General Manager, WorkCover Authority of NSW v Law Society of NSW [2006] NSWCA 84 24 April 2006

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http://www.smh.com.au/news/national/judges-open-access-to-sensitive-documents/2006/04/28/1146198353373.html#
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Judges open access to sensitive documents

By Matthew Moore FOI Editor

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IN A landmark decision, the state's highest court has thrown out arguments used for two decades by federal and state government agencies to keep secret thousands of their documents. The unanimous judgement of the Court of Appeal has imposed tough new tests for governments that want to refuse to release documents by claiming they are "internal working documents" in which there is no legitimate public interest.

The decision, certain to have ramifications throughout Australia, said many documents rightly regarded as confidential internal working documents when created, must become available for release as their significance wanes over time. The decision was against WorkCover, which appealed against a decision by the Administrative Decisions Tribunal to grant the NSW Law Society access to five documents prepared for WorkCover by legal costs consultant Michelle Castle. WorkCover also claimed the reports were exempt from the freedom of information law because they were protected by legal professional privilege, but the court also rejected that submission.

The decision means thousands of documents, such as consultants' reports, that have been kept secret on the grounds they are internal working documents should become available under FoI laws. It also means government agencies will have to show "tangible harm" would flow from disclosing the documents rather than relying on theoretical arguments known as the "Howard Factors" formulated in a 1985 FoI case which John Howard, now the Prime Minister, lost against the then treasurer, Paul Keating. WorkCover relied on the Howard Factors such as the "high level of communication" argument which says in part "the higher the office of the persons between whom the communications pass, and the more sensitive the issues involved in the communication, the more likely it is that the communication should not be disclosed". But the Court of Appeal preferred a 1993 decision by the Queensland Information Commissioner that says government departments need facts before deciding to refuse to release information on the grounds its release was not in the public interest. "Š [The] commissioner was emphasising that claims for exemption based on disclosure being contrary to the public interest should have a demonstrated factual basis rather than baldly iterate one or other of the Howard Factors."

The FoI expert Rick Snell, from the University of Tasmania, said the decision was a landmark because it scrapped "stupid arguments about theoretical possibilities" and backed public interest arguments put forward more than a decade ago by the Queensland Information Commissioner. "It's a very important decision Š it places the onus on agencies to demonstrate there's a factual basis to the concerns they raise about releasing particular documents," he said.

A NSW FoI consultant, Peter Timmins, said the decision was "probably the most significant decision for FOI ever in NSW". "We have seen a rejection of the formula put forward in a previous era where government departments could just tick a box that says certain documents are exempt," he said. Although the Commonwealth and every state has long had FOI laws, they have been widely criticised because of the ease with which exemption clauses are used to refuse access. But the judgement, written by Justice Ruth McColl, said time had moved on. "Freedom of information legislation Š was intended to cast aside the era of closed government and principles developed in that era may, with the benefit of 20 or more years of experience, be seen as anachronisms," it said.