Supplementary Submission No 18a

INQUIRY INTO PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

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Date received: 3/09/2008

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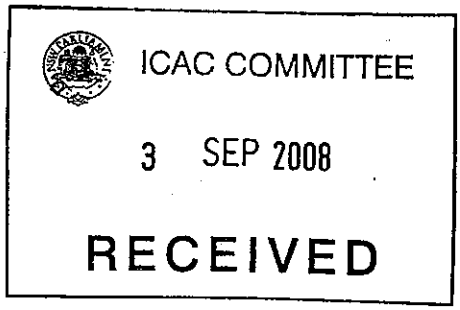
2 September 2008



Committee on the Independent Commission Against Corruption
Parliament House
Macquarie St
SYDNEY NSW 2000
Att: Ms Helen Minnican, Committee Manager

Dear Ms Minnican,

PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

I refer to the inquiry currently being conducted by the Committee on the Independent Commission Against Corruption (the 'ICAC Committee') titled *'Protection of Public Sector Whistleblower Employees'*.

Clearly this inquiry requires consideration in part at least – although such consideration is not necessarily the focus of the inquiry as there are arguably more important considerations – of the role that the *Protected Disclosures Act 1994* plays (if any) in 'protecting' public sector whistleblowers.

I note that submissions to the inquiry closed on Wednesday 27 August 2008.

On 29 August 2008 however, *two days after* this closing date, the Administrative Decisions Tribunal of New South Wales (per Judicial Member Robert Wilson) delivered its decision in *Chen v University of New South Wales* [2008] NSWADT 244, a copy of which is attached.

Yours sincerely

Michael McGuirk

Encl:

Administrative Decisions Tribunal
New South Wales

CITATION:	**Chen v University of New South Wales [2008] NSWADT 244**
DIVISION:	General Division
PARTIES:	APPLICANT Juchuan Chen RESPONDENT University Of New South Wales
FILE NUMBER:	053403
HEARING DATES:	18 September 2006 21 September 2006 19 December 2006 20 December 2006 3 October 2007
SUBMISSIONS CLOSED:	26 December 2007
DATE OF DECISION:	29 August 2008
BEFORE:	Wilson R - Judicial Member
CATCHWORDS:	Freedom of Information Act - access to documents
MATTER FOR DECISION:	Preliminary determination
LEGISLATION CITED :	Freedom of Information Act 1989
REPRESENTATION:	APPLICANT In person RESPONDENT P Singleton, barrister
ORDERS:	1. The 8 documents with which these reasons deal all fall within clause 20(1)(d) of Schedule 1 to the Freedom of Information Act 1989 and are therefore exempt documents within the meaning of the Act 2. Within 3 weeks of receipt of these reasons for decision the parties are directed to approach the Tribunal Registry and have the residual proceedings set down for a directions hearing on a date suitable to the parties and to the Tribunal.

REASONS FOR DECISION

1 The applicant has commenced these proceedings pursuant to the provisions of the *Freedom of Information Act* 1989 (NSW) seeking a review of a decision by the respondent refusing access to certain documents sought by the applicant under that legislation. The applicant's exhibits adduced in the proceedings have been marked with an "A" prefix and an identifying number. The respondent's exhibits have been marked with an "R" prefix and number (indicating that copies have been given to the applicant) or with a "C" prefix and number (indicating that they are confidential at this stage and that copies thereof have not been provided to the applicant).

2 It has been agreed between the parties that it would be appropriate to proceed by way of an initial determination by the Tribunal as to whether the documents, to which access is sought and over which exemption from disclosure is claimed, are, or are not, exempt documents within the ambit of clause 20(1)(d) of Schedule 1 to the *Freedom of Information Act* 1989 (NSW). The essential basis for this agreement is that it would facilitate the respondent's presentation of its case in relation to a second exemption that it wishes to rely upon and would also facilitate its adducing of evidence relevant to the Tribunal's discretionary power to grant access to even exempt documents, should the circumstances so warrant. The Tribunal acquiesced in this approach as there is much practical sense in following the course proposed, given the large volume of documentation involved. Consequently, these reasons for decision address this preliminary issue only, that is whether these documents relate to protected disclosures under the *Protected Disclosures Act* 1994. Although these reasons express a concluded view on this aspect, they do not finally determine the proceedings. Therefore they should not be seen by the parties as precluding any application they may wish to make to revisit the issue. Whether any such application would be granted, and whether the Tribunal can be persuaded to change its views, will remain to be seen upon any such application being made. Whilst this aspect is unsatisfactory to a degree, it is outweighed by the advantages in following the course that has been proposed by the parties. This is primarily an advantage in the respondent's favour, but the applicant, quite fairly, accepts this position. The parties have conducted these proceedings in a measured and responsible way and they should be commended for this. The applicant has assisted by making such submissions as he was able and the respondent has identified the evidence relevant to the protected disclosures point in some detail.

3 Whether the documents fall within clause 20(1)(d) of the Schedule ideally calls for evidence showing what the original disclosures in fact were, in what terms they were expressed, by and to whom they were made and the more general circumstances under which they were made, communicated and dealt with. The enquiry at this level is directed towards the question whether the disclosures were in fact, and in law, protected disclosures within the meaning of the *Protected Disclosures Act* 1994. If this be so, the secondary enquiry is whether the documents over which exemption is claimed fall within clause 20(1)(d) of the *Freedom of Information Act* 1989: that is, whether they "contain matter the disclosure of which would disclose matter relating to a protected disclosure within the meaning of the *Protected Disclosures Act* 1994". However, this ideal approach is somewhat thwarted by the complications arising from the circumstances here: the relevant "employment" status of the several makers of the disclosures is complicated; there were more than just single acts of disclosure, as follow up interviews were conducted, about which little direct evidence is available; and there is a great deal of reliance placed upon what is said in subsequent reports about the nature of the disclosures. These reports, it is argued, came about during investigations and reviews of the matters disclosed. These complications have been compounded by the antiquity of the relevant events and by the

time in which the relevant events have taken to unfold. During this time numerous reviews of the circumstances have taken place.

4 To illustrate this complexity, it is argued that the disclosures were made in relation to the conduct of a Professor of Medicine employed by the respondent University at a School, which, although off campus, was part of the Faculty of Medicine. It is also argued that the persons who made the disclosures were either employees of the University or of a statutory body established under the *Health Services Act* 1997, or both (respondent's submissions 16.08.07 paragraphs 5 and 6). As neither employment by the respondent nor by the statutory corporation attracts the provisions of the *Public Sector Management Act* 1988 (as it then was), the extended definition of "public official" in s.4 of the *Protected Disclosures Act* 1994 is relied upon. In particular, the respondent has directed enquiry to the question whether the makers of the disclosures, or any one of them, had "public official functions" or were "acting in a public official capacity", together with the additional question whether their conduct and activities may be investigated by an "investigating authority" (respondent's submissions paragraph 55). Consequently, employment per se is not determinative as consideration must be given to the terms of the extended definition relied upon by the respondent.

5 The evidence in the proceedings is voluminous and it has been necessary to read quite a lot of it to gain a satisfactory understanding of the points that the parties have been making. Much of it is historical and only a small part of it is actually pertinent to the preliminary issue under consideration. Even on this issue, the evidence does not contain the detail that this issue calls for in order to be able to comfortably reach factual determinations that ideally need to be addressed. This is due in part to the antiquity of the relevant events. However, in the long run there is sufficient to enable determinations to be made on the critical factual issues. Perhaps the preferable starting point, before considering the evidence in any detail, is the *Protected Disclosures Act* 1994 itself, a course which the respondent's submissions have followed. The stated object of this Act is to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and waste in the public sector (s.3), this object being accompanied by three stated methods which relate to the facilitation of methods for making disclosures, protection for those making disclosures and the proper investigation of such disclosures. The reference to the "public sector" suggests a distinction between public and private sectors of the economy, but this should be seen only as a guide and should give way to the specific provisions of the Act.

6 A "protected disclosure" is one which satisfies the applicable requirements of Part 2 of the Act. The respondent has outlined the applicable requirements in its submissions so that it is sufficient to note here that what is required, in general terms, is that there be a disclosure of information by a *public official* concerning alleged corrupt conduct, maladministration or waste by a *public authority*, or one of its officers (ss.8 and 14). It is these two provisions that in essence provide the nexus with the public sector that the objects of the Act speak of. Also, the act of disclosure must be voluntary (s.9). These provisions are attended by several specific definitions.

7 If the applicable requirements in Part 2 are satisfied then the disclosure becomes a "protected disclosure" for the purposes of the Act simpliciter. Two points should be noted. The first is that the sections require the presence of a public sector element, but only in the sense that the terms *public official* and *public authority* must be satisfied (as well as the requirements of s.14 of the Act). This does not mean of course that the Tribunal is to embark upon examining whether the relevant activities occur within the public sector or the private sector of our economy. Equally, it does not mean that a disclosure must be made only to an officer of a public authority: disclosures may be made to others as well, including journalists (s.8(1)(d), subject to s.19). Secondly, there is no requirement that the disclosure in issue must be intentionally made pursuant to the Act, as it is sufficient if the disclosure falls within the applicable provisions. If it

does, the disclosure will thereby become a protected disclosure irrespective of the intent of the maker of the disclosure, save perhaps for the voluntary requirement. It also follows from this that the way in which a recipient of a disclosure treats that disclosure is not determinative per se: the disclosure will only be a protected disclosure if it satisfies the applicable requirements contained in Part 2 of the Act. However, the subjective views of both the maker and the recipient are opinions which the Tribunal may, and should, take into account and use in its deliberations according to whatever weight, if any, they may properly have. In this regard the Tribunal is not limited by the rules of evidence that would apply in a Court of Law.

8 If a particular disclosure satisfies the Part 2 requirements, then certain consequences follow, as provided in Part 3 of the Act. Essentially this Part negates any liability accruing to the maker of the disclosure by reason thereof, provides requirements of confidentiality and imposes penalties for reprisal against the maker of the disclosure (ss.20, 21 and 22). These several protections are qualified in the legislation. In relation to s.22, which provides a certain degree of confidentiality, it should be noted that the provision in s.5 of the Act, that the Act is to prevail over other specific legislation, does not include a reference to the *Freedom of Information Act* 1989 (see s.4 definition of "investigating Act").

9 The Act appears to have been drawn upon the basis that the disclosures with which it is concerned are discrete events, which are identifiable as such. It is possible, of course, that the making of a disclosure may have in fact involved a series of related actions, such as the writing of an initial letter and the later provision of detailed statements or the provision of further information or proof. However, as the provisions of Part 3 demonstrate, the Act also envisages that the act of disclosure (whatever its extent) may bring about fuller investigations and other action flowing thereafter. The maker of the disclosure may well participate in these investigations and in the course of doing this may provide further information from time to time. The provision of any such further information itself may, or may not, be a protected disclosure within the Act or it may simply be information in relation to which other protections are conferred upon the giver of the information by the legislation under which the investigation is being conducted. This possibility must be kept in mind, particularly when considering the application of clause 20(1)(d) of the *Freedom of Information Act* 1989.

10 Broadly speaking, there is much common ground between the parties as to how the several documents in question came into existence and were subsequently dealt with. However, there still remain several factual issues that need to be addressed by consideration of specific parts of the evidence, particularly in relation to exhibits, which the applicant has not seen. The documents under review in these proceedings are identified in exhibit R1, the schedule of exempt documents and they are dealt with in the evidence of Ms Deborah Gibson, a senior employee of the respondent. They appear as confidential exhibits to Ms. Gibson's statements of evidence (exhibits R2 and R3).

11 Starting in about September 2001, a number of disclosures were made in relation to the conduct of a Professor of Medicine employed by the respondent University at a School or facility, which, although off campus, was part of the Faculty of Medicine. This is common ground. It is argued that the persons who made the disclosures were either employees of the University or of a statutory body established under the *Health Services Act* 1997, or were employees of both (respondent's submissions 16.08.07 paragraphs 5 and 6). The type of information revealed by these disclosures is quite varied, as is the way in which the disclosures were made, but they do at least contain allegations that could well suggest corruption, maladministration and waste. These disclosures were followed by enquiry and report. Following this report a series of "reviews" were conducted into the allegations contained in the disclosures and, as matters progressed, into the way in which the respondent had dealt with them. This gave rise to a number of subsequent reports, each one dealing with the reports that had come before it. This is just a general overview of the circumstances, but it suffices to show the context in

which most of the documents in question here came into being.

12 Under the respondent's protocol for dealing with disclosures of this nature, the disclosures came into the hands of Professor Ingleson (a Deputy Vice-Chancellor at the time). He directed Professors Dowton and McLachlan to make enquiry and report, and they did so in about April 2002 by way of separate reports. Professor Ingleson then prepared his own short report based on these two reports that had been submitted to him. A report by Professor Niland followed shortly thereafter. The respondent then commissioned an independent enquiry to report further: it did so on 31 January 2003 (the Brennan Report). This report then came to the hand of Professor Hume who instigated action pursuant to the respondent's Enterprise Bargaining Agreement to determine whether the Professor, who was the subject of the initial disclosures, was guilty of misconduct, as those disclosures had suggested. It is this aspect, which provides a nexus, the respondent argues, between Professor Hume's action (and the reports that followed) and the initial disclosures. Professor Hume engaged Professor Deane to investigate and report on the alleged misconduct. Professor Deane then did this and submitted a report (the Deane Report) to a Professor Wainright, who prepared his own report (the Wainright report), which he submitted to Professor Hume together with the Deane Report. Professor Hume then made certain determinations upon considering these two reports, which he recorded in a document dated 23 December 2003 (commonly referred to as the Hume Report). Professor Hume also commissioned an inquiry by Hungerford QC, mainly into the issue whether the reports from Deane and Wainright had considered all the allegations that had been alleged in the initial disclosures. There were quite a number of them. Hungerford QC submitted his report on 09 June 2004. Finally, the respondent commissioned the St. James Ethics Centre to enquire into how, in an overall sense, the entire process had been handled. This report was finalised in April 2005. These several reports are particularised in exhibit R2, paragraph 8.

13 This brief overview demonstrates how the matter progressed from the initial disclosures and inquiry to the engagement of action under the Enterprise Bargaining Agreement and finally to an assessment of the way in which the entire process had been handled. Clearly, as steps were taken along the way the terms upon which various persons or bodies were engaged to enquire and report varied. But, despite these changes, the respondent argues there is shown clearly, and consistently, a nexus between the reports that were prepared and the initial disclosures.

14 Exhibit C6, at pages 7 to 9 inclusive, sets out a convenient chronology of the communications that occurred when the initial disclosures were made, as well as other steps that were taken. The documents relevant to these initial disclosures are set forth as annexures to the Hungerford Report (namely annexures "O", "P", "Q" and "R": see the volume marked "Volume 7" which is part of the confidential documents DG-2 and DG-4 to exhibit R2, commencing at page 224). There is much factual variation shown by these communications: the communications are initiated by four different persons; some are addressed to different recipients and some are copied to other recipients; there is consistency of content in some parts of some communications, but there still remain differences which are significant; and the communications are spread across a period of 12 months.

15 Given this variability, the respondent has adopted a fairly broad brush approach in its submissions on the evidence. This is not meant critically, as the respondent identified the particular communications it relies upon in exhibit C6 (pages 7, 8 and 9). In this list there is at least one communication from three of the four persons who made disclosures. The gist of the respondent's approach is that, provided at least one of the communications from each person is a protected disclosure, it would be in a position where, given the width of the nexus prescribed in clause 20(1)(d), its broad submissions should carry the day. This is a cogent forensic approach. It prompts, however, a closer examination of the several communications being relied upon.

16 The series of written communications from the first person is contained in annexure "O" (volume 7 noted above, commencing at page 224). However, the documents reproduced here are incomplete as numerous annexures to the communications do not appear, the evidence before the Tribunal not explaining why this is so. This makes analysis uncertain. There are a number of communications by the writer addressed to different persons and different bodies, the majority of which contain allegations about corrupt conduct by the particular Professor who is the subject of the communications (see pages 226 and 230 for example). The writer was an employee of a statutory body and was undertaking work, which had a nexus with the respondent's off campus facility. Communications were sent to Professor Dowton and to other persons who may well have had an interest in the subject matter of the communications. However, the evidence does not show any direct communication by the writer to Professor Ingleson, who the respondent submits was the appropriate recipient (exhibit C6 page 7). In its submissions (exhibit C6) the respondent has not identified any particular communication from this writer that is relied upon as being a protected disclosure. In these circumstances the Tribunal is not satisfied that it can make sufficient findings with any confidence by relying upon these documentary communications alone. They may well not be protected communications in themselves, but this is a matter that the Tribunal cannot determine either way.

17 However, there is some additional evidence in the Dowton report (see Volume 5 documents at 7.2). Professor Dowton was directed, by Professor Ingleson, to enquire into the disclosures made by the first writer. Professor Dowton only investigated disclosures made by the first three of the abovementioned persons, the fourth person not making any disclosures by the time of Professor Dowton's report (see annexure "R"). In the Dowton report it is noted that these three persons were requested to provide copies of documents that they had authored concerning the disclosures that they wished to make and that extensive interviews were conducted with each person. However, no documents or transcript of interviews are annexed to the report that is in evidence.

18 Leaving this to one side, what is important here is the information that was provided during the course of the interview with this first person. From the content of the report it appears to have been quite extensive and to have contained much the same information as was disclosed in the earlier communications from this person that have been referred to above. Whilst it is impossible on the evidence to be certain about this, the Tribunal is satisfied, on the evidence before it, that on the balance of probabilities this was the case. If the disclosures made at interview satisfy the requirements of Part 2 of the *Protected Disclosures Act* 1994 they could in themselves be protected disclosures, irrespective of the status of the earlier communications. If this is the correct approach, these later disclosures would need to be taken into account when the application of the clause 20(1)(d) exemption is being considered. For the purposes of clause 20 (1)(d), it could be argued, it does not matter whether it is the initial disclosures or those made later at interview that are the relevant protected disclosures. This appears to be the genesis of the broad brush approach that the respondent has put forward in its submissions.

19 This approach has much to commend it as it would make little sense to hold that an initial written communication concerning corrupt conduct was a protected disclosure whereas information provided at a follow up interview, whether the same information or a more detailed exposition, was not, provided of course that Part 2 is satisfied. Although disclosures must be discrete events so that they may be tested for compliance with Part 2 of the Act, there is no reason why a series of discrete disclosures could not all be within Part 2. Further, it may be well argued that if a particular disclosure satisfies the Part 2 requirements it does not matter that the same disclosure has been made at an earlier point in time to other persons in such a way that the earlier disclosure does not satisfy Part 2: this does not affect the status of the later disclosure which in fact, and in law, is made in accordance with the Part 2 requirements. The latter disclosure remains protected by the Act. In the Tribunal's view this is the correct construction to adopt. The Act does not expressly exclude this rationale and it is the type of legislation that

should not be construed narrowly in light of its stated object. In this regard the Tribunal notes that the question whether the word *disclosure* in the Act means *disclosure for the first time* was not the subject of argument.

20 It is sufficiently clear from the Dowton report that at the interview this first named person did in fact make allegations of corrupt conduct and maladministration, although not for the first time. This element of Part 2 is therefore satisfied. The next question is whether this person was a *public official* as defined. Whilst this definition in its very terms refers to public servants in the traditional sense (now employees under the *Public Sector Employment and Management Act* 2002) and to State owned corporations, it does not refer expressly to entities which, although not State owned, have been created by statute and which have an existence independent of the Crown, although perhaps funded, at least in part, by Crown revenue. This type of entity is well known in our legal system, and has been for quite some time. The entities created by the *Health Services Act* 1997 are relevant examples. As the respondent submits, employees of these particular entities are not employed under *Public Sector Employment and Management Act* 2002, nor were they so employed under the earlier legislation (respondent's submissions paragraph 54). Given this, the respondent here relies upon the latter part of the definition in the protected Disclosures Act 1994 so that it becomes necessary to consider whether this person had *public official functions* or was acting in a *public official capacity* and was, as such, a person whose conduct was subject to investigation (s.4 definition of public official and respondent's submissions paragraph 55).

21 The gist of the *Protected Disclosures Act* 1994, in broad terms, is that it is concerned with disclosures made by a person who has a relevant connection with the public sector about the conduct of an entity which, or person who, has a similar connection, although perhaps not quite the same one. The provisions of Part 2 make this quite clear (see sections 8(1) and 14(1) for example). Although there are variations, this theme is consistent throughout the provisions of Part 2. Consequently, it would have been logically consistent to include in the definition of *public official* a reference to "any employee of a public authority (as defined)". However, the definition of *public official* does not so provide. Therefore when determining whether a person is a *public official* it would be incorrect to simply ask whether that person is an employee of a *public authority* (as defined). The proper question is whether that person comes within the definition of *public official* as it stands.

22 The latter part of the definition of *public official* upon which the respondent relies refers to any person who holds public office pursuant to which he or she performs functions of a public nature or acts in a public capacity. Its purpose appears to be to extend the definition beyond Crown employee's simpliciter and employees of State owned corporations and local government authorities. Whilst its ambit is limited by the proviso as to investigation of the conduct and activities of the person involved, it clearly must be an extension in this way. However, the difficult question is the scope of the extension. Is it limited to those who, for example, exercise statutory powers or hold an appointment, office or sinecure under the Crown? Or does it go further than this, as the respondent argues?

23 In the circumstances at hand, the broad reading for which the respondent contends is that this part of the definition should be read so as to include any person who is analogous to an employee of the Crown or of a State owned corporation. The argument is basically that where an entity or body performs some type of public function, then any employee of that entity would necessarily be a *public official*. This argument runs even if the entity is not a *public authority* within the meaning of the Act. The Tribunal accepts this proposition as the correct construction of the provision. As the person who made the disclosures was an employee of an entity established by the abovementioned enactment then that person satisfies the definition of *public official*, given that the entity itself was providing health services in a public, rather than a private, capacity. As the respondent aptly puts it, this entity was part of the public health system.

The nexus with the enactment suffices to make the capacity in which the entity, and its employees or servants, act a public one for the purposes of the legislation. The activities of this entity and its servants are subject to investigation, as the definition requires.

24 The next question is whether the person about whom the disclosures were made was an *officer of a public authority* (s.14 of the Act). As s.14 (1) shows, it is not necessary that this person be an officer of the same public authority of which the person making the disclosures is an employee. At material times this person was an employee of the respondent University. The respondent was subject to investigation, as the s.4 definition of *public authority* requires so the only real issue on this point is whether it was a *public authority*.

25 The respondent is an institution, established by statute, with prescribed functions relating to learning, research and teaching. Whilst there are privately owned institutions with functions such as these, the Ministerial overview that may be exercised in relation to the respondent's commercial activities and the statutory nexus that the respondent has with the Auditor-General and the Ombudsman leave no room for doubt that it is a *public authority* within the definition.

26 The Tribunal of course is an administrative body and cannot authoritatively determine the meaning of legislation, however in order to discharge its function it will from time to time need to interpret legislation, depending upon the submissions that it has been asked to consider. If the constructions the Tribunal has adopted are wrong then they are points of law and may be set right on appeal. It would have of course been preferable if the Act had been a little clearer on what persons and entities come within its jurisdiction so as to avoid construction issues like these.

27 The Act requires that the subject disclosures must have been made voluntarily. Whilst there is no direct evidence in point from the person who made these particular disclosures, a reading of the relevant communications referred to above shows that, on the balance of probabilities, the disclosures were made by this particular person voluntarily, that is, as a matter of choice. This is shown in part by the fact that the maker of the disclosures initiated action seeking redress of perceived problems in the workplace. Also, the disclosures were not made by way of routine reporting and therefore it is unlikely that a statutory duty has come into play.

28 The applicant has submitted that there is an obligation on employees to report improper administration and corrupt conduct and therefore the disclosures were not voluntary. He bases this upon the obligations that employees of the respondent have by reason of their employment, particularly when they are requested to provide information, and the applicant reasons from this that all employees have similar obligations, including employees of statutory entities such as we have here. This proposition no doubt has a degree of cogency about it.

29 Section 9 of the Act is the relevant provision. Its import is to take disclosures made pursuant to a statutory duty imposed upon a public official (to make such disclosures) outside the Act, with a limited modification in the case of police officers and correctional officers. However, it also provides that disclosures, made by a public official in accordance with an adopted code of conduct for making such disclosures, are voluntary for the purposes of the section. It is not suggested here that the disclosures were made pursuant to a statutory duty and the respondent does not, at the end of the day, really press an argument that its relevant code of conduct (exhibit R2 paragraph 15) was followed. Rather, the respondent argues that the disclosure was voluntary by reason of the absence of any statutory duty or legal obligation (submissions paragraphs 87 and 88).

30 The section is silent in relation to the abovementioned issue that the applicant has raised. For the reasons given above, the disclosures came about by actions initiated to redress problems without any regard to a duty to bring improper activities to the notice of an employer. Even

though the employee may have been under a duty as an employee to report such matters, this duty was not in fact acted upon in this case. The Tribunal is therefore satisfied that the disclosures here under consideration (those of the first person) were made voluntarily in the sense that section 9 of the Act requires. They were made as a matter of choice rather than legal compulsion.

31 Consequently, the Tribunal finds that disclosures were in fact made by this first person which fall within the *Protected Disclosures Act* 1994. These disclosures, inter alia, were the subject matter of the several documents to which access is sought by the applicant.

32 The disclosures made by the three other persons may be considered briefly. The relevant communications that are in evidence have been noted above, and are summarised in exhibit C6, and the respondent has detailed the pertinent arguments in its submissions. The Tribunal is satisfied that each of these persons was a *public official* who voluntarily made allegations about improper conduct within the Act by the abovementioned Professor, who at relevant times was an employee of a *public authority*, namely the respondent. It follows that these disclosures fall within the ambit of the *Protected Disclosures Act* 1994, essentially for the reasons given above. Not all information so disclosed by these persons would be within the Act, but a number of the disclosures clearly are. The Act has application to such disclosures and brings into play the obligations to investigate and the protections afforded by the Act to the persons who made the disclosures.

33 By reason of the confidential nature of much of the evidence in relation to the current issues, it has been very difficult for the applicant to formulate any arguments that he could advance. His submission in relation to the voluntary nature of the disclosures has been discussed above. The Tribunal has accepted this limitation as being unavoidable for the purposes of its deliberations.

34 Given that the respondent has established that the disclosures discussed above are protected disclosures, consideration must now be given to the provisions of the *Freedom of Information Act* 1989. Clause 20(1)(d) of the Schedule provides that a document is exempt if it contains matter, the disclosure of which would *disclose matter relating to a protected disclosure* (within the Act). Consequently, to the extent that such documents, inter alia, record the protected disclosures made, discuss those disclosures or deal with them in any way, a disclosure of such material would disclose *matter relating to a protected disclosure,* on a broad reading of the necessary connection. This would include comments in the documents as to how the disclosures were investigated, criticisms of those investigations and recommendations as to outcomes or future steps that ought to be taken, again on a broad reading. The reason for this is that, clearly, it can be well argued that, by reason of the postulated connections, the material recorded in the document is matter *relating to* a protected disclosure.

35 The documents for which exemption has been claimed are listed in exhibit R2 at paragraph 2. They are 8 in number, although some documents contain several volumes. The history of these documents, and of the investigations that were undertaken and the several reports that were commissioned following the disclosures, is also set forth in exhibit R2, at paragraphs 10 and following. This history is summarised above, commencing at paragraph 11of these reasons.

36 Documents numbered 3 to 8 inclusive (exhibit R2, paragraph 2) are reports of investigations following the making of the disclosures. Exhibit R2, commencing at paragraph 30, describes these several reports further. These reports consider the allegations contained in the protected disclosures and the way in which the respondent dealt with these allegations (see paragraph 33 exhibit R2). The respondent submits that if these reports, considered individually, contain matter which embodies any type of consideration of a protected disclosure or which deals with the way in which respondent has handled the protected disclosure, then there is sufficient nexus between the matter in the reports, and the reports themselves (considered as a single document),

and the protected disclosure. Again this is a broad brush approach, rather than a piecemeal one, but it is apposite in the circumstances. In the Tribunal's view this submission is correct. The consequence is that the documents numbered 3 to 8 inclusive are exempt documents within clause 20(1)(d). It may of course be appropriate at a later stage to consider whether excision of exempt matter is appropriate, should any such application be made.

37 Document number 1 (exhibit R2, paragraph 2; exhibit C4 annexure D)) was only located at a late date (transcript 21.09.06 page 26.54 ff). It is an unsigned document and ex facie it bears no relationship with any protected disclosure. It may have well preceded the making of any disclosures. However the respondent submits that this is the only copy of the document held and that it came into the respondent's submission by reason of the fact that it formed part of a submission that was made to the Brennan Inquiry (transcript 21.09.06 page 31.1). The searches made by the respondent to locate this document support this proposition. The relevance of submitting this document to this Inquiry is not established by the evidence, although it is possible to speculate that it may have had some relevance to credit issues. However, the question is whether submission to the Inquiry is sufficient to bring this document within clause 20(1)(d) of the Schedule. The relationship required by this clause is that matter in the document *be related to* a protected disclosure. The document clearly has a relationship with the Inquiry process itself: it was submitted for consideration and most likely had some relevance to the deliberations that the Inquiry undertook at the end of the day, although the nature of its relevance cannot be determined on the evidence before the Tribunal. It was then placed with the Inquiry papers and eventually found its way into the possession of the respondent in this form. As these deliberations directly concerned the protected disclosures that had been made, this document, more likely than not, had some significance for the disclosures themselves, even if it went no further than putting forward a contextual background. Consequently, it may be properly said that matter in this document is related to a protected disclosure and therefore this document falls within clause 20(1)(d). However, the Tribunal notes that the respondent has indicated that it will consider this document further (transcript page 32) and this may well resolve the issue. If not, discretionary considerations will become important given the limited nexus that this document has with any protected disclosure.

38 Document number 2 (exhibit R2, paragraph 2) is the subject of evidence in exhibit R2, paragraphs 27 and following. Ex facie it has no relationship with any protected disclosure that was made. However, the only copy held by the respondent came into its possession as a submission to the Brennan Inquiry. This document comes within clause 20(1)(d) on the same basis as does document 1. The Tribunal's reasons on this point are set forth above. It is also possible that discretionary considerations will become important in relation to this document as well.

39 Therefore the Tribunal holds that each of these 8 documents falls within the exemption provided by clause 20(1)(d) of the schedule. Given this, the parties will need to consider what position they wish to adopt in relation to the Tribunal's discretion to grant access to exempt documents and as to whether excision of exempt matter is possible, should either party consider that excision is appropriate here.

40 It is desirable that the matter proceeds to finality with as much expedition as is reasonably possible, although it is obvious that the parties will need appropriate time to consider their respective positions and prepare for any further hearing. Therefore it is appropriate to set a timetable as soon as possible, but it should not be unduly onerous. Whilst a great deal of the relevant evidence is already before the Tribunal it is possible that there will be a need to adduce additional evidence, and the timetable should reflect this. Either party, for example may wish to contact the persons who made the protected disclosures in order to ascertain whether they consent to the applicant being granted access to the documents either wholly or in an abridged form. The Tribunal notes the applicant's position in this regard. Consideration will also need to