be in favour of disclosure included the

[59] Ibid.
[60] Ibid.
[61] Ibid 6–7.
[62] Ibid 7.
[63] Ibid 10.
[64] Ibid 7.
[65] Ibid 8.
[66] *Battin v University of New England* [2013] NSWADT 73 [3]. There was also an internal review: [6].
[67] Ibid [4].
[68] Ibid [1].
[69] Ibid. The review was conducted on the papers rather than at a hearing.
[70] *Evidence Act 1995* (NSW) s 118: *Battin v University of New England* [2013] NSWADT 73 [40].
[71] *Battin v University of New England* [2013] NSWADT 73 [71].

public being informed about the operations of the university, in particular the operation of its HREC.[72]

The university asserted there were a number of factors weighing against disclosure of these documents. In respect of the Table of public interest considerations against disclosure in section 14, item 1(f) (disclosure of information provided in confidence), the tribunal found this factor was established in the circumstances but the relevant confidentiality related to the information revealing the identity of the complainants rather than the content of the complaints.[73] Item 3(a) (revealing an individual's personal information) was also established.[74] There was no evidence brought to support the item 3(f) claim (exposing a person to risk of harm or serious harassment or serious intimidation), so the ADT was not satisfied this matter had been established.[75] The university also argued that the need to ensure 'the integrity and effectiveness' of the HREC's processes 'by ensuring the confidentiality of complainants' meant that item 4(e) applied in the circumstances (prejudice conduct, effectiveness or integrity of research whether or not commenced and whether or not completed). The ADT characterised this argument not as a claim to protect disclosure of the research but a claim to protect 'the process and conduct' of the HREC, so item 4(e) did not apply.[76]

The tribunal decided the public interest considerations against disclosure of the information outweighed those in favour of disclosure. However, as the identifying information relating to the complainants could be 'readily deleted' from the documents 'without rendering them nonsensical', the release of the balance of the documents was in the public interest.[77] It set aside the university decision and sent the matter back for reconsideration by the university in accordance with the reasons of the tribunal.[78]

2 *Raven v The University of Sydney*

Another instance of an FOI application seeking access to information from a university about the ethics approval for a research project and the handling of a complaint made to the university's HREC, involved the University of Sydney. In 2009 the university's HREC had given ethics approval for a clinical trial, the Beyond Ageing Project.[79] In December 2011 Melissa Raven (R) and four other academics submitted a complaint to the HREC about its approval of the trial. They were worried about the effect on participants of the use of the antidepressant Sertraline. The academics questioned the methods adopted in the clinical trial, including what they believed to be inadequate monitoring of participants once administration of Sertraline had ceased.[80]

The HREC responded by appointing independent experts to review the complaint and suspending the clinical trial while the review was conducted.[81] It received the experts' report in January 2012. The HREC then asked the researchers on the project to respond to the review

[72] Ibid [43].
[73] Ibid [57].
[74] Ibid [61].
[75] Ibid [67].
[76] Ibid [69].
[77] Ibid [75], [77].
[78] Ibid [78].
[79] *Raven v The University of Sydney* [2015] NSWCATAD 104 [2]. The project was funded by a National Health and Medical Research Council grant: [80].
[80] Ibid [43].
[81] Ibid [5].

report and their responses were in turn reviewed by an independent biostatistician.[82] The expert reviewers delivered their final responses on 23 January. The following day the HREC decided the trial should continue but with some further conditions imposed. These included a clear statement in the participant information statement (PIS) of the 'potential benefits and risks' of participation, obtaining the consent of current participants once again and changes to the way participants were monitored.[83]

R then applied to the university under the *Government Information (Public Access) Act 2009* (NSW) seeking access to various documents about the project, including the ethics application, expert reviewers' report, researchers' responses to the complaint, biostatistician's review, final responses of the expert reviewers, original and revised PIS, relevant sections of the HREC minutes and '[a]ny other documents relevant to the external review'.[84] The university refused to provide the information sought other than the revised PIS. It argued there was an overriding public interest against disclosure within section 14 items 1(d) to (g) (discussed below). It also referred to items 4(a), (c), (d) and (e) (discussed below). The university identified the principal consideration for refusing access was 'the overriding public interest in not disclosing information created or received in confidence'.[85]

R then applied to the IC for review of the university's decision. The IC was not satisfied the university had demonstrated the disclosure 'could reasonably be expected to prejudice the supply of information to it, as it was in the interests of researchers to provide information in order to obtain approval or funding'.[86] The IC recommended the university reconsider the decision, which it did, but again the university decided against disclosure. The university maintained that there was an overriding public interest against disclosure, mainly based on the obligations of the HREC to maintain confidentiality.[87]

In October 2013 R took the matter to the ADT for review. The ADT was abolished on 1 January 2014, so R's application came under the NCAT. R appeared in person at the hearing, while the university was represented by counsel. In the NCAT, R argued the public interest favoured disclosure as it would facilitate public scrutiny of research conducted by the university and its ethics approval processes.[88] The university relied on the considerations against disclosure in section 14 items 1(d), (e), (f), (g) and 4(a) and (e). The NCAT confirmed the university's decision to refuse access to the information, finding it had discharged the onus of establishing the considerations in items 1(d), (f) and (g).

In relation to item 1(d) (prejudice the supply of confidential information that facilitates the effective exercise of the agency's functions), the information sought by R was found to be confidential. Under paragraph 5.1.37(t) of the *National Statement on Ethical Conduct in Human Research,*[89] the university was required to establish procedures for 'appropriate confidentiality' of the ethics applications and the deliberations of its HREC.[90] Experts advising a HREC were also to be subject to the same confidentiality requirements as HREC members

[82] Ibid [6].
[83] Ibid [8].
[84] Ibid [10].
[85] Ibid [12].
[86] Ibid [14].
[87] Ibid [15].
[88] Ibid [39].
[89] ARC, NHMRC, and Universities Australia, above n 43.
[90] *Raven v The University of Sydney* [2015] NSWCATAD 104 [57].

(paragraph 5.2.19).[91] The reasonable expectation of prejudice to the supply of information was established by evidence from university witnesses.[92] According to this evidence, if information about an ethics application and its consideration by the HREC and any expert advisers was disclosed, some research partners would be discouraged from funding university research or from applying for ethics approval, some researchers would not be as forthcoming in their applications for ethics approval, some HREC members would be discouraged from committee membership and some of those who remained on the HREC would be less likely to express their frank views.[93] The evidence asserted that if such disclosure occurred, it would be more difficult to find experts prepared to undertake ethics reviews or they would be more careful in expressing their review findings.[94] Removing details that would identify the individuals concerned would not address the problem, as in areas of specialised research, with a limited number of experts, the identity of individuals might still be able to be determined.[95] Unlike the earlier decision in *Whitely and Curtin University of Technology*, in the view of the tribunal the university had 'provided probative evidence to the relevant standard from which it may be inferred that the disclosure of information to the applicant could reasonably be expected to prejudice the future supply of information to the University'.[96]

The university was also successful in its reliance on item 1(f) (reasonably expected to prejudice the effective exercise of its functions) as this consideration applied, for the same reasons as for item 1(d).[97] The evidence also established item 1(g) (reasonably expected to result in the disclosure of information provided to it in confidence).[98] However, the other items the university sought to rely on were not established by the evidence.

The NCAT was then required to balance the factors in favour of disclosure with those against disclosure. Those in favour of disclosure were R's 'genuine concern' about the use of Sertraline in the clinical trial, in particular what she regarded as inadequate monitoring of participants once the antidepressant ceased to be administered,[99] that disclosure would enhance the HREC's 'accountability', it would help encourage 'positive and informed debate on issues of public importance', including the approval of clinical trials where antidepressants were used and R's concerns about the research were shared by four other academics 'with a wide range of expertise'.[100]

Despite these significant factors in favour of disclosure, the NCAT decided they were outweighed by the public interest considerations against disclosure. The opportunity for public discussion of the research would come after the research was published and publication would be likely to 'facilitate positive and informed debate' and 'contribute to the accountability of the HREC'.[101] For the NCAT there was a strong public interest in maintaining the confidentiality

[91] Ibid [58].
[92] The university's Deputy Vice-Chancellor (Research), the Director of the university's Research Integrity and Ethics Administration and a chief investigator on the research project: *Raven v The University of Sydney* [2015] NSWCATAD 104 [71], [80].
[93] Ibid [84].
[94] Ibid.
[95] Ibid [87].
[96] Ibid [85].
[97] Ibid [96].
[98] Ibid [104].
[99] *Raven v The University of Sydney* [2015] NSWCATAD 104 [122]: personal factors within *GI(PA) Act* (NSW) s 55(2).
[100] *Raven v The University of Sydney* [2015] NSWCATAD 104 [124]–[125].
[101] Ibid [130].

of ethics applications and the university's processes for their consideration. Ensuring confidentiality would mean researchers would continue to provide 'full and frank information when seeking ethics approval'.[102] Those acting as reviewers would also be 'prepared to conduct reviews and do so candidly' and members of HRECs would not be deterred from expressing their views in HREC meetings.[103] If disclosure was allowed, 'the prejudice to the supply of confidential information and the effective exercise of the functions the University exercises through the HREC, could reasonably be expected to be significant'.[104]

D *Peer Review of Grant Funding Decisions*

In the current university research environment, researchers compete vigorously for the funding available from the ARC and NHMRC, the two main government grant funding bodies. The processes by which the grants are determined and administered have been subject to continuing government oversight and have long been the subject of scrutiny from researchers and university research administrators.[105] Among the instances where an FOI application has been used to obtain information about university research, its use to seek information from a grant funding body about a project's lack of funding success, appears to have the longest history. Although the targets of this type of application are the grant funding bodies rather than the universities, the two examples discussed in this section are included because they relate to university research activities and a central consideration in such applications is the treatment of other researchers,[106] generally other university researchers acting as peer reviewers of the grant applications. Similar issues as were discussed above in relation to members of university ethics committees arise in this context, that is, the need to maintain confidentiality of reviewers' identities.

1 *Re Wertheim and Department of Health*

An early example of this type of FOI application is that brought by Eleanor Wertheim (Wr), a senior research fellow in the Monash University Department of Paediatrics at the Queen Victoria Medical Centre. In 1976, 1979 and 1982 Wr applied to the NHMRC for research funding. She succeeded only in 1979. Wr made three applications under the *Freedom of Information Act 1982* (Cth) to the Department of Health seeking: the numerical ratings made

[102] Ibid [131].
[103] Ibid.
[104] Ibid.
[105] Australian National Audit Office, *Administration of Grants by the National Health and Medical Research Council*, Auditor-General's Audit Report No 7, 2009–10, Performance Audit (Attorney-General's Department, 2009); Australian National Audit Office, *The Australian Research Council's Management of Research Grants*, Auditor-General's Audit Report No 38, 2005–06, performance Audit (Attorney-General's Department, 2006); reviews such as that of Watt, above n 1; and through the annual reporting obligations of the two bodies. See, eg, Pat Bazeley, 'Peer Review and Panel Decisions in the Assessment of Australian Research Council Project Grant Applicants: What Counts in a Highly Competitive Context?' (1998) 35 *Higher Education* 435; Clyde Manwell, 'Peer Review: A Case History from the Australian Research Grants Committee' (1979) 3 *Search* 81; Ray Over, 'Perceptions of the Australian Research Council Large Grants Scheme: Differences Between Successful and Unsuccessful Applicants' (1996) 23(2) *Australian Educational Researcher* 17; Ray Over, 'The Australian Research Council Large Grants Scheme: Problems, Concerns and Recommendations for Change' (1995) 38(1) *Australian Universities Review* 33; Ray Over, 'Use of Peer Review by the Australian Research Council' (1994) 37(1) *Australian Universities Review* 31; Fiona Wood, V Lynn Meek and G Harman, 'The Research Grant Application Process: Learning from Failure?' (1992) 24 *Higher Education* 1.
[106] There are more recent examples of such applications but these later decisions turn on technical matters such as the reinstatement of the application, the grant of an extension of time to lodge a new application and reasonable steps taken to locate documents, so they are of limited relevance to the discussion in this article: *CDJR and Australian Research Council* [2012] AATA 525; *X and Australian Research Council* [2013] AICmr 3.

by external assessors in relation to her 1982 grant application; a letter written by her on 17 November 1976 to the then Secretary of the NHMRC; all documents, notes and records used by the 1982 Regional Grants Interviewing Committee (RGIC) used to provide the basis for the RGIC's final report to the NHMRC Grants Committee on Wr's 1982 application; the ratings given by individual members of the 1976, 1979 and 1982 RGICs in respect of Wr's grant applications; and the final ratings given by each RGIC for those applications.[107]

Wr was provided with some documents with deletions made to them, but access was otherwise refused. She then sought internal review of the decision to refuse access. On review the initial decision was generally maintained. Some further documents were supplied to Wr but the other documents were claimed to be exempt. Wr then appealed to the Administrative Appeals Tribunal (AAT). Both Wr and the Department were legally represented in the proceedings.[108] Wr was successful in part, in the AAT. In relation to the letter, the tribunal directed the Department to make one further enquiry not yet pursued by it, that is, to make enquiries of the person who was then Secretary and notify Wr of the result. Either party would then be free to make a further application to the tribunal.[109] As for the documents of the 1982 RGIC, the tribunal found that the NHMRC (including its committees), as then constituted by an order-in-council,[110] did not fall within the scope of the FOI legislation. It was neither an 'agency' under the Act (it was not established under an enactment, that is, an Act or Ordinance or an instrument made under an Act or Ordinance) nor was it declared by regulation to be a 'prescribed authority'.[111] Therefore, the only documents subject to the FOI legislation were documents in the possession of the Department. The tribunal directed the Department to produce whatever documents were received from the RGIC. Documents were later received by the AAT and it remitted the matter to the Department for reconsideration.[112]

Wr was also successful in relation to the numerical ratings of the external assessors for the 1982 grant application. She had been given copies of the reports of the external assessors but the numerical ratings were deleted (also deleted were the identities of the assessors). The Department claimed the deleted material was exempt under section 36 (internal working documents), section 45 (disclosure would constitute a breach of confidence) and section 40 (certain operations of agencies). The AAT found the ratings were not exempt under section 36 as they were excluded under section 36(6) as reports of scientific or technical experts.[113] In weighing the public interest in favour of disclosure and the public interest against disclosure where disclosure would constitute a possible breach of an obligation of confidence within section 45, the tribunal decided in favour of disclosure. There was no evidence the external assessors would not have provided their reports if they had known their ratings would be revealed and there was a public interest in an applicant knowing why their applications were

[107] *Re Wertheim and Department of Health* (1984) 7 ALD 121, 125.
[108] Ibid 123, 154.
[109] Ibid 136. The enquiries were made but the person did not recall the letter being received and as no further application was made by either party, the tribunal affirmed the decision of the Department: *Re Wertheim and the Department of Health* [1985] AATA 51.
[110] The NHMRC replaced the Federal Health Council (established in 1926) in 1936 and there was a 'chain of orders' from the original order of 17 September 1936, such as those in 1966, 1975 and 1981: *Re Wertheim and Department of Health* (1984) 7 ALD 121, 137. In 1992 the NHMRC was established as a statutory body corporate under the *National Health and Medical Research Council Act 1992* (Cth) and in 2006 it became a statutory agency pursuant to the *National Health and Medical Research Council Amendment Act 2006* (Cth): *Elston v Commonwealth of Australia* (2013) 212 FCR 76.
[111] *Re Wertheim and Department of Health* (1984) 7 ALD 121, 137.
[112] *Re Wertheim and the Department of Health* [1985] AATA 51.
[113] *Re Wertheim and Department of Health* (1984) 7 ALD 121, 142.

rejected ('for their own sake' and 'for the sake of improving the general quality of medical research').[114] The tribunal also found that section 40 did not apply to exempt the ratings, as there was no evidence disclosure of the ratings would discourage appropriate individuals from becoming assessors.[115]

The AAT affirmed the decision of the Department in relation to the individual ratings of the members of the RGIC. The practice was for these to be destroyed at the RGIC meeting. However, in relation to the reports, including the final ratings, of each RGIC, the tribunal found the ratings did not fall within section 36 (they were excluded under section 36(6) as reports of scientific or technical experts). They also did not come within the confidentiality exception (section 45(1)), being excluded by section 45(2) (documents prepared by an officer or employee of the agency for purposes relating to the affairs of the agency).[116] The tribunal found section 40 did not apply to exempt the RGIC ratings for the same reason as applied to the ratings of the external assessors.

After Wr received the information disclosed in response to her FOI application she lodged a complaint with the Commonwealth Ombudsman. The Ombudsman criticised aspects of the NHMRC procedures and its handling of the complaint but Wr's complaint to the Ombudsman was dismissed.[117]

2 *'GO' and National Health and Medical Research Council*

In a more recent example, the applicant, identified in the proceedings as 'GO',[118] sought details from the NHMRC about its decision to grant funding to a research project being conducted at Melbourne University. GO's application, made in December 2011, under the *Freedom of Information Act 1982* (Cth), was for access to the grant application and other supporting documents relating to the grant managed by the university. There is little information in the report of the review conducted by the IC about the nature of the research in question. However, among the submissions made by GO were claims there was 'controversy surrounding the researchers, in particular "the proposal for the administration of drugs to young people"',[119] that the 'psychiatric research [was] controversial' and the work of the lead researcher (unidentified in the reported decision) 'in particular [had] been highly controversial in recent years'.[120]

The NHMRC undertook third party consultation with the researchers.[121] In March 2012 it identified five documents falling within the scope of the FOI application. It gave access to one document in full and to edited copies of four documents but it relied on exemptions under section 47 (trade secrets), section 47E (operations of agencies), and section 47F (personal privacy) to otherwise deny access. GO sought internal review of the NHMRC decision in April

[114] Ibid 148, 149.
[115] Ibid 153.
[116] Ibid 143.
[117] Brian Martin, 'Bias in Awarding Research Grants' (1986) 293 *British Medical Journal* 550, 551; John Funder, 'Correspondence: Bias in Awarding Research Grants' (1986) 293 *British Medical Journal* 1500.
[118] *'GO' and National Health and Medical Research Council* [2015] AICmr 56. The applicant and seven other persons were not identified by name in the decision.
[119] Ibid [24].
[120] Ibid [36]–[37].
[121] *FOI Act* (Cth) ss 27, 27A provide for third party consultation where the FOI application relates to business information of a person or organisation and in relation to documents affecting privacy.

2012.[122] In July the NHMRC notified GO that a further exemption, s 47G (business information), was being relied upon.

GO then applied to the IC for review of the NHMRC's decision.[123] In August 2013 GO reduced the scope of the request for information, so the only exemptions that remained relevant to the application were sections 47E and 47G. GO's application for review was unsuccessful. The Acting IC determined that documents relating to the peer review assessment of the grant application were conditionally exempt under section 47E(d) (disclosure would/could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency) and to grant GO access, on balance, would be contrary to the public interest.[124] Among the matters weighing against disclosure was the risk that disclosure of the material, whether or not the identity of the assessors was revealed, would mean researchers would be less willing to act as assessors for grant applications, or if they did, they would be less prepared to 'provide frank assessments'.[125] Another factor weighing against disclosure was that 'assessors would modify their future assessments in the knowledge that their views may be made public'.[126]

The documents were also found by the Acting IC to be conditionally exempt under section 47G(1)(a) (disclosure would/could reasonably be expected to unreasonably affect that person adversely in respect of his/her business or professional affairs) and on balance granting GO access would be contrary to the public interest. Among the matters taken into account against disclosure was the Acting IC's view that 'disclosing unpublished research would enable competitors to access details of the research to the prejudice of the research'.[127] The Acting IC accepted the lead investigator's claim that 'disclosure could lead to further campaigns against the investigators'.[128]

For the Acting IC, medical and scientific research provided significant public benefit and consequently there was a 'substantial public interest in ensuring that legitimate and ethical research is undertaken and funded'.[129] Another public interest consideration was the 'efficient allocation' of the available research resources.[130] The disclosure sought here posed a risk to the NHMRC's ability to obtain 'the depth and quality of information' in the grant application and the assessment process necessary for it to make its recommendation on the grant application.[131] The Acting IC identified 'the long timeline associated with medical research' as requiring 'the professional interests of the individual investigators be given substantial weight'.[132]

[122] *'GO' and National Health and Medical Research Council* [2015] AICmr 56 [6].
[123] Ibid [9].
[124] As explained earlier, conditionally exempt documents are those where access must be granted unless, on balance, disclosure would be contrary to the public interest.
[125] *'GO' and National Health and Medical Research Council* [2015] AICmr 56 [20].
[126] Ibid [27].
[127] Ibid [33].
[128] Ibid [39].
[129] Ibid.
[130] Ibid [40].
[131] Ibid.
[132] Ibid [41].

IV FOI Disclosure, Confidentiality and Stakeholder Interests

The above discussion reveals the range of research related information being sought by FOI applicants from universities and government funding bodies: information about the content and methodologies of the research; who was funding it; and the ethics and grant funding peer review of the research. Essentially all the applications discussed above can be characterised as attempts to obtain disclosure of information relating to the integrity of university research: W was concerned about independence and competency in the research; Wh's application related to the sensitive area of research involving medication administered to children; R was concerned about the ethics procedures that approved a trial with what she considered inadequate disclosure to participants and inadequate monitoring of effects once the use of an antidepressant had ceased; and GO's application, like that of Wh, related to research involving the administration of drugs to young people. Two of the disputed FOI applications had more to do with the personal interests of the university researcher: B was seeking details about complaints made under research ethics procedures that led to the suspension of a research project in which he was involved; and Wr was attempting to determine the reasons behind the failure of her research funding applications. However, both these applications can also be seen as attempts to obtain information about the integrity of the ethics and funding procedures in university research.

A central concern of FOI legislation is the public interest in disclosure. The default position is in favour of disclosure unless there are public interest factors against disclosure to outweigh that position. As illustrated in the examples discussed above, in the context of university research the public interest factors in favour of disclosure include ensuring the accountability of public agencies such as public universities and government grant funding bodies. Other important public interests favouring disclosure are ensuring public moneys supporting research are spent in high quality research endeavours conducted according to ethical standards. The exemptions established under FOI legislation represent areas where the public interest in disclosure is balanced against other matters. In the examples discussed above there were a range of exemptions relied upon to refuse disclosure of information about university research activities but the central issue for the bodies reviewing these disclosure decisions was the confidentiality argued to be a necessary part of university research.

One aspect of this confidentiality, as illustrated in W's application, is that research in its early stages should remain confidential while it undergoes peer review, a mechanism intended to ensure 'scientific integrity, quality and performance'.[133] The release of 'unsettled early views and findings' is argued to be damaging in that they could be used later to seek to discredit the final outcomes of the research.[134]

Another aspect of confidentiality highlighted above relates to the operation of HRECs. While the Acting IC in reviewing Wh's application was not convinced of the need for the confidentiality of ethics committee procedures as argued for by the university, a very different position was taken by the NCAT in R's application. This was based on evidence from university representatives who argued the risk of disclosure through FOI applications would discourage full participation in the ethics approval process not only by the researchers and their research partners but also the ethics committee members and outside experts asked to review

[133] *Watts and Department of Veterans' Affairs* [2016] AICmr 26 [24].
[134] Ibid.

committee decisions.[135] The tribunal reviewing B's FOI application accepted the need to maintain the confidentiality of ethics complainants' identities so as to preserve the integrity of the ethics procedures, but rejected an argument that the content of their complaints was similarly confidential.[136]

Peer review occurs in relation to ethics approvals but it is also a central part of decision making by the two main government research grant funding organisations. Confidentiality is also argued to be an essential part of these procedures. Unlike the approach adopted in the earlier decision in Wr's application, the review of GO's FOI application reflects a similar position to that taken in relation to ethics approval. The risk of disclosure of the identity of peer reviewers under FOI procedures is seen as something that would discourage those who would otherwise act as reviewers or would lead them to modify their assessments in light of the risk.[137]

There are a number of stakeholders whose interests are potentially affected by the use of FOI legislation to obtain information about the conduct of university research activities. Individual researchers who make the FOI application will be concerned about the effects of such action on their future careers and future funding opportunities. Some of the instances discussed above involved researchers questioning the peer review of their grant or ethics applications, potentially risking their relationships not only with the government grant funding bodies and universities but with the other researchers in their field who had been involved in the assessment of the application. There is also some risk to the applicants' personal finances and personal life. An FOI application is an administrative process and it is intended to be conducted with less cost and formality than a court proceeding. But in most instances discussed above, the self-represented applicant was facing a well-resourced university, grant funding body or government department. In such circumstances the applicant would have to invest considerable time and effort in order to be in a position to meet the arguments raised by the other side.

Another category of individual researcher involved in these circumstances is someone whose research work is the subject of an FOI application brought by a third party. Being the first to publish in a particular research area or the first to adopt new methodologies in a field carries with it significant academic prestige, and the premature disclosure of a research project may rob an academic of this benefit. As was argued in *Watts and Department of Veterans' Affairs*, damage to reputation may arise from the release of draft results that have yet to be finalised through the process of peer review.[138]

Another category of individual researcher affected by developments in this area is those involved in the peer review of research grants and ethics approval. As was argued in *Raven v The University of Sydney*, they will be concerned about maintaining the confidentiality of their opinions. However, the position that peer reviewers need the 'cloak of confidentiality' before they will participate fully in the review process was not accepted in all of the instances discussed above. In *Whitely and Curtin University of Technology* a different view was taken about the expectations on a professional offering their professional opinion.[139] In *Re Wertheim and Department of Health* there was evidence from researchers who had acted as assessors for

[135] *Raven v The University of Sydney* [2015] NSWCATAD 104 [84].
[136] *Battin v University of New England* [2013] NSWADT 73 [57].
[137] *'GO' and National Health and Medical Research Council* [2015] AICmr 56 [20].
[138] Roberta Morris, Bruce Sales and John Burman, 'Research and the Freedom of Information Act' (1981) 36 *American Psychologist* 819, 820. See also the discussion above (Part II) about the express exemptions or factors to consider relating to research data or a document containing uncompleted research.
[139] *Whitely and Curtin University of Technology* [2008] WAICmr 24 [86]–[87].

other funding agencies that did not require confidentiality, and who had on 'several occasions' discussed unsuccessful proposals with the applicants.[140] In its decision in that instance the AAT drew the analogy between research academics asked to provide their professional opinion about a research project and teaching academics asked to assess their students. It referred to the view of the Victorian County Court in the decision of *Hart v Monash University* in relation to marks being disclosed to university students:[141] 'Most positions of responsibility in the community involve pressures of some degree, and giving an honest and accurate percentage mark, in my view, is what the community should expect from University examiners'.[142] The tribunal recognised the public interest in research applicants knowing why they had been unsuccessful both 'for their own sake, and for the sake of improving the general quality of medical research'.[143]

It is clear that FOI legislation imposes an administrative burden on the public universities. The burden will be heavy when disputes arise about the appropriate limits of disclosure of the details of controversial research projects. The universities subject to the disputed FOI applications discussed above are well funded, were represented by solicitors and counsel and generally faced self-represented applicants. Nevertheless, the universities (and funding bodies) have argued that such applications will have 'chilling effects' on research in areas of academic or public controversy.[144] When targeted by an FOI application seeking disclosure of information about their research activities, the universities have indicated concern about their future ability to attract research funds and researchers if the research ideas or methodologies of their researchers are required to be disclosed prior to the research being subject to peer review, robbing the researchers of their opportunity to be the first to publish. They have persisted with the argument that the checks and balances necessary to ensure the integrity of university research operate through HREC review and the peer review that occurs as part of publication in peer reviewed research journals. Many research areas are characterised as relatively closed communities, where anonymity of peer review is a necessary precondition to the recruitment of willing peer assessors. In a university environment where commercialisation of research is strongly encouraged, the release to third parties of information about research projects may also undermine attempts to obtain critical legal protection for the intellectual property (for example patent registration) generated by the project.[145]

The main Federal Government grant funding bodies, the ARC and NHMRC, are in a similar position to the universities in that they are government funded and often face self-represented applicants. They, like the public universities, have to bear the administrative burden of responding to FOI applications.[146] These grant funding agencies have imposed on the universities the ethics obligations that ensure research involving human participants or research

[140] *Re Wertheim and Department of Health* (1984) 7 ALD 121, 123, 148.
[141] *Stephen Lesley Hart v Monash University* (unreported, County Court of Victoria, 30 July 1984).
[142] Quoted in *Re Wertheim and Department of Health* (1984) 7 ALD 121, 148.
[143] Ibid 149.
[144] Morris, Sales and Berman, above n 138, 825. The potential for FOI disclosure to discourage research in 'contentious areas' was discussed in *Watts and Department of Veterans' Affairs* [2016] AICmr 26 [25].
[145] Lewis and Vincler, above n 6, 430; raised as a consideration in the evidence brought in *Raven v The University of Sydney* [2015] NSWCATAD 104 [84].
[146] The NHMRC in its submission to the Hawke Review (Hawke, above n 8) argued that it was a 'small agency', the processing of FOI applications placed 'a significant burden on its resources' and it '[could not] afford to employ dedicated FOI officers' (6 December 2012).

using animals undergoes prior ethics review.[147] They also rely on academics and other researchers acting as peer reviewers of the grant applications in order to assist them in allocating the available resources most effectively.[148] For the same reasons as the universities, they argue the anonymity of peer reviewers is a necessary part of the grant review framework. However, the maintenance of anonymity of grant reviewers is not without its critics. The fact there are small communities of researchers in particular areas means there is significant potential for a conflict of interest to arise. For instance the Australian National Audit Office's report on the ARC found 'many researchers considered that conflicts of interest were an unavoidable consequence of the peer review process' and this was 'particularly the case in Australia because of the relatively small pool of researchers available to assess applications in some specialist areas'.[149] Similar concerns were raised by the AAT in *Re Wertheim and Department of Health*. The tribunal expressed its concern that 'applicants and assessors are, as was clear from the evidence, in competition, within the same fields, for the same funds'.[150] However it recognised the importance of expert researchers 'actively engaged in medical research' (quoting from a speech by Dr T H Hurley) having a role in decisions about what research to fund, rather than those decisions being left to representatives of professional organisations and/or government representatives.[151]

Another category of stakeholder potentially affected by these developments is commercial enterprises. These include businesses financially supporting university research, either because of philanthropic motives or because they are partners in an endeavour to develop commercially useful outputs. There are also enterprises whose business may be adversely affected by the research findings. There has been disquiet in some sections of the research community about the potential for research supported by commercial interests to be influenced in direct and indirect ways.[152] These controversies have been raised in areas such as research about the health effects of products like soft drinks.[153] Another area of controversy has been the health effects of tobacco products.[154] Commentators have pointed to the potential for FOI applications to be used by commercial interests to obtain information about research projects in order to question them, to tie up resources in complying with the applications, distract the researchers from their research work and to help the commercial interest use their own marketing efforts to target the groups being studied.[155]

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[147] ARC, NHMRC and Universities Australia, above n 43. See also ARC, NHMRC, Universities Australia and the Commonwealth Scientific and Industrial Research Organisation, *Australian Code for the Care and Use of Animals for Scientific Purposes* (8th ed, NHMRC, 2013).

[148] Lewis and Vincler, above n 6, 426.

[149] Australian National Audit Office, *ARC's Management*, above n 109, 45. There was a similar finding in its report on the NHMRC: Australian National Audit Office, *Administration of Grants BY NHMRC*, 70–71.

[150] *Re Wertheim and Department of Health* (1984) 7 ALD 121, 151.

[151] Ibid.

[152] See, eg, in the US, Woodbury, 'A Difficult Decade', above n 6 [24]–[29].

[153] Marcus Strom, 'Coke's $1.7m Health Funding List Revealed' *Sydney Morning Herald*, 11 March 2016, 3.

[154] Nick McKenzie and Richard Baker, 'Big Tobacco Trying to Access Data on Teen Smokers' *The Age*, 20 August 2015, 1.

[155] See, eg, Anne Landman and Stanton Glantz, 'Tobacco Industry Efforts to Undermine Policy-Relevant Research' (2009) 99 *American Journal of Public Health* 45; Andrew Charlesworth, 'Paved with Good Intentions: Universities, Freedom of Information and Open Research' (2011) 21(6) *Computers & Law* 28; Andrew Charlesworth, 'Data Protection, Freedom of Information and Ethical Review Committees' (2012) 15 *Information, Communication & Society* 85; Andrew Mitchell and Tania Voon, 'Someone to Watch Over Me: Use of FOI Requests by the Tobacco Industry (2014) 22 *Australian Journal of Administrative Law* 18; Georgina Dimopoulos, Andrew Mitchell and Tania Voon, 'The Tobacco Industry's Strategic Use of Freedom of Information Laws: A Comparative Analysis (2016) *Oxford University Comparative Law Forum* 2; *Johnson v Cancer Council of Victoria* [2016] VCAT 1596.

V CONCLUSION

The discussion above has examined instances where FOI applications have sought disclosure of information about the content, methodologies, source of and decision making about funding, and ethics review and complaint handling of research activities in universities, and has identified where the balance between disclosure and confidentiality has been struck in these instances. It has also explored the potential effect of the FOI decisions on the various stakeholders involved in university research.

As outlined in Part II, the legislative intention of Commonwealth and state FOI legislation is to favour disclosure of government information. Openness and transparency in government is to be encouraged, citizens are to be better informed so they will be able to participate in government processes, and information that is generated through public funds is to be made more widely available. The legislative principles encouraging disclosure are balanced by the operation of exemptions, either by way of express exemptions or through a public interest test under which lists of considerations favouring and weighing against disclosure are to be addressed as appropriate in the circumstances of the particular FOI application. As discussed, in some state jurisdictions there are express exemptions or factors to be taken into account weighing against disclosure where the disclosure relates to research data. In some jurisdictions the exemption relates to uncompleted research but in others it includes research whether or not it has been completed. The Commonwealth FOI legislation is more limited as it relates to uncompleted research conducted by an officer of an agency listed in Schedule 4 (this includes the Australian National University). The research related exemption or factor was raised in B's application but not found to apply in the circumstances and it was not found to have been established by the evidence in the R decision.[156] Outside these specific exemptions or factors, FOI applications targeting public universities or government agencies funding university research, fall to be considered in the same way as any other type of FOI application.

Overall, what do the disputed FOI applications discussed here reflect about how the legislative principles favouring disclosure operate in the context of university research activities? The decisions have been considered according to the main type of information being sought, for example information about the content of the research or its funding. When looked at in this way, a bare majority found against disclosure. The various exemptions recognising the necessary confidentiality of aspects of university research, such as incomplete research findings not subject to peer review, and the peer review of funding and ethics applications, were found to weigh against disclosure (W, R and GO). Two applications (Wh and Wr) came to the opposite conclusion about the same kinds of matters. The decisions examined are intended as illustrations and do not purport to represent the full range of disputed FOI decisions arising in this context, so no conclusions can be drawn from them about trends in this area. However, when the decisions are placed in chronological order, there appears to be a discernible shift in approach from an earlier position favouring disclosure to a more recent willingness to accept the argument that confidentiality is a crucial part of the university research environment. This change in attitude is demonstrated most clearly when comparing the approach taken in the Wh decision with that in the R decision. As was pointed out in Part II, the public interest factors and the considerations to be taken into account in weighing for or against disclosure, are addressed on a case by case basis rather than earlier decisions operating as strict precedents.[157] However, it appears from the disputed FOI decisions examined in Part

[156] In R's decision, parts of the published decision relating to the exemption were 'Not for publication': *Raven v The University of Sydney* [2015] NSWCATAD 104 [112]–[114].
[157] See discussion above, Part II.

III, that in this context the reviewing bodies have shown they are aware the current university research framework relies on the maintenance of confidentiality.

The universities and government funding bodies supporting university research have continued to argue for the necessity of confidentiality of university research in the face of FOI legislation that favours disclosure for the public benefit. But what was being queried by the FOI applicants discussed above was whether the checks and balances in the research framework meant to be provided by peer review were in fact operating effectively in the particular circumstances. For these applicants it was no answer to their concerns that they should rely upon ethics processes and peer review of the research grant, and wait for the final outcome as published in a peer reviewed journal, in order to have access to information about the research being conducted. The operation of these checks and balances has also been questioned more generally. There is growing discussion about predatory journals and fake peer reviews,[158] developments that undermine the research framework.

In circumstances where the current research governance structures are being put under pressure, instances of FOI applications are likely to increase. Decision makers and review bodies will continue to be faced with the issue of the confidentiality that is argued to be a necessary part of that framework and will have to balance the need for confidentiality against the FOI legislative principles that favour disclosure.

[158] Ware and Mabe, above n 4, 122; Cenyu Shen and Bo-Christer Bjork, '"Predatory" Open Access: A Longitudinal Study of Article Volumes and Market Characteristics' (2015) 13 *BMC Medicine* 230; Kylar Loussikian, 'Peer Review Scams Conning Local Journals', *The Australian*, 2 September 2015, 30; Kylar Loussikian, '"Publisher" in Journal Fake Review Scam', *The Australian*, 4 May 2016, 32.