OFFICE OF THE INFORMATION COMMISSIONER (QLD))) S 2 of 1993 (Decision No. 93003)

Participants:

COLIN GRAHAM SMITH
Applicant

- and -

ADMINISTRATIVE SERVICES DEPARTMENT
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - Request for access - Applicant challenging sufficiency of search for documents responsive to application - Jurisdiction of Information Commissioner to entertain application for review - Powers of Information Commissioner on review - Jurisdiction to determine limits of jurisdiction.

FREEDOM OF INFORMATION - Exempt matter - Matter affecting legal proceedings - Legal professional privilege - Whether privilege waived - Whether communications in furtherance of an illegal purpose or abuse of statutory power - Public interest - Personal interest - *Freedom of Information Act 1992* (Qld), s. 43.

Freedom of Information Act 1992 (Qld) ss. 5; 6; 43; 71(1); 72(1)(a); 72(2); 88(1)
Freedom of Information Act 1982 (Cth) ss.55(1); 58
Freedom of Information Act 1982 (Vic) ss.21(1)(e); 50(2)
Administrative Appeals Tribunal Act 1975 (Cth) ss.33(1)(a); 43(2)

Re Christie and Queensland Industry Development Corporation (Information Commissioner Qld, Decision No. 93001, 31 March 1993, unreported)
Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs (Information Commissioner Qld, Decision No. 93002, 30 June 1993, unreported)
Re Adams and the Tax Agents Board (1976) 1 ALD 251
Re Geary and Australian Wool Corporation (No. V84/387, 26 April 1985), 7 ALN N312
Re Wilson and Australian Federal Police (1983) 5 ALD 343
Re Properzi and Department of Immigration and Ethnic Affairs (Commonwealth AAT, 23 November 1984, No. N84/267, unreported)
Re Wertheim and Department of Health (1984) 7 ALD 121

Re Anti-Fluoridation Association of Victoria and Secretary, Department of Health (1985) 8 ALD 163

Re Sargent & Burton Pty Limited and Australian Institute of Sport (Commonwealth AAT, 25 October 1985, No. N85/239, unreported)

Re Wiseman and Department of Transport; Re Wiseman and Department of Communications (Commonwealth AAT, 22 October 1985, No. V84/420 et al., unreported)

Re Wiseman and Department of Transport (No. 2); Re Wiseman and Department of Communications (No. 2) (Commonwealth AAT, 11 April 1986, No. V84/402 et al., unreported)

Re Hancock and Attorney-General's Department (Commonwealth AAT, 13 November 1985, No. N84/601, unreported)

Re Hancock and Department of Resources and Energy (Commonwealth AAT, 2 June 1986, No. N85/515, unreported)

Re Borgward and Secretary, Department of Defence (Commonwealth AAT, 13 June 1986, No. W86/25, unreported)

Re Davis and Attorney-General's Department (Commonwealth AAT, 11 September 1986, No.N85/547, unreported)

Re Czuczor and Department of Social Security (Commonwealth AAT, 11 December 1987, No. V87/350, unreported)

Re Kalman and Department of Veterans' Affairs (Commonwealth AAT, 23 October 1992, No. Q91/619, unreported)

Re Gill and Department of Industry, Technology & Resources (1985) 1 VAR 97

Re Hezky and Health Department of Victoria (1987) 1 VAR 387

Re Schorel and Victoria Police Force (Victorian AAT, 20 March 1990, No. 89/43592, unreported)

Re Tovarlaza and Ministry of Housing & Construction (Victorian AAT, 9 October 1990, No. 90/29305, unreported)

Re Property Owners Association of Vic. Inc. and Ministry of Consumer Affairs (Victorian AAT, September 1991, No. 91/3262, unreported)

Re Clarkson and Attorney-General's Department (1990) 4 VAR 197

Grant v Downs (1976) 135 CLR 674

Waterford v Commonwealth of Australia (1987) 163 CLR 54

Attorney-General (NT) v Kearney (1985) 158 CLR 500

Attorney-General (NT) v Maurice (1986) 161 CLR 475

DECISION

1. The Information Commissioner has both the jurisdiction to review, and the power to give directions, in respect of the sufficiency of search conducted by an agency for documents responsive to an access application under the *Freedom of Information Act* 1992 (Qld).

2. The decisions of the Administrative Services Department, dated 13 January 1993 and 8 March 1993, refusing Mr Smith access to two documents which are the subject of this review, on the basis of s. 43 of the *Freedom of Information Act* 1992 (Qld), are affirmed.

Date of Decision: 30 June 1993

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F N ALBIETZ
INFORMATION COMMISSIONER

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Participants:

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ADMINISTRATIVE SERVICES DEPARTMENT
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REASONS FOR DECISION

Background (First external review application - 18 January 1993)

1 On 27 November 1992, Mr Colin Graham Smith submitted to the Freedom of Information Co-ordinator of the Administrative Services Department (Qld) a completed application form, requesting access to copies of the following documents:

> *"1. Details of all communications between any officer or representative of the Dept. of Admin. Services and any Minister of the Crown or his/her representatives concerning Colin Graham Smith since Nov 1989.*
>
> *2. Details of all communications to and from Crown Law concerning Colin Graham Smith."*

2 By letter dated 24 December 1992, the Department's Freedom of Information Co-ordinator, Ms Leanne Hardwicke, conveyed to Mr Smith her decision on his application, and the reasons for that decision, in accordance with the requirements of section 34 of the *Freedom of Information Act 1992* (the FOI Act).

3 In her letter of 24 December 1992, Ms Hardwicke's decision was set out in the following terms:

> *"In relation to part 1 of your request, I have identified 33 documents as falling within the scope of your request. 13 of these were identified from files held at CITEC and a further 20 were identified from files held by Corporate Services. I have decided to release those documents to you in full. (Copies attached)*
>
> *With respect to part 2 of your request, I have identified 1 document as falling within the scope of your request. I have decided to deny access to this document on the grounds that it is exempt under section 43 of the Freedom of Information Act.*
>
> *Section 43 provides that matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege. I believe that the abovementioned document falls within that*

> *category, being a document containing confidential professional communications involving legal advice between the Administrative Services Department as client and the Crown Solicitor as legal advisor."*

4 By letter dated 7 January 1993, Mr Smith requested an internal review of Ms Hardwicke's decision of 24 December 1992, wherein she had refused to grant access to the one document described as being responsive to the second part of his access application.

5 By letter dated 13 January 1993, Ms S A Porter, Deputy Director-General, Corporate Services, Administrative Services Department, advised Mr Smith that she had conducted an internal review of the decision of 24 December 1992, made by the Department's Freedom of Information Co-ordinator, Ms Leanne Hardwicke. Ms Porter's decision on internal review was stated in the following terms:

> *"I have reviewed the decision to exempt one document relating to correspondence between the Administrative Services Department and the Crown Solicitor. This document, I believe, has been exempted correctly under section 43 of the [Freedom of Information] Act and I therefore uphold the original decision.*
>
> *Section 43 provides that matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege. I believe that the abovementioned document falls within that category, being a document containing confidential professional communications involving legal advice between the Administrative Services Department as client and the Crown Solicitor as legal advisor."*

6 On 18 January 1993, Mr Smith lodged with the Information Commissioner an application for review of Ms Porter's decision refusing access to the document in question on the basis of s. 43 of the FOI Act. Mr Smith's application for external review raised two separate issues in connection with the decision in question. First, Mr Smith challenged the basis for exemption under s. 43 (legal professional privilege) for the one document which was identified as being within the scope of his access application. Second, Mr Smith challenged the sufficiency of the search conducted by the Administrative Services Department for documents responsive to the second part of his access application, arguing that the Department's files must contain more than just the one document which had been identified as responsive to that part of his application.

Preliminary issue as to jurisdiction of the Information Commissioner

7 Subsection 71(1) of the FOI Act specifies the types of decisions of agencies and Ministers, made under the Act, which the Information Commissioner has jurisdiction to investigate and review. Relevant to the present review is s. 71(1)(b), which confers jurisdiction on the Information Commissioner to investigate and review decisions:

> *"refusing to grant access to documents in accordance with applications under s.25 [of the FOI Act]".*

8 At the outset of my review I was satisfied that the Department's internal review decision of 13 January 1993 was, in respect of the one document identified by the Department in that decision, a decision falling within the meaning of s. 71(1)(b) of the FOI Act, and that

accordingly, I had jurisdiction to review that decision. However, there remained a preliminary issue concerning my jurisdiction in respect of the 'sufficiency of search' issue raised by Mr Smith in his application for external review, as there is no specific provision in the FOI Act concerning the Information Commissioner's jurisdiction to entertain applications for external review in situations in which requested documents cannot be located, or the powers on review (assuming jurisdiction can be established).

9 In a previous decision, *Re Christie and Queensland Industry Development Corporation* (Information Commissioner Qld, Decision No. 93001, 31 March 1993, unreported), I had occasion to consider the question of my power to embark upon a consideration of issues relating to the limits of my jurisdiction under the FOI Act. At paragraph 11 of that decision, I referred to a relevant passage in the decision of His Honour Mr Justice Brennan in *Re Adams and the Tax Agents Board* (1976) 1 ALD 251, wherein he stated (at p. 254):

> *"An administrative body with limited authority is bound, of course, to observe those limits. Although it cannot judicially pronounce upon the limits, its duty not to exceed the authority conferred by law upon it implies a competence to consider the legal limits of that authority, in order that it may appropriately mould its conduct. In discharging its duty, the administrative body will, as part of its function, form an opinion as to the limits of its own authority. The function of forming such an opinion for the purpose of moulding its conduct is not denied to it merely because the opinion produced no legal effect. In* Re Hickman; ex parte Fox and Clinton *(1945) 70 CLR 598, Dixon J, whilst denying the power of a Local Coal Reference Board to determine judicially the meaning of a statutory phrase upon which its jurisdiction depended, distinguished the Board's function of forming an opinion upon the question. He said, at p.618: 'I do not mean to say that the Board may not, for the purpose of determining its own action, "decide" in the sense of forming an opinion upon the meaning and application of the words "coal mining industry". It must make up its mind whether this or that particular function on the borders of the coal mining industry does or does not fall within the conception.'*
>
> *Blackburn J, sitting in an administrative jurisdiction in* Re Cilli's Objection *(1970) 15 FLR 426 at 428; [1970] ALR 813 at 815, noted that an administrative body 'must satisfy itself that all its proceedings are in accordance with the law. It must therefore receive and consider, whenever the point is taken, an argument that it has no jurisdiction. To say that is, in truth, to say no more than that it must at all times act lawfully."*

10 A further relevant case which I considered in this regard in *Re Christie* was the decision of the Commonwealth AAT in the matter of *Re Geary and Australian Wool Corporation* (No. V84/387, 26 April 1985), 7 ALN N312. Of particular relevance is the following passage from the Tribunal's decision in that case (at p. 8 of the decision):

> *"The question is whether the Tribunal may embark upon a consideration of the [jurisdictional] issue. In our opinion, the Tribunal has a duty to do so with a view to arriving at a decision within its jurisdiction."*

11 On the basis of these statements of general principle, I concluded in *Re Christie* (at para

13 of that decision):

> *"I take it therefore to be well established in law that an appeal tribunal of limited jurisdiction has both the power, and a duty, to embark upon a consideration of issues relating to the limits of its jurisdiction, when they are raised as an issue in an appeal lodged with the tribunal."*

12 I adopt my analysis in *Re Christie* as being applicable in the present case, and conclude that as an appeal tribunal of limited jurisdiction, I have the power to enter into a consideration of the jurisdictional issues raised by Mr Smith's allegations concerning the sufficiency of the search efforts made by the respondent Department for documents responsive to his access application. Specifically, the jurisdictional issues for determination are: whether my review jurisdiction includes investigation into such 'sufficiency of search' issues, and my powers on review (assuming such jurisdiction exists).

'Sufficiency of Search' issues

13 As I have not had occasion, prior to this case, to address the 'sufficiency of search' jurisdictional issues identified above, I consider it instructive to canvass the cases on point decided under analogous FOI legislation in other Australian jurisdictions. Both the Commonwealth Administrative Appeals Tribunal (Cth AAT) and the Victorian Administrative Appeals Tribunal (Vic AAT) have had occasion to consider cases dealing with these issues, under the relevant FOI legislation in those jurisdictions, albeit with quite different results.

14 From my review of the relevant cases, it is apparent that the inability of a respondent agency to locate documents requested under FOI legislation can arise in three distinct situations:

> The agency concerned acknowledges to the requester that the documents sought did exist, but finds evidence to confirm or suggest that those documents have been destroyed, or finds that while the documents sought should be in the agency's possession or control, search efforts have failed to locate them;
>
> The agency can find no documents which are responsive to the request, but the requester insists that such documents exist, and should be held by the agency; or
>
> The agency locates documents responsive to the request and grants full or partial access to those documents, but the applicant insists that further documents exist.

In either of the latter two categories, there may or may not be evidence supporting the requester's allegations concerning the existence of documents, or further documents.

a) Commonwealth AAT decisions

15 To my knowledge, the first decision of the Commonwealth AAT to deal with 'sufficiency of search' issues was *Re Wilson and Australian Federal Police* (1983) 5 ALD 343. In that case, the applicant had been provided with certain documents in response to his FOI application, but insisted that there were other relevant documents, and renewed his request. The respondent agency subsequently advised the applicant that a search had failed to disclose any documents of the type which he insisted existed, and the applicant

applied to the AAT for a review of that decision. The respondent challenged the jurisdiction of the AAT on two grounds: that the applicant had failed to seek internal review, as required under s. 54(1) of the Commonwealth *Freedom of Information Act 1982* (the Cth FOI Act), and that notification that no documents could be located did not constitute a "decision refusing to grant access in accordance with a request", so as to confer jurisdiction on the AAT under s. 55(1) of the Cth FOI Act.

16 In *Re Wilson,* the Tribunal expressly left open the question of whether a decision that a request could not be acceded to because the documents sought could not be located was a "decision refusing to grant access to a document" within the meaning of s. 55(1) of the Cth FOI Act. It determined, however, that it was a "decision in relation to the provision of access to a document that is the subject of the request" within the meaning of s. 54(1)(a) of the Cth FOI Act. Accordingly, the Tribunal determined that it lacked jurisdiction to hear the application, as internal review was available but had not been sought. (It should be noted in passing that the wording of s. 54(1) which the Tribunal relied on in this decision was amended shortly after the case was decided.)

17 Although expressly declining to deal with the broader jurisdictional issue in *Re Wilson,* the Tribunal did express its views on the issue, in *obiter dicta*. In response to submissions by the respondent agency that the Cth FOI Act was concerned with documents which were known to exist, and did not deal with situations in which documents which were the subject of an application could not be traced, the Tribunal stated at paragraphs 25-26 and 30 of its decision:

> *"As to these submissions, it is certainly true that the whole concept of exceptions (s.12) and exemptions (Pt III) is based on the premise that there are documents which are known to exist and to which the provisions of the Act can be applied. The question in such cases for the decision-maker and, on review, this Tribunal is whether access should be granted in accordance with the Act.*
>
> *There are, on the other hand, indications within the Act that the expression "refusal to grant access" is used not only in relation to documents that are known to exist but also in circumstances where a requested document has not been located, may not be capable of being located or may not even exist (see for example ss. 24 and 56). Furthermore, it requires a high degree of confidence in the filing systems of large agencies to assume that documents can always be readily identified and located upon request. The probabilities are that, in at least a percentage of cases where requested documents are said to be incapable of being found, those documents nevertheless do exist and have simply been incorrectly filed or filed under some unexpected reference. Thus, a claim by an agency that a requested document cannot be found does not necessarily mean that no such document exists.*
>
> ...
>
> *Where the requested documents cannot be found, the Act is silent as to the appropriate decision in such a case. If Mr Pose is correct in his submission that a decision in such circumstances is not a decision "refusing to grant access to a document in accordance with a request" within the meaning of s. 55(1)(a) of the Act, there is potentially a large area in which decisions of responsible Ministers and agencies in relation to requests for access will be immune from external scrutiny before the*

> *Tribunal and will only be reviewable internally or by complaint to the Ombudsman. If such decisions were reviewable before the Tribunal, it does not follow that the Tribunal would itself undertake an examination of the agency's filing system. But circumstances may well arise where the Tribunal might consider it appropriate to give directions as to further avenues of enquiry that ought properly to be pursued [see s.33(1)(a) of the* Administrative Appeals Tribunal Act 1975*]."*

18 The Tribunal went on to state that the evidence presented established that, with one exception, thorough investigations had been made in an effort to locate the documents sought. The Tribunal felt that the evidence did warrant an approach to an individual who might be of assistance in locating the records requested, but that if nothing came of that enquiry, "there appear[ed] to be no other avenue of enquiry which the Tribunal, even if it had jurisdiction, could direct to be pursued".

19 *Re Properzi and Department of Immigration and Ethnic Affairs* (Unreported, 23 November 1984; No. N84/267) involved a similar situation to that dealt with in *Re Wilson*, with the applicant asserting that the respondent agency should have more documents responsive to his application than whose which had been located. Although the applicant gave specific descriptions of the documents which he asserted existed, the respondent agency said that searches had failed to disclose any additional documents.

20 The first jurisdictional issue which had been discussed by the AAT in the *Re Wilson* case did not arise in *Re Properzi*, as the applicant in the latter case had exhausted his right of internal review prior to making an external review application to the AAT. The Tribunal's decision in *Re Properzi* contained no discussion concerning the AAT's jurisdiction to entertain the review application. The Tribunal simply examined the evidence as to the search efforts undertaken, and concluded that reasonable search efforts had been made to assist the applicant, and that no additional documentary evidence had been located other than that dealt with in the agency's decision. The Tribunal agreed with that decision and, in the circumstances, therefore affirmed the decision under review.

21 In *Re Wertheim and Department of Health* (1984) 7 ALD 121, the applicant was advised that in response to her application for one specifically described document, the respondent Department's decision was that access was refused on the ground that the document was not in the possession of the Department. The requester maintained that the document had existed (being a letter which she asserted she had mailed to the Department some 7 years previously), and sought internal review of the Department's decision. The Department's internal review decision-maker upheld the original decision, after unsuccessfully examining the relevant Department files and determining that the Department's mail register contained no record of such incoming correspondence. The applicant remained unsatisfied, and sought external review before the AAT.

22 The Tribunal referred to *Re Wilson*, and stated that it found itself in a similar situation to that case. However, the Tribunal made no finding on the jurisdictional issue left open in *Re Wilson*, and simply proceeded to evaluate the search efforts which had been undertaken by the Department, and to adopt the approach taken in *Re Wilson* with respect to directing additional enquiries to be made. In later proceedings (unreported, 8 March 1985), the Tribunal reported on the outcome of those additional enquiries (which had been unsuccessful), and affirmed the decision under review.

23 In *Re Anti-Fluoridation Association of Victoria and Secretary, Department of Health*

(1985) 8 ALD 163, the respondent Department acknowledged that the document to which access was sought should have been located within its files, but that three separate extensive searches (including enquiries outside the Department) had failed to locate a copy. As a result, the Department had responded to the applicant's access request by denying access to the requested document on the ground that it was not a "document of the agency". Internal review proceedings were brought, and after additional search efforts the agency's decision was to affirm the original decision.

24 On the issue of its jurisdiction to hear the application, the Tribunal found (at p. 166 of its decision) that s. 15(1) of the Cth FOI Act must "be construed so as to authorise the making of a request for access to a document which may reasonably be expected to be in the possession of the agency to which the request is addressed". The Tribunal's decision then went on, at p. 167, to examine the "decision" letters which had been sent to the requester by the Department:

> *"In the present case the officer who first dealt with the applicant's request for access to the report expressed himself in terms of denial of access to it and referred to that as his decision on the matter. Subsequently, after the internal review the Chief Commonwealth Medical Officer again expressed himself in terms of making a decision to uphold the previous "refusal decision". However, both letters contain in fact a denial that the document to which access is requested is a document of the agency, rather than a refusal to grant access to a document of the agency. As the Tribunal pointed out in* Re Wilson, *the fact that a document cannot be found in an agency's filing system does not necessarily mean that it is not in the agency's possession. Where the evidence indicates that it was, or should have been, in that possession in the past and there is no evidence of its having passed out of that possession, there is a strong possibility that it is still in that possession but has been misplaced. That is the situation in the present case. The two "decisions" can, I consider, be regarded either as decisions deferring provision of access to the document requested (s. 55) or as merely giving information , so that there has been a failure to make a decision on the request and to give notice of it."*

25 On either basis, the Tribunal determined, it had jurisdiction to hear the application for review. It then went on to determine, at paragraphs 14-15 of the decision, that section 58 of the Cth FOI Act and section 43(2) of the AAT Act, when taken together, gave it the power to determine whether an agency's search for documents was sufficient, and to direct further search efforts, if necessary in a particular case. (This particular aspect of the Tribunal's decision is considered further at para 59, below). In the result, the Tribunal concluded that, on the evidence presented, the Department had more than complied with its obligations under the Cth FOI Act in attempting to locate the document in question, and that it would be inappropriate to make any decision or give any directions requiring any further search efforts.

26 In *Re Sargent & Burton Pty Limited and Australian Institute of Sport* (Unreported, 25 October 1985, No. N85/239), the respondent claimed that it had released all documents responsive to the applicant's request, but the applicant remained dissatisfied. The Tribunal's decision made no mention of any issue as to its jurisdiction to entertain the review application, but simply assessed the evidence concerning the respondent's search efforts, and concluded that there was no evidence that further material existed. Citing *Re Wilson* and *Re Fluoridation*, the Tribunal referred to the practical limitations on its powers in such cases, and made the following finding and decision:

> *"Whereas the Tribunal finds that the respondent by its officers has conducted a thorough search for all documents germane to the applicant's request which is the subject of the review; that it is not appropriate that the respondent should be required to take further action to try to locate further documents and that consequently the respondent is not obliged to comply further with the applicant's request unless further documents relevant to the applicant's request come to light in the course of the respondent's normal operations; the decision of the respondent that it has granted all access that is required of it by the Freedom of Information Act 1982, unless further documents come to light in that manner, is affirmed."*

27 In *Re Wiseman and Department of Transport; Re Wiseman and Department of Communications* (Unreported, 22 October 1985, No. V84/420 et al.), nine of the applicant's forty-three applications for external review involved situations in which requested documents could not be found. In response to the applicant's characterisation of the Departments' responses in each of these cases as a refusal to supply specific documents, the Tribunal canvassed the previous cases on point (at para. 10):

> *"The issues which arise in cases of this kind were considered briefly in* Re Wilson and Australian Federal Police, (1983) 5 ALD 343 *and the course of action there suggested was followed in* Re Wertheim and Department of Health, (1985) 7 ALD 121. *In* Re Anti-Fluoridation Association of Victoria and Secretary to the Department of Health, (1985) 8 ALD 163, *Deputy President Thompson gave more extensive consideration to the difficulties of these cases. He concluded that the correspondence before him could, on one view, be regarded not as indicating a decision, but merely as conveying to the applicant the information that the respondent has been unable to locate the documents requested in its possession or under its control. If that were the case, there had been a failure to make a decision within the relevant period, and by virtue of sub-section 56(1) the respondent was deemed to have made a decision refusing to grant access to the documents requested. That was a decision reviewable by the Tribunal. He then referred to the power given to the Tribunal by sub-section 58(1) of the FOI Act to decide any matter in relation to the request that could have been decided by the agency, and the power given to the Tribunal by sub-section 43(2) of the AAT Act to give directions as to the procedure to be followed at or in connection with the hearing of a proceeding before the Tribunal. He concluded that these two powers, taken together, empowered the Tribunal to make a preliminary decision and to give directions as to the extent and manner in which the search for the requested document should be undertaken. This was also the course followed in* Re Wertheim *(supra)."*

28 The Tribunal stated (at para. 11 of its decision) that in this particular case, the circumstances of the nine review applications fell into several categories:

> *"In the nine matters in this group the circumstances vary. At one extreme of formality is the statement "The inability of this Department to provide you with the documents you have requested is technically a decision to refuse access under the FOI Act"... . At the other extreme are the cases where documents have been supplied in response to a request, but Mr*

> *Wiseman has formed the view that the Department must have in its possession or under its control other documents falling within the ambit of that request which have not been supplied. However, we find that in each of this group of matters there is a decision, whether formal or deemed, which is reviewable by the Tribunal."*

29 During the Tribunal hearing, counsel for the respondents gave undertakings with regard to further searches which the respondents were prepared to undertake in an effort to locate documents sought by the applicant. The Tribunal then disposed of seven of the nine review applications by affirming the decisions under review on the following basis (at para. 12):

> *"After hearing the evidence, Mr Wiseman indicated that subject to the carrying out of those undertakings, he would be satisfied, in respect of [7 of the 9 applications], that adequate searches had been made and that either the documents in question had never existed or that they had existed but for good reason could not now be located."*

30 In one of the two remaining applications, the Tribunal determined that, on the basis of the evidence heard, there was no evidence which would suggest that the document sought had ever existed, and that the Tribunal was satisfied that it never did exist. On that basis, the AAT affirmed the decision under review. The Tribunal made no decision in respect of the last of the nine applications. That matter was subsequently dealt with in further proceedings involving the same parties (discussed in the next paragraph).

31 In *Re Wiseman and Department of Transport (No. 2); Re Wiseman and Department of Communications (No. 2)* (Unreported, 11 April 1986, No. V84/402 et al.), the Tribunal considered further the one review application left unresolved in the proceedings described in the preceding paragraph. The Tribunal stated, at paragraph 19 of its decision, that it refused to accept the applicant's submissions that files might have been interfered with and documents destroyed, and accepted the respondent's submissions and its explanation as to why there might be no formal record of the documents which the applicant contended must exist:

> *"There are obvious difficulties in proving that a document, to which access has been sought, does not exist; or, as in this case, that every document which comes within the applicant's request has been located. Mr Pose said, on behalf of both respondents, in relation to this and the other similar applications which were heard at the same time, that the respondents were not concerned to guarantee in absolute terms that there was no further documentation in existence: but rather to submit that the evidence showed that, all reasonable searches having been conducted, nothing further could be located, and the decisions under review should be affirmed."*

The Tribunal affirmed the decision under review, on the basis suggested by respondents' counsel.

32 In *Re Hancock and Attorney-General's Department* (Unreported, 13 November 1985, No. N84/601), the applicant had filed a request with the Commonwealth Reporting Service for access to documents in a number of different categories. Having received no reply within the prescribed time period, the applicant lodged an external review application with the AAT. Subsequently, the Attorney-General's Department (as the Department responsible for the Commonwealth Reporting Service) processed the

applicant's original request, and responded that in relation to two aspects of that request, there were no documents in existence fitting the description given by the applicant. The applicant remained unsatisfied, and elected to proceed with his application for external review.

33 On the issue of the AAT's jurisdiction and powers in such cases, the Tribunal stated at paragraph 8 of its decision:

> *"Before the Tribunal the only matter outstanding is whether in fact there exists documents satisfying the terms of (b) and (g). ... The Tribunal is a creature of statute and, unless legislation has specifically vested power in it, it lacks any power of review, let alone decision. It has, however, been held on a number of occasions that the Tribunal does have, under s. 58 of the FOI Act the power to decide whether a search undertaken by an agency for a document is sufficient and, if it is not so satisfied, to require the agency to undertake further searches:* Re Wilson and Australia Federal Police (1983) 5 ALD 343; Re Anti-Fluoridation Association of Victoria and Secretary to Department of Health (No. V84/281, 31 July 1985). *Thus the question for the Tribunal here is whether it is satisfied that the search undertaken by the CRS was a sufficient one in all the circumstances."*

34 In the case of *Re Hancock and Department of Resources and Energy*, (Unreported, 2 June 1986, No. N85/515), the applicant was granted 'full access' to all documents sought, except two, for which exemption was claimed on grounds of legal professional privilege. When an internal review was not resolved within the prescribed time period, the applicant sought an external review by the AAT. Despite a subsequent decision by the respondent department to release both of the 'exempt' documents, the applicant elected to proceed with his review application, believing that there were additional documents which the department had not disclosed to him. The AAT's jurisdiction was challenged on several grounds, one of which is relevant to the present case. At pages 4 to 6 of its decision, the Tribunal said:

> *"The second ground upon which the respondent relied was that there was no refusal within the meaning of s. 55(1)(a) of the Act which would grant jurisdiction to the Tribunal. The respondent argued that because the department did not have the documents in question it was not refusing access by not making them available. Naturally this is not the way in which the applicant looked at the matter. Whether or not the documents were in existence, he believed them to exist and so far as he was concerned, the action of the department was a refusal. In any event, this very argument has been considered and rejected in at least three cases. We refer to* Re Wilson, 5 ALD 343, Re Anti-Fluoridation Association of Victoria, 8 ALD 163 *and* Re Hancock *(a decision involving the present applicant),* N84/601 13 November 1985.
>
> *The danger of acceding to such an argument was first raised in* Re Wilson *(supra). ..."*

The Tribunal proceeded by quoting the portions of the decision in *Re Wilson* set out in paragraph 17, above, and then continued:

> *"These then are the dangers that are perceived in the administration of the Act in accordance with the respondent's submission. However the*

> *Tribunal went further than adverting to the dangers in* Re Anti-Fluoridation Association of Victoria *(supra) and held specifically that in similar circumstances the facts amounted either to an actual decision to defer access or a deemed decision refusing it pursuant to s. 56(1) of the Act. Both these decisions were followed without question in* Re Hancock *(supra) and it must now be taken that the Tribunal's jurisdiction to consider an application is not usurped by failure on the part of the respondent to identify and locate the documents requested. The task before the Tribunal will be to decide whether the search undertaken was a sufficient one in all the circumstances."*

35 In *Re Borgward and Secretary, Department of Defence* (Unreported, 13 June 1986, No. W86/25), the applicant sought review of a decision which refused to grant access to "the whole of [his] personal defence file" on the ground that wide ranging and extensive searches of all service and civil offices had failed to locate any documents relating to the applicant. As set out at pages 6-7 of the Tribunal's decision, its jurisdiction to entertain the review application was challenged by the respondent:

> *"At the hearing before the Tribunal counsel for the Respondent raised as a preliminary question the issue whether the Tribunal had jurisdiction in a case where evidence establishes the documents to which access is sought do not exist. Her submission was the Tribunal lacked jurisdiction to proceed with the review.*
>
> *It is not necessary to pursue that submission because it has been held on a number of occasions that the Tribunal does have, under section 58 of the FOI Act,the power to decide whether a search undertaken by an agency for a document is sufficient and, if it is not so satisfied, to require the agency to undertake further searches:* Re Hancock and Attorney-General's Department (No. N84/601; decided 13 November 1985; unreported) *applying* Re Wilson and Australian Federal Police (1983) 5 ALD 343; Re Anti-Fluoridation Association of Victoria and Secretary, Department of Health (1985) 8 ALD 163. *See also* Re Hancock and Department of Resources and Energy (No. N85.515; decided 2 June 1986; unreported). *Thus the question for the Tribunal here is whether it is satisfied that the search undertaken by the Respondent was a sufficient one in all the circumstances."*

The Tribunal was satisfied that the respondent's search efforts had been reasonable in the particular circumstances of the case, and affirmed the decision under review.

36 In *Re Davis and Attorney-General's Department* (Unreported, 11 September 1986, No. N85/547), the applicant sought review of a decision granting access to only 9 of 22 categories of documents sought. The respondent's position, as set out in the internal review decision before the AAT, was that "the group of nine constituted the whole of the documents that could be located by the respondent after a diligent search had been made". The applicant argued that either a diligent search had not been made, or that he was being denied access to the remaining documents sought.

37 At pages 10-11 of its decision, the Tribunal discussed its jurisdiction and powers in such a situation:

> *"Whatever suspicions the applicant may harbour concerning the possible*

existence of documents of the nature described in the group of 22, the fact is that evidence of the most extensive kind has been given of the extent of the searches made by the respondent for documents falling within the terms of the request. This evidence has not been shaken in cross-examination and no evidence given by the applicant has led to any firm basis from which one could infer that the applicant's suspicions were justified.

The principles to be applied in such a case were extensively canvassed in Re Hancock N85/515 2 June 1986. *The Tribunal certainly has jurisdiction to proceed, notwithstanding the fact that the agency asserts that it has no relevant documents. As was said in that decision:*

> *"The task before us is to consider whether a search undertaken by the respondent for the alleged documents is sufficient. If we are satisfied that it is not sufficient, we may require the agency to undertake further searches pursuant to s.58 of the Act.""*

38 The Tribunal concluded that there was sufficient evidence to demonstrate that the respondent's search efforts had been thorough, and to find that the documents identified by the respondent were the only ones in its possession falling within the scope of the applicant's request. In the circumstances, it would not be reasonable to require the respondent to undertake any further search, and the decision under review was therefore affirmed.

39 In *Re Czuczor and Department of Social Security* (Unreported, 11 December 1987, No. V87/350), the Commonwealth AAT again had occasion to consider this issue. As in the previous cases considered above, the applicant brought an application for review before the AAT on the basis of his dissatisfaction with the respondent department's view that it had granted him full access to all relevant documents. At paragraphs 9 and 12 of its decision, the Tribunal described the categories of documents still in issue, and its findings on the evidence as to the existence of those documents:

> *"[Re: category two] We accept Mr Czuczor's evidence that these documents are known to him to have existed. We are, however, satisfied on the evidence, on a balance of probabilities, that they have been destroyed and are accordingly no longer in the possession of the respondent, and thus are no longer "documents of an agency" in terms of sub-section 4(1) of the Act."*
>
> *[Re: category three] We appreciate Mr Czuczor's conviction that these documents should have existed but, save for those itemised in paragraphs (e), (f) and (g) we are not ourselves satisfied that they ever did exist; and, to the extent that they did exist, we are not satisfied that they have not been destroyed. We also accept the evidence of the respondent that extensive searches have been made for the documents and that no documents answering the description have been located."*

40 Regarding its jurisdiction in such cases, the Tribunal referred to the excerpts from the earlier decision of *Re Wiseman*, quoted at paragraph 27, above, and then continued:

> *"Thus there is in respect of the second and third groups of documents ... a deemed decision to refuse access which is reviewable by the Tribunal. However, in the present case there is no avenue of inquiry which the Tribunal can suggest is appropriate to be pursued. Mr Charles made it clear that the department is not concerned to withhold from Mr Czuczor any relevant document within its possession. Accordingly, it seems to us that there is no action which the Tribunal can take other than formally to affirm the deemed decision under review."*

41 In the most recent case on point to be considered by the Commonwealth AAT, *Re Kalman and Department of Veterans' Affairs* (Unreported, 23 October 1992, No. Q91/619), the applicant sought external review of the department's internal review decision, which was to the effect that full access had been granted to all relevant documents sought, and denying the existence of a further file which the applicant argued existed. At paragraphs 27-28 of her decision, Deputy President Forgie recited the basis of the respondent's challenge to the jurisdiction of the AAT to hear the matter:

> *"Mr Loftus submitted that the Department had given Mr Kalman all of the documents, which are in its possession and which come within his request for access. The Department had nothing to gain by not revealing all of the documents in its possession to Mr Kalman. The decisions, both originally and on review, had been to give access to all documents.*
>
> *He argued that, as it had been a decision to give access to all documents requested, it was not possible to seek internal review of the decision pursuant to section 54. If the decision could not be validly reviewed pursuant to section 54, there could be no subsequent review of the decision by this Tribunal. It was true that access to several of the documents had been given after the date of Mr Kalman's application to this Tribunal and perhaps the Department could have been deemed to have refused access to those documents."*

42 At paragraph 40 of her decision, Deputy President Forgie further stated:

> *"The decision made in this case was a decision to grant access to all documents sought by Mr Kalman. In view of the piecemeal way in which he has been given access, it is easy to understand that Mr Kalman has grave doubts that he has actually been given all of the documents in accordance with that decision but that does not resolve the question whether this Tribunal has power to review the decision."*

43 At paragraphs 42-48 of her decision, Deputy President Forgie reviewed the relevant cases on point, (citing *Re Wilson, Re Anti-Fluoridation Association, Re Wiseman (No. 1), Re Hancock and Attorney-General,* and *Re Hancock and Department of Resources and Energy* (all referred to above), finding that all five of those cases were distinguishable on the facts from the case before her:

> *"In each of these cases, other than* Re Wilson and Australian Federal Police *and* Re Anti-Fluoridation Association of Victoria and Secretary to the Department of Transport, *there has either been a decision of the agency actually refusing access to the document or a decision to refuse deemed to have been made by virtue of section 56. In* Re Anti-Fluoridation Association of Victoria and Secretary to the Department of

> Transport, *the Tribunal was able to interpret the events as meaning that there was, as in the other cases, a deemed decision to refuse or a decision to defer access. In any of those, there can be no doubt that there is clearly power to review the decision pursuant to section 55 provided it has been through the internal review process under section 54. It was in relation to the absence of that preliminary step under section 54 that the Tribunal in* Re Wilson and Australian Federal Police *held that it did not have jurisdiction and it did not go further and consider whether it would have had power to review a decision made after internal review that an agency's searches had failed to reveal any documents.*
>
> *The facts of the case before me are different from any of these cases. There is a very clear decision to grant access to all documents. There is nothing in the correspondence advising Mr Kalman of the decisions that there is any doubt in the officers' minds that the Department had released all of the documents. There is no suggestion that there might have been other documents which might have existed but which could not be located. As it turned out, there were other documents, which were subsequently located and released, but that does not alter the decision which was made and that was to grant access to the documents sought in Mr Kalman's request."*

44 In the result, Deputy President Forgie determined that the Tribunal did not have jurisdiction to consider the matter, as the situation did not fall within any of the provisions in s. 55(1) of the FOI Act (Cth), which set out the types of decisions over which the AAT had jurisdiction:

> *"It seems to me that the only provision of sub-section 55(1) under which there could possibly be jurisdiction is that in parentheses in paragraph 55(1)(a) for a decision to grant access in accordance with the request clearly does not come within any of the other provisions. Having considered that provision for some time, I have decided that it does not come within it for what I am asked to review is a decision granting access to a document but not granting, in accordance with the decision, access to all documents to which the request relates. If I were to have jurisdiction, there would need to be "a decision granting access to a document but not granting, in accordance with the request, access to all the documents to which the request relates" (paragraph 55(1)(a), underlining added).*
>
> *I note that the decision under section 54 was not given to Mr Kalman within 30 days of the day on which the Department received his application for review under that section. Failure to advise of that decision entitles a person to apply to the Tribunal in respect of the original decision but the Tribunal will only have jurisdiction if the application is in respect of a decision specified in sub-section 55(1). I have already decided that it does not."*

45 To summarise the Commonwealth AAT decisions on point, it would appear that prior to the *Kalman* decision, the Commonwealth AAT had consistently taken the position that it did have jurisdiction to entertain applications for review of an agency's 'decision' that documents requested by an applicant could not be located, or did not exist. It might seem logical to draw a distinction between cases in which there was evidence to support the

applicant's contention that the requested documents did exist, and those in which there was no such evidence. However, no such distinction appears to have been drawn in the decisions of the Commonwealth AAT on this point (see, in particular, *Re Wilson, Re Borgward, and Re Davis*, which are all cases in which the AAT assumed jurisdiction, notwithstanding its determination that there was no evidence to support the applicant's position in this regard).

46 As indicated previously, Deputy President Forgie determined in *Re Kalman* that all of the previous cases which she had canvassed were distinguishable on their facts from the situation before her, which was clearly a situation in which a decision had been made to grant "full access" to the documents requested. However, it would appear that two of the cases cited by Deputy-President Forgie (*Re Wiseman (No. 1)* and *Re Hancock and Department of Resources and Energy)* were, on their facts, "full access" cases like *Re Kalman*, in that the applicant in each case was unsatisfied with the respondent's assertion that it had produced all relevant documentation. In addition, several other cases involving similar fact situations, in which the AAT had asserted jurisdiction (*Re Sargent and Burton, Re Czuczor, Re Borgward* and *Re Davis)*, were not considered in the *Re Kalman* decision.

47 It is somewhat ironic that in 1991, amendments were made to the Commonwealth FOI Act for the stated purpose of clarifying the AAT's jurisdiction to deal with the sufficiency of search issues arising in cases before the Tribunal. (In this regard, reference may be had to the Explanatory Memorandum circulated by the Attorney-General concerning the *Freedom of Information Amendment Bill 1991 (Cth)*). However, *Re Kalman*, which is the only decision of which I am aware pronounced by the Cth AAT after the entry into force of those amendments to sections 24A and 55(5) of the Commonwealth FOI Act made no mention of them, and is, to my knowledge, the only Cth AAT decision to date which has held that the AAT lacked jurisdiction to hear a review application in such a case.

b) Victorian AAT decisions

48 As indicated previously, these 'sufficiency of search' jurisdictional issues have also arisen in a number of cases decided under the provisions of Victoria's *Freedom of Information Act 1982.* Section 21(1)(e) of that Act provides that in situations in which requested documents do not exist or cannot be located, the respondent's notice of decision must advise the applicant of their right to complain to the Ombudsman.

49 In *Re Gill and Department of Industry, Technology & Resources* (1985) 1 VAR 97, the respondent granted partial access to the documents identified as responsive to the applicant's FOI request. The applicant contended that all relevant documents had not been produced by the respondent, and the matter eventually came before the Victorian AAT for determination. Although the Tribunal's decision contained no discussion of the Tribunal's jurisdiction in such situations, it demonstrated the application of the procedure involving the Ombudsman which is adopted in Victoria for such cases (at p. 100):

> *"At an early stage of the proceedings Mr Tracey, who appeared for the applicant and who had access to the documents listed in Ex 1, alleged that the respondent may not have located and produced all the documents the subject of the application. On the applicant's motion, the Tribunal requested the Ombudsman (Mr Norman Geschke) to investigate the matter. On 25 September 1985 the Ombudsman reported that a thorough*

> *and diligent search had not been carried out by the respondent and he recommended that this be undertaken: see Ex 10.*
>
> *Following the Ombudsman's intervention and the search requested by him, further documents were produced by the respondent and the Tribunal came to deal with ... additional documents."*

50 In *Re Hezky and Health Department of Victoria* (1987) 1 VAR 387, medical records sought by the applicant were released to her doctor, who subsequently released them to her. From her analysis of those documents and the particular circumstances, the applicant argued that additional relevant documents existed. At page 391 of its decision, the Tribunal accepted the applicant's arguments that there were cogent reasons to believe further documents existed, and directed that the Ombudsman be advised of the situation and invited to investigate:

> *"The respondent submits that it has given the applicant access to all documents in its possession covered by her application. It says that a thorough and diligent search has been conducted and no other documents can be located I am unable to form a view or make a finding as to the thoroughness or diligence of the search or the existence of further documents. As I have outlined there are cogent reasons for believing that other documents may exist. I have informed the applicant of her right to complain to the Ombudsman. She informed me that she was already in communication with the Ombudsman who was awaiting the outcome of her application to this Tribunal. I invite the Ombudsman to make whatever further investigation he considers appropriate. I will ask the Registrar to forward a copy of these reasons to the Ombudsman. Pending further investigation and report by the Ombudsman, I adjourn the further hearing of this application to a date to be fixed."*

51 *Re Schorel and Victoria Police Force* (Unreported, 20 March 1990, No. 89/43592) is the first case of which I am aware which explicitly addressed the jurisdiction of the Victorian AAT to hear an application in which the respondent's position was that it did not have possession of any documents within the ambit of the applicant's request. Initially, the matter came before the AAT as a hearing on review of a decision refusing to grant access to requested documents. During the hearing, the applicant narrowed the scope of his access request. The result of this, as recorded at pages 2-3 of the Tribunal's decision, was as follows:

> *"The narrowing of the request resulted in the respondent advising the Tribunal that there were no documents held by it in relation to the matter, the documents above-mentioned having relevance only to the original wider request. The Tribunal having perused the documents accepts the respondent's contention in that regard and finds, in view of the absence of any relevant documents, that it has no jurisdiction in the matter. Accordingly, I dismiss the application for want of jurisdiction."*

52 In *Re Tovarlaza and Ministry of Housing & Construction* (Unreported, 9 October 1990, No. 90/29305), the respondent identified one document as relevant to the applicant's FOI request, but was unable to locate an additional document which the applicant claimed existed. The applicant was advised by the respondent of her right to complain to the Ombudsman about the matter, and the Ombudsman's subsequent investigation resulted in a report confirming that a thorough search had failed to disclose any further relevant

documents. The applicant persisted in her view, and brought an application for review before the AAT. The Tribunal determined that, in view of the outcome of the Ombudsman's investigation, no useful purpose would be served by allowing an application for review to continue. Without making a finding on jurisdiction, the Tribunal dismissed the application. In doing so, it commented at page 4 of its decision, on the difficulty faced in dealing with such situations:

> *"Cases where an agency is unable to locate documents answering the description contained in a request are unsatisfactory in many ways. The solution which the legislature has sought to obtain is to provide for investigations by the Ombudsman. This seems a sensible procedure. But where the Ombudsman having investigated the matter himself, is satisfied that a comprehensive search has been made, then that would appear to be the end of the road. It may well be that this Tribunal does not have jurisdiction in a situation such as this. Section 50(2) of the* Freedom of Information Act *is the section which confers jurisdiction on the Tribunal in matters arising under that Act. That sub-section sets out the circumstances in which an applicant may appeal to the Tribunal. Those circumstances include a decision refusing to grant access, a decision deferring the provision of access and a number of other circumstances. They do not include a "decision" that the documents sought cannot be located".*

53 In *Re Property Owners Association of Vic. Inc. and Ministry of Consumer Affairs* (Unreported, 6 September 1991, No. 91/3262), the respondent advised the applicant that no documents falling within the scope of his request could be located, despite a thorough search. Although advised of his right to complain to the Ombudsman, the applicant chose not to do so, and brought an application for review before the AAT.

54 The Tribunal commented in passing on the "possibly unsatisfactory nature" of the procedure established by the Victorian Parliament to deal with such situations:

> *"It seems that [complaint to the Ombudsman] is the machinery which Parliament has chosen to set up in situations where a respondent says it cannot find the documents in question or that they do not exist and where the applicant is dissatisfied with that, he can go to the Ombudsman who then carries out an investigation.*
>
> *...*
>
> *Now, I have remarked on an earlier occasion, in ... the case of* Tovarlaza v Ministry of Housing and Construction *... in which decision I remarked on the possibly unsatisfactory nature of the procedure; that although the Ombudsman is given power to investigate, if the applicant for the information is still dissatisfied about the adequacy of the search and if the Ombudsman reports that he considers the search has been adequate, then that is the end of the road."*

55 The Tribunal determined that it lacked jurisdiction to hear the matter, on the basis that none of the provisions in s. 50(2) of the Victorian FOI Act (which identifies matters on which an appeal lies to the AAT) included a situation where the respondent's conclusion was that the documents could not be located (see pp. 4-5 of the decision):

> *"It seems that none of the five paragraphs set out in s.50(2) is sufficient to confer jurisdiction on the Tribunal in this matter. There was no decision refusing to grant access - that is quite different from a conclusion; (I use that neutral word) arrived at by the respondent, that the documents cannot be located - that is, as I say, quite different from a decision refusing to grant access. You can only have a decision refusing to grant access to a document where there is a document. The respondent said there is not."*

56 To summarise the Victorian experience, *Re Gill* and *Re Hezky* did not address the issue of the AAT's jurisdiction to hear review applications in cases where the respondent takes the position that requested documents do not exist or cannot be located. In *Re Tovarlaza*, the Tribunal said, in *obiter dicta*, that it may not have jurisdiction in such circumstances, because the types of decision subject to AAT review, as set out in s.50(2) of the Victorian FOI Act, did not include a "decision" that the documents sought cannot be located. In *Re Schorel*, the AAT held specifically that it had no jurisdiction in the absence of any relevant documents. In *Re Property Owners* the Tribunal determined that a decision refusing to grant access to a document, within the meaning of s. 50(2) of the Victorian FOI Act, could only occur where there was such a document, and that the conclusion that requested documents could not be located was quite different from a decision refusing to grant access. On that basis, the Tribunal determined that it lacked jurisdiction to hear the matter.

Conclusion on preliminary jurisdictional issue

57 In the present case, Mr Smith's application for access to documents was made in accordance with section 25 of the FOI Act (Qld), for documents described in that application in precise terms. Although the decision of the Administrative Services Department which gave rise to Mr Smith's original application for external review identified only one document as being responsive to the terms of his access application, Mr Smith asserted that there were cogent reasons to believe that the Department should hold additional relevant documentation. In my view, the cases of *Re Sargent and Burton, Re Wiseman (No. 1), Re Hancock and Department of Resources and Energy, Re Davis* and *Re Czuczor* are all analogous to the fact situation presented in the case before me for determination, and I respectfully adopt the Commonwealth AAT's analysis of the jurisdictional issues arising in such cases as being applicable to the particular circumstances of the present matter.

58 In both *Re Anti-Fluoridation* and *Re Wiseman (No. 1)*, the Cth AAT referred to provisions in the Cth FOI Act and Cth AAT Act which, taken together, gave the Tribunal the power "to make a preliminary decision and to give directions as to the extent and manner in which the search for the requested document should be undertaken". In this regard, I refer specifically to the following relevant portion of the Cth AAT's decision in *Re Anti-Fluoridation* (at p. 168 of that decision):

> *"Section 58 of the Act empowers the Administrative Appeals Tribunal in proceedings under Pt VI of the Act not only to review any decision that has been made by the agency in respect of the request but also "to decide any matter in relation to the request that, under this Act, could have been or could be decided by the agency. ... The expression "to decide <u>any matter</u> in relation to the request" is very broad; it includes, I am satisfied, a preliminary decision as to the extent of the search which should be made for the document. If the Tribunal lacked power to decide that*

matter, the objects of the Act could be readily frustrated by deliberate inactivity in response to a request for access. I am satisfied that it has that power."

...

The Tribunal has power under s. 43(2) of the Administrative Appeals Tribunal Act 1975 to give directions as to the procedure to be followed at or in connection with the hearing of a proceeding before the Tribunal and by virtue of s. 33(1)(a) the procedure is within the discretion of the Tribunal. The nature and the resources of the Tribunal are such that it probably could not in any proceedings undertake a detailed examination of an agency's filing system; but it can make decisions in relation to the making of further searches and inquiries by officers of the agency to enable requested documents to be located; and it can give appropriate procedural directions in relation to evidence of them. Failure to comply with any such decision might be punishable under s. 63 of the Administrative Appeals Tribunal Act 1975."

59 Queensland's FOI Act contains provisions which are directly analogous to the provisions in the Cth FOI Act and *Administrative Appeals Tribunal Act* relied upon in the cases cited in the preceding paragraph. In particular, I refer to sections 72(1)(a) and (2), and s. 88(1) of the Queensland FOI Act, which provide as follows:

> ***72(1)*** *On a review under this Part -*
>
> *(a) the procedure to be followed is, subject to this Act, within the discretion of the Commissioner; ...*
>
> ***(2)*** *The Commissioner may, during a review, give directions as to the procedure to be followed on the review.*
>
> ***88(1)*** *In the conduct of a review, the Commissioner has, in addition to any other power, power to -*
>
> *(a) review any decision that has been made by an agency or Minister in relation to the application concerned; and*
>
> *(b) decide any matter in relation to the application that could, under this Act, have been decided by an agency or Minister;*
>
> *and any decision of the Commissioner under this section has the same effect as a decision of the agency or Minister.*

60 For the same reasons as those expounded by the Commonwealth AAT in the cases of *Re Anti-Fluoridation* and *Re Wiseman (No. 1)*, based on that Tribunal's analysis of provisions in the Cth FOI Act analogous to those in the Qld FOI Act described at para 60 above, I find that in respect of the additional documentation which Mr Smith asserted should exist, there was a decision by the Administrative Services Department, whether formal or deemed, which falls within the scope of my review functions pursuant to s. 71(1)(b) of the FOI Act.

61 In *Re Hancock and Attorney-General's Department* (see para 32 above), the Tribunal recognised that the Commonwealth AAT is a *"creature of statute and, unless legislation has specifically vested power in it, it lacks any power of review, let alone decision."* However, the Tribunal determined that it had been vested with powers of review in respect of "sufficiency of search" issues, such as have been raised in this case. While the Office of the Information Commissioner (Qld) is also a creature of statute, I find that for the reasons stated above the FOI Act has vested in me both the jurisdiction to review, and the power to give directions, in respect of "sufficiency of search" issues such as have been raised by Mr Smith's first application for external review.

Background (Second external review application - 17 March 1993)

62 In light of my view on the jurisdictional issues canvassed above, I wrote to the Department on 22 January 1993 and requested its response to Mr Smith's allegation that it was reasonable to assume that more than one item of correspondence must have been exchanged between that Department and the Crown Law Division, in the course of seeking legal advice.

63 On 28 January 1993, the Department's FOI Co-ordinator advised that another relevant document had been located, not in the files of the Department, but within the Crown Law Division. As the document in question had originated within the Administrative Services Department, and should have been in its files, the Department agreed to obtain a copy from the Crown Law Division, and to make a decision with respect to that document. By letter dated 29 January 1993, the Department's FOI Co-ordinator, Ms Leanne Hardwicke, advised Mr Smith of her decision concerning that document:

> *"With respect to Part 2 of your request, as a result of communications from yourself and the Information Commissioner, I have instituted a further search for any other documents which may relate to your request, apart from the 1 document already identified (letter of 1 October 1991).*
>
> *I have been unable to locate any other document on any file held by the Department. However, after consultation with the Crown Solicitor, I have obtained a copy of a document held on the files of the Crown Solicitor's Office which relates to your request. This document is a letter dated 17 September 1991.*
>
> *I have decided to deny access to this document on the grounds that it is exempt under section 43 of the Freedom of Information Act.*
>
> *Section 43 provides that matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege. I believe that the abovementioned document falls into that category, being a document containing confidential professional communications involving legal advice between the Administrative Services Department as client and the Crown Solicitor as legal advisor.*
>
> *I am aware that you are currently applying for an external review of the decision of 13 January 1993 to deny access to the document dated 1 October 1991 on the grounds of legal professional privilege.*
>
> *The office of the Information Commissioner has advised me that a review*

of the decision about the recently located document (letter dated 17 September 1991) which is the subject of this communication cannot be made by the Information Commissioner until an internal review has been carried out with regard to that decision.

Therefore, if you are unhappy about the decision to deny access to this document (letter dated 17 September 1991), you are entitled to seek an internal review of the decision under the Freedom of Information Act 1992. ..."

64 On 26 February 1993, Mr Smith lodged an application for internal review of Ms Hardwicke's decision. In response to an invitation on the Department's 'application for review of decision' form to include any comments he wished to be considered in the review of the original determination, Mr Smith stated the following:

"1. The person making the review should not have a vested interest in the outcome.

2. Personal details are involved.

3. It is in the public interest."

65 By letter dated 8 March 1993, the internal review officer, R W Dunning, Director-General of the Administrative Services Department, conveyed his decision to Mr Smith in the following terms:

"... I have reviewed the decision to exempt a document containing correspondence between the Administrative Services Department and the Crown Solicitor. Section 28 of the Act provides that an agency may refuse access to documents which are considered exempt. After consideration of your objections to the original decision and examination of the document, I have decided that the document has been exempted correctly under section 43 of the Act and I therefore uphold the original decision.

I have based my decision on the following facts:

1. The document was a letter written by the Administrative Services Department, in the capacity of a client, seeking legal advice from the Crown Solicitor who acts as legal adviser to the Department.

Section 43 provides that matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.

I believe that the abovementioned document falls within that category, being a document containing confidential professional communications between solicitor and client and is therefore exempt.

2. I note your claim that the document in question contains personal details.

Section 44(1) of the Act provides that information containing

personal affairs of a person is exempt, unless disclosure would be in the public interest. Further, section 44(2) provides that matter is not exempt under section 44(1) merely because it relates to information concerning the personal affairs of the applicant.

However, access to the document in question has not been denied because it is considered exempt under section 44. Rather, it is considered to be exempt under section 43. There is no provision in the Act which obliges the Department to release documents which are considered exempt under section 43, either because they relate to personal affairs or for other public interest considerations.

3. Section 43 does not have a public interest test associated with the exemption. Therefore, I did not take into account any public interest matters when making my decision.

I note your objections that the person making the review should not have a vested interest in the outcome. I do not believe that I have a vested interest in the outcome of the decision. The decision is based upon objective criteria, as set out above."

66 On 17 March 1993 Mr Smith lodged an application for external review of Mr Dunning's decision of 8 March 1993, in respect of the letter dated 17 September 1991. In his external review application, Mr Smith indicated that he disputed Mr Dunning's internal review decision on the basis of the following:

" - Information is not privileged

- Personal details are involved

- It is in the public interest for the information to be released"

The external review process

67 In summary, Mr Smith's application for external review pertains to two separate internal review decisions made on behalf of the Administrative Services Department:

the decision of Ms S A Porter made on 13 January 1993, in respect of a document dated 1 October 1991 (the document originally identified as being the sole document held by the Department which was responsive to the access application); and

the decision of Mr R W Dunning, made on 8 March 1993, in respect of a document dated 17 September 1991 (the document subsequently located as a result of additional inquiries by the Department, after Mr Smith had raised the 'sufficiency of search' issue in his application for external review).

68 I am mindful that pursuant to s.81 of the FOI Act, the Administrative Services Department bears the onus of establishing that the internal review decisions which are the subject of these review proceedings were justified.

69 In accordance with my authority under s. 76(1) of the FOI Act, I requested that the Administrative Services Department produce the exempt documents for my inspection, for the purpose of determining whether those documents are exempt. Both documents

were provided by the Department in response to my request, and have been inspected by me.

Arguments Submitted by the Participants

a) Submissions of Applicant

70 In his first application for external review, dated 18 January 1993, Mr Smith made the following submissions:

> *"In a letter dated 19 September 1991, I was advised by Mr David Mills, Manager Human Resources and Industrial Relations, Administrative Services Department that matters raised by both myself and my solicitor had been referred to the Crown Solicitor for advice. And, once that advice had been received, I would be advised further.*
>
> *Under the Freedom of Information Act, I sought to obtain particulars of all communications to and from Crown Law concerning and pertaining to myself.*
>
> *The response to my request under FOI legislation was that only one document was identified as falling within the scope of my request, and that document was exempt under section 43 of the FOI Act.*
>
> *Firstly, it is difficult to believe that there was only one communication between the Department and Crown Law concerning myself. Given that there was only one communication, it is reasonable to assume that the communication identified was the sending on of the letters from myself and my solicitor as notified in the 19 September 1991 letter. Surely in view that solicitor's letters were involved, Crown Law would have responded in some form, even if only to acknowledge that the request had been received. Furthermore, would the Department not follow up the matter if they got no response? After all, some 16 months have transpired since the request to Crown Law from the Department.*
>
> *Secondly, given that the matters raised concern myself, I believe that I have a right to access my personal file, and such matters set out in my FOI request would be recorded on my personal file.*
>
> *Thirdly, I believe that by advising me on 19 September 1991 that the Department had approached Crown Law in my case and that I would be advised once that advice had been received, indicates that I would be notified of Crown Law's opinion in my matter. If the Department believes that privilege was involved, why tell me that they had written to Crown Law? Why not write to Crown Law and not tell me about it?*
>
> *Fourthly, if the Department now claims there is only one item of communication, does this mean that Crown Law did not respond to the Department's request for advice, and that all actions taken against me since then have been taken without formal legal advice.*

In summary, can it be established that there was no response of any kind from Crown Law, and that the Department's actions against me were not based upon any legal interpretation of the facts by Crown Law?

Finally, I believe that if there was only the one communication to Crown Law, then I am entitled to know the contents of that communication and whether it was in accordance with what I was informed by the Department on 19 September 1991."

71 In his second application for external review, dated 17 March 1993, Mr Smith made the following points in support of that application:

" - Information is not privileged

- Personal details are involved

- It is in the public interest for the information to be released"

72 The allegations made by Mr Smith in his written submission concerning missing documents have already been considered previously in this decision. Following the Department's subsequent search, and location of the second document at issue in this review, Mr Smith indicated that he accepted that the two documents which are the subject of this review were the only documents responsive to Part 2 of his access application which could be located by the Administrative Services Department. The balance of my decision is therefore confined to the second issue raised by Mr Smith; namely, the basis for exemption under s. 43 of the FOI Act (the legal professional privilege exemption) for the two documents to which access was refused.

73 In response to an invitation to clarify the points made in his applications for external review, and to make any further submissions he wished to make in support of his contention that he was entitled under the FOI Act to obtain access to the withheld documents, Mr Smith met with a member of my investigative staff and made the following additional points:

Mr Smith indicated that the documents to which he sought access concerned the relationship of employer and employee existing between the Administrative Services Department and himself, and asserted that in the course of that relationship, the Department had adopted a particular course of action toward him which contravened the Department's own labour relations policies and the relevant governing legislation. Mr Smith argued that the documents in question had therefore been brought into existence as a result of his challenging the course of action adopted by the Department toward him, on the grounds that the Department's actions toward him were contrary to law and constituted an abuse of statutory power, and that the documents would necessarily relate to the allegations he had raised concerning illegality and abuse of statutory power on the Department's part. Mr Smith was of the view that in those particular circumstances, the documents in question fell outside the scope of 'legal professional privilege', and the Department was therefore not entitled to rely upon the exemption contained in s. 43 of the FOI Act, to deny him access to those documents.

Mr Smith also argued that the Crown Solicitor's advice to the Department would, in the particular circumstances of his case, have related to matters of policy or

administrative arrangement, rather than matters of law. Accordingly, in Mr Smith's view, the Department would not be entitled to rely upon the s. 43 exemption, which was restricted in its application to legal advice.

Mr Smith alleged that the Department had waived its entitlement to rely upon the s. 43 exemption in this particular case. Mr Smith asserted that both he and his solicitor had been advised, in the course of their dealings with the Department about the issues between Mr Smith and the Department, that the Department was seeking legal advice from the Crown Solicitor's Office, as recorded in the Department's letter to him dated 19 September 1991. In Mr Smith's view, the Department had implied in the course of those dealings that it would convey to him the substance of the legal advice it received from the Crown Solicitor's Office, and that it was reasonable for him, as a layman, to interpret the Department's letter of 19 September 1991, stating that he "would be advised once that advice had been received", as confirming the Department's undertaking in this regard.

In Mr Smith's view, the documents in question should be released to him because it is in the public interest to do so, and because "personal details are involved". By this Mr Smith meant that both he and his solicitor had put certain submissions to the Department concerning the issues of dispute in the employer-employee relationship between Mr Smith and the Department. Since the position taken by the Department in efforts toward resolving that dispute would depend, in large part, on the legal advice received by the Department from the Crown Solicitor's Office, Mr Smith felt that he was entitled to know that the Department had fairly represented the "true facts of the situation".

b) Submissions of respondent

74 On the basis of my review of the two internal review decisions which are the subject of the present review, and the statements of reason for those decisions, and on the basis of my examination of the two documents in question, I determined that it was not necessary to obtain further submissions from the Administrative Services Department in support of its contention that both documents fall within the scope of the legal professional privilege exemption contained in s. 43 of the FOI Act.

75 I believe that the Department's position can be fairly summarised as follows:

Section 28(1) of the FOI Act affords an agency the discretion to refuse access to "exempt matter" (matter exempt under Division 2 of Part 3 of the Act) or an "exempt document" (a document containing exempt matter, to which access cannot be given under s.32 of the Act)

Included among the "exempt matter" provisions in Division 2 of Part 3 of the FOI Act is s. 43, dealing with "matter affecting legal proceedings", which provides that matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.

The scope of the section 43 exemption applies to documents containing confidential professional communications involving legal advice between solicitor and client.

The Crown Solicitor's Office acts as legal advisor to the Government, including

the Administrative Services Department, and there is therefore a solicitor-client relationship between those two entities in respect of correspondence passing between them in the course of that professional relationship, where that correspondence records either the seeking of legal advice by the Administrative Services Department from the Crown Solicitor's Office, or the provision of such legal advice by the Crown Solicitor's Office to the Department.

The two documents to which Mr Smith seeks access are letters (dated 17 September 1991 and 1 October 1991) which passed between the Administrative Services Department and the Crown Solicitor's Office, in the course of that professional solicitor-client relationship, and record *"confidential professional communications involving legal advice between the Administrative Services Department as client and the Crown Solicitor as legal advisor."*

The section 43 exemption does not contain a public interest test, and the Department was therefore not obliged to take account of any public interest considerations in reaching decisions on Mr Smith's access application, where its decisions were based on the s. 43 exemption. The fact that the documents in question may have related to Mr Smith's personal affairs was also irrelevant to the determination of his access application in reliance on the s. 43 exemption.

The Relevant Provisions of the FOI Act

76 The particular provisions of the FOI Act cited by the Department in the decisions which are the subject of this review are:

> *28.(1) An agency or Minister may refuse access to exempt matter or an exempt document.*
>
> *43.(1) Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.*
>
> *(2) Matter is not exempt under subsection (1) merely because it appears in an agency's policy document.*

77 The phrases "exempt matter" and "exempt document", which appear in s. 28(1) of the FOI Act are defined, in s. 7 of the Act as follows:

> *7. In this Act -*
> *...*
>
> *"exempt document" means a document that contains exempt matter, but to which access cannot be given under section 32"* [section 32 deals with the provision of access to a document from which exempt matter has been deleted]
>
> *"exempt matter" means matter that is exempt under Division 2 of Part 3"*

The s. 43 exemption - 'matter affecting legal proceedings'

78 The basis for the exemption provisions contained in Division 2 of Part 3 of the FOI Act is the recognition that there are some situations in which the general principles of openness,

accountability and public participation in government which underlie FOI legislation must be balanced against other legitimate interests of government or third parties in maintaining confidentiality of information. The necessity of exemption provisions to deal with these areas of legitimate concern is reflected in s. 5 of the FOI Act, which provides as follows:

> *5 (1) Parliament recognises that, in a free and democratic society -*
>
> *a) the public interest is served by promoting open discussion of public affairs and enhancing government's accountability; and*
>
> *(b) the community should be kept informed of government's operations, including, in particular, the rules and practices followed by government in its dealings with members of the community; and*
>
> *(c) members of the community should have access to information held by government in relation to their personal affairs and should be given the ways to ensure that information of that kind is accurate, complete, up-to-date and not misleading.*
>
> *(2) Parliament also recognises that there are competing interests in that the disclosure of particular information could be contrary to the public interest because its disclosure in some instances would have a prejudicial effect on -*
>
> *(a) essential public interests; or*
>
> *(b) the private or business affairs of members of the community in respect of whom information is collected and held by government.*
>
> *(3) This Act is intended to strike a balance between those competing interests by giving members of the community a right of access to information held by government to the greatest extent possible with limited exceptions for the purpose of preventing a prejudicial effect to the public interest of a kind mentioned in subsection (2).*

79 The basis of the public interest rationale for many of the exemption provisions in Division 2 of Part 3 of the FOI Act is briefly discussed in my decision in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (Information Commissioner Qld, Decision No. 93002, 30 June 1993, unreported) at paragraphs 14 to 20. In paragraphs 16-18 of that decision, the public interest rationale for the enactment of s. 43 was explained as follows:

> *"16. Most of the exemption provisions call for a judgment to be made about whether disclosure of particular matter contained in a document would have certain specified effects, which in Parliament's judgment would be injurious to the public interest.*
>
> *17. The exemptions in respect of Cabinet matter and Executive Council matter (ss.36 and 37) on the other hand, do not require any judgment to be formed about the likely effects of disclosure.*

Matter in a document is exempt upon proof of the facts which bring it within the prescribed class, irrespective of whether disclosure of the contents of the document would cause any damage to the public interest. ...

18. Other exemption provisions, like s.43 (legal professional privilege) and s.46(1)(a) (disclosure which would found an action for breach of confidence) call for the application of a legal test to be derived from the general law. Because that aspect of the general law has itself been developed for the protection of important public interests, satisfaction of the legal test means that disclosure would be contrary to the public interest."

80 The public interest rationale for the enactment of s. 43 is therefore the same as that which underlies the common law's development of the doctrine of legal professional privilege, which is explained in some of the authorities discussed below. Proof of the exemption is complete upon proof that the legal test derived from the general law is satisfied in respect of particular documents. No further consideration of public interest factors bearing on disclosure, or of prejudicial effects of disclosure, is required.

81 The proposed exemption for matter subject to legal professional privilege was discussed in some detail, at paragraphs 7.152-7.157 of the Electoral and Administrative Review Commission's Report on Freedom of Information (December 1990, No. 90/R6), and the remarks are worth noting:

"...

7.152 The exemption incorporates the common law concept of legal professional privilege (see generally Byrne and Heydon 1986 *at pp. 635-660); valuable commentaries relating to the privilege under FOI legislation are* Re Maher and Attorney-General's Department, Mary Kathleen Uranium Ltd and CRA Ltd *(1986) 7 ALN 411;* Re Ralkon Agricultural Company Pty Ltd and Aboriginal Development Commission *(1986) 10 ALD 380; and* Waterford v Commonwealth of Australia *(1987) 163 CLR 54).*

7.153 A question in any event is whether the sole purpose for which the matter in a document has been made or brought into existence was either the seeking or giving of legal advice or, alternatively, was the use in existing or anticipated litigation. It is, however, immaterial that the purpose for which the documents were created may have passed. The rule is 'once privileged, always privileged'. The common law privilege belongs to the client, and not to the lawyer, but an agency may claim the exemption whether or not it is the client (see Re Dwyer and Department of Finance *(1985) 8 ALD 474 at 479-480). This clause may apply where an agency is possessed of a document in respect of which a non-government 'third party' might be able to claim the privilege.*

7.154 Where the client is a government agency and the legal advisers are salaried employees of the government agency, the lawyers must act as advisers on matters of law (and not on matters of policy or administrative arrangement), and must be independent.

Advice as to the policy to be followed in the administration of an Act is not legal advice (see Waterford*). The critical issue, however, is the sole purpose for which the document was created, and if this test is satisfied, the fact that the documents contain material 'which may be factual or contain administrative as distinct from legal advice' will not remove the operation of the privilege (see* Re Ralkon *at 391). Nor does it matter that the document, if it satisfies the test, might also fulfil some 'secondary need or function such as administrative efficiency or administrative requirements' (*Re Ralkon *at 390). The High Court in* Waterford *clearly accepted that deletion of 'extraneous matter' was possible.*

7.155 There are public policy limits to the scope of the privilege, and it is useful to note that in Attorney-General for the Northern Territory v Kearney (1985) 158 CLR 500 *the High Court held that it could not protect communications made to further a deliberate abuse of statutory power, thereby preventing others from exercising their rights under the law. Once the extent of the common law limits is reached there is, however, no overriding notion that clause 35 does not apply where it would be contrary to the public interest for it to d*o so (see Waterford v Department of the Treasury (1985) 5 FCR 76*, affirmed on this point in the High Court).*

7.156 The privilege can apply only where the matter has been communicated in confidence, and the common law allows a client to waive the privilege. In Re Colonial Mutual Life Assurance Society Ltd and Department of Resources and Energy (1987) 6 AAR 80 at 83*, the AAT held that the operation of section 42 of the* Freedom of Information Act 1982 (Cth) *was unaffected by waiver. This, however, is contrary to the assumptions made in* Waterford v Department of the Treasury (1985) 5 FCR 76 at 81*, and to other AAT decisions (see* Re Dwyer and Department of Finance (1985) 8 ALD 474*).*

7.157 An applicant cannot rely on her or his particular interest in the document because this exemption does not operate according to the effects of disclosure."

Legal professional privilege at common law

82 The EARC Report indicated that the 'legal professional privilege' exemption which was recommended for inclusion in Queensland's FOI Act "would incorporate the common law concept of legal professional privilege". The nature and scope of legal professional privilege at common law has been the subject of consideration by the High Court of Australia in a number of recent cases. A concise summary of the general principles which can be extracted from those High Court judgments is contained in the decision of Mr K Howie, Member of the Victorian Administrative Appeals Tribunal, in *Re Clarkson and Attorney-General's Department,* (1990) 4 VAR 197, at p. 199:

"The nature of legal professional privilege has been closely examined by the High Court in a number of decisions, in particular Grant v Downs

(1976) 135 CLR 674, *Baker v Campbell* (1983) 153 CLR 52, *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, and *Waterford v Commonwealth of Australia* (1987) 163 CLR 54.

From these decisions, the following principles emerge:

(1) To determine whether a document attracts legal professional privilege consideration must be given to the circumstances of its creation. It is necessary to look at the reason why it was brought into existence. The purpose why it was brought into existence is a question of fact.

(2) To attract legal professional privilege the document must be brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings. Submission to legal advisers for advice means professional legal advice. It includes the seeking or giving of advice. Use in legal proceedings includes anticipated or pending litigation.

(3) The reason for legal professional privilege is that it promotes the public interest. It assists and enhances the administration of justice by facilitating the representation of clients by legal advisers. There are eloquent statements of the importance of this public interest in each of the cases referred to above.

(4) Legal professional privilege attaches to confidential professional communications between salaried legal officers and government agencies. It must be a professional relationship which secures to the advice an independent character. The reason for the privilege is the public interest in those in government who bear the responsibility of making decisions having free and ready confidential access to their legal advisers. Whether or not the relationship exists is a question of fact.

(5) If a document contains material that does not fulfil the required test, that does not necessarily deny the document the protection of the privilege. What matters is the purpose for which the document was brought into existence. If it was for the required purpose, it is not to the point that the document may contain advice which relates to matters of policy as well as law. However, an analysis of the document may assist in determining its moving purpose.

(6) A client may waive legal professional privilege: see in particular the Maurice *case.*

(7) Some vigilance is necessary to ensure that legal professional privilege is not successfully invoked to protect from production documents that do not properly fall within its ambit. Otherwise the important public purposes it is intended to serve will be undermined.

(8) Legal professional privilege does not attach to documents brought into existence for the purpose of guiding or helping in the commission of a crime or fraud, or for the furtherance of an illegal purpose, including an abuse of statutory power, or for the purpose of

frustrating the process of the law itself: see the Kearney *case."*

I shall consider these general principles, as they apply to the facts of the case before me, in the light of the submissions of the parties and my reading of the documents in dispute in this review application.

The "Sole Purpose" test

83 As stated in *Re Clarkson*, one of the general principles expounded by the High Court in its decisions concerning legal professional privilege is that in order to determine whether a document attracts the privilege, it is necessary to examine the circumstances of the document's creation. Further, according to *Re Clarkson*, a document must have been brought into existence for the sole purpose of submission to legal advisers for professional legal advice, or for use in legal proceedings, including anticipated or pending litigation. The reasons for the High Court's adoption of the 'sole purpose' test were explained in *Grant v Downs*, (per Stephen, Mason and Murphy JJ., at p. 685):

> *"All that we have said so far indicates that unless the law confines legal professional privilege to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings the privilege will travel beyond the underlying rationale to which it is intended to give expression and will confer an advantage and immunity on a corporation which is not enjoyed by the ordinary individual. It is not right that the privilege can attach to documents which, quite apart from the purpose of submission to a solicitor, would have been brought into existence for other purposes in any event, and then without attracting any attendant privilege. It is true that the requirement that documents be brought into existence in anticipation of litigation diminishes to some extent the risk that documents brought into existence for non-privileged purposes will attract the privilege but it certainly does not eliminate that risk. For this and the reasons which we have expressed earlier we consider that the sole purpose test should now be adopted as the criterion of legal professional privilege."*

84 In its internal review decisions, the Department described the documents which are the subject of this review as being letters which passed between the Administrative Services Department and the Crown Solicitor's Office, in the course of that professional solicitor-client relationship, recording confidential communications involving legal advice in the course of a professional solicitor-client relationship between the Administrative Services Department (the client) and the Crown Solicitor (as legal advisor).

85 As indicated previously, Mr Smith submitted to me that the documents in issue pertained to the dispute existing between the Administrative Services Department and himself in an employer-employee context, and that his position in that dispute was that the Department was in violation of governmental and departmental labour relations policies. Accordingly, in his view, any request by the Department for advice from the Crown Solicitor's office would have sought advice on how to respond to his allegations in this regard, and would therefore necessarily have related to issues of policy or administrative arrangement rather than matters of law. In the result, he submitted, the communications would not attract the protection of the s. 43 exemption, which applied only to legal

advice.

86 I have the advantage, necessarily denied to Mr Smith, of having an opportunity to inspect the documents in issue in these proceedings. While Mr Smith's submissions regarding the content of those documents is necessarily based on supposition, I am in a position to make findings of fact based upon my inspection of the documents. Having carefully inspected both documents in issue, I am satisfied that the character of those documents demonstrates, *prima facie,* that the purpose for which they were brought into existence was the seeking or giving of legal advice, in the context of a professional relationship of solicitor and client, between the Administrative Services Department and the Crown Solicitor's Office.

87 Further, I am satisfied that, to the extent that the documents in question may contain a mixture of legal advice and policy advice, that would not take the documents outside the scope of the privilege. In this regard, I respectfully adopt the statement of general principle, as set out in *Waterford v Commonwealth of Australia,* per Wilson and Mason JJ, at page 66 of their decision:

> *"Matters of policy and legal advice may be intermingled in the one document. ... [However,] the sole purpose test is a test that looks to the reason why the document was brought into existence. If its sole purpose was to seek or to give legal advice in relation to a matter, then the fact that it contains extraneous matter will not deny to it the protection of the privilege. The presence of matter other than legal advice may raise a question as to the purpose for which it was brought into existence but that is simply a question of fact to be determined ..."*

Salaried "in-house" or government legal advisers

88 Although not raised by the parties as an issue in the present case, I note that the High Court has, in the course of its examination of legal professional privilege, had occasion to consider whether the scope of the privilege extended to include salaried "in-house" or government legal advisers. The High Court's view on the point is that there is no cogent reason to place salaried government legal officers outside the scope of legal professional privilege, and that the privilege may attach to communications between such salaried legal officers and government agencies, provided that the communications have the necessary confidential character, and are undertaken for the sole purpose of seeking or providing legal advice, or in connection with anticipated or pending litigation.

89 In *Waterford v Commonwealth of Australia,* Mason and Wilson JJ, canvassed relevant authorities from other jurisdictions on this point and concluded, at p. 62 of their decision:

> *"In our opinion, given the safeguards to which reference is made in the various citations, there is no reason to place legal officers in government employment outside the bounds of legal professional privilege. The proper functioning of the legal system is facilitated by freedom of consultation between the client and the legal adviser. ...*
>
> *To our minds it is clearly in the public interest that those in government who bear the responsibility of making decisions should have free and ready confidential access to their legal advisers. Whether in any particular case the relationship is such as to give rise to the privilege will*

> *be a question of fact. It must be a professional relationship which secures to the advice an independent character notwithstanding the employment."*

90 On the facts of the present case, I am satisfied that the relationship between the Administrative Services Department and the Crown Solicitor's Office has the necessary professional character, and that there is the appropriate degree of independence with respect to the advice which is the subject of the communications, to attract the privilege.

Exceptions to the privilege:

91 Mr Smith submitted that, in his view, the documents in issue would not attract legal professional privilege at common law, and hence would not fall within the scope of the s. 43 exemption in the FOI Act. The basis for Mr Smith's assertion in this respect was that he had made allegations about the Department, as his employer, contravening its own labour relations policies and the relevant governing legislation. In Mr Smith's view, the documents in question would have been created as a result of his allegations that the Department's actions toward him were contrary to law and constituted an abuse of statutory power, and in those circumstances would fall outside the scope of legal professional privilege.

92 In addition to the well-recognised rule that the scope of legal professional privilege excludes communications made in furtherance of crime or fraud, the High Court has stated that the privilege's protection should also not be afforded to communications made to further a deliberate abuse of statutory power, thereby preventing others from exercising their rights under the law. See *Attorney-General (NT) v Kearney*, supra, per Gibbs CJ, at pp. 61-62 of that decision:

> *"One exception to which the general rule [pertaining to legal professional privilege]is subject is that communications by a client for the purpose of being guided or helped in the commission of a crime or fraud are not privileged from discovery. This exception is frequently stated as though it were confined to crime and fraud. In* Varawa v Howard Smith & Co Ltd (1910) 10 CLR 382 at 385, Griffith CJ said: *"The point is taken now that the objection of privilege does not apply to a case of fraud, or intended fraud, or intended crime. I am not sure that the exception has ever been extended beyond these two cases. But I am sure that it has never been held to apply to a case where all that is alleged is that the evidence will show that the plaintiff knew he had not a good cause of action."*
>
> ...
>
> *In Wigmore, op cit., para 2298, at p. 573, it is said that the reasons for the protection given by the privilege "cease to operate ... where the desired advice refers not to prior wrongdoing, but to future wrongdoing", and the question is then asked, amongst others: "Must not that unlawfulness [the unlawfulness of the end for which the advice is sought] be either a crime or a civil wrong involving moral turpitude?" The learned author states (at p. 577), that this question should be answered in the negative, but goes on to acknowledge that the decisions show "an inclination to mark the line at crime and civil fraud". He adds: "Yet it is difficult to see how any moral line can properly be drawn at that crude boundary, or how the law can protect a deliberate plan to defy the law*

> *and oust another person of his rights, whatever the precise nature of those rights may be."*

93 After canvassing a number of other authorities, Gibbs CJ concluded, at pp. 63-64 of his decision in *Kearney* (concurred in by Mason and Brennan JJ):

> *"These statements of the principle, and the reason on which it is based, suggest that the exception is not confined to cases of crime and fraud, even in the wide sense in which "fraud" has been used in this context, unless the meaning of that word is extended to include anything that might be described as a fraud on justice.*
> ...
> *It would be contrary to the public interest which the privilege is designed to secure - the better administration of justice - to allow it to be used to protect communications made to further a deliberate abuse of statutory power and by that abuse prevent others from exercising their rights under the law. ..."*

94 However, as Gibbs CJ then pointed out in his decision:

> *"The privilege is of course not displaced by making a mere charge of crime or fraud, or, as in the present case, a charge that powers have been exercised for an ulterior purpose. This was made clear in* Bullivant v Attorney-General for Victoria ([1901] AC) at pp 201, 203, 205, *and in* O'Rourke v Darbishire [1920] AC 581 at 604, 613-4, 622-3, 632-3. *As Viscount Finlay said in the latter case (at p 604) "there must be something to give colour to the charge". His Lordship continued: "The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact. ... The court will exercise its discretion, not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications."*

95 I would respectfully adopt that reasoning in the particular circumstances of the present case. In my view, Mr Smith's allegations of illegality and abuse of statutory power are not sufficient to withdraw the protection of legal professional privilege from the documents in issue, and there is nothing in those documents which establishes, or even suggests, that they constitute or include communications made to further crime or fraud, or abuse of statutory power having the effect of preventing him from exercising his rights under the law.

Waiver of legal professional privilege:

96 Mr Smith submitted that the Department was not entitled to rely upon the s. 43 exemption, by virtue of having waived legal professional privilege in the course of its prior dealings with him concerning the matters dealt with in the documents in issue. In support of this contention, Mr Smith stated that he and his solicitor had been advised verbally that the Department was seeking legal advice from the Crown Solicitor's Office on the matters in dispute, and that the Department had implied that it would convey to him the substance of the legal advice it received from the Crown Solicitor's Office. In Mr Smith's view, it was reasonable for him, as a layman, to interpret the Department's letter of 19 September 1991, stating that he "would be advised once that advice had been

received", as confirming the Department's undertaking in this regard.

97 The question of waiver of legal professional privilege was addressed by the High Court in the case of *Attorney-General (NT) v Maurice* (supra). After first setting out the rationale of the privilege, Gibbs CJ considered the question of waiver, both express and implied, at pp. 480-481 of his judgment:

> *"However, like every privilege properly so called, it can be waived, although only by the person entitled to claim it, that is the client, and not the client's legal representative."*

Gibbs CJ then stated that where there had been no express waiver of privilege, and there was nothing to suggest an actual intention to waive privilege:

> *"[t]he principle applicable in these circumstances seems to me to be well stated in* Wigmore, *op. cit., par. 2327:*
>
> > *"In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final."*
>
> *The decisions in which this question has been considered seem to me to be particular applications of the rule that in a case where there is no intentional waiver the question whether a waiver should be implied depends on whether it would be unfair or misleading to allow a party to refer to or use material and yet assert that that material, or material associated with it, is privileged from production."*

(See to similar effect the reasons of Mason and Brennan JJ, at pp. 487-488 of the High Court decision in *Attorney-General (NT) v Maurice*).

98 I am not persuaded that the circumstances of the present case support Mr Smith's contention in this regard. In particular, I am unable to agree with the interpretation Mr Smith urges for the Department's letter to him dated 19 September 1991. In my view, that letter does no more than to advise Mr Smith that the Department was seeking advice from the Crown Solicitor's Office, and cannot reasonably be interpreted as constituting an undertaking to share with Mr Smith the substance of the advice received. I therefore find that there is no evidence of waiver on the Department's part,either express or implied, which would disentitle the Department to its claim for exemption under s. 43 of the FOI Act for the documents in question.

The public interest

99 Mr Smith urges that it would be in the public interest for the documents to which he

seeks access to be disclosed to him. The respondent Department, on the other hand, takes the position that there is no public interest test associated with the s. 43 exemption in the FOI Act, and that accordingly the Department was not obliged to take any public interest considerations into account in making its decision on Mr. Smith's access application.

100 In my opinion the respondent Department's view correctly states the position with respect to public interest considerations in the context of the s. 43 exemption. While some of the exemption provisions contained in Division 2 of Part 3 of the FOI Act are subject to a public interest balancing test, others are not. The nature of the distinction is explained in my decision in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (Information Commissioner Qld, Decision No. 93002, 30 June 1993, unreported), at paras. 14 to 20, and see para. 79 above.

101 It is clear, on the plain reading of the wording of s. 43, that it is one of those exemption provisions in the FOI Act which are not subject to such a public interest balancing test, and which operate by reference to the character of the documents in issue rather than the effects of their disclosure. To attach a public interest balancing test to the s. 43 exemption in the FOI Act would be contradictory to the very rationale for the common law doctrine of legal professional privilege, which s. 43 has enshrined in the FOI Act. As stated in the summary of the relevant general principles in *Re Clarkson* (see para 82, above), the reason for the existence of legal professional privilege at common law is that it promotes the public interest, by facilitating the representation of clients by legal advisers, and thus enhancing the administration of justice. In this regard, I respectfully adopt the reasons of the High Court in the case of *Grant v Downs* (supra) per Stephen, Mason and Murphy JJ, at p. 685:

> *"The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice, by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available.*

102 A decade after its decision in *Grant v Downs*, the High Court again had occasion to consider the genesis and rationale of legal professional privilege in the case of *Attorney-General (NT) v Maurice* (supra). At page 480 of that decision, Gibbs CJ made the following observations:

> *"The rule which recognizes legal professional privilege goes back at least to the time of Elizabeth I (see* Wigmore on Evidence, McNaughton rev. 1961), vol. VIII, par. 2290), *but that does not mean that it is archaic, technical or outmoded. Without the privilege, no one could safely consult a legal practitioner and the administration of justice in accordance with the adversary system which prevails at common law would be greatly impeded or even rendered impossible. This has been recognized in many cases: see, e.g.,* Grant v Downs (1976) 135 CLR 674, at p. 685; Reg. v Bell; Ex parte Lees (1980) 146 CLR 141, at p. 152; Baker v Campbell

(1983) 153 CLR 52, at pp. 66, 94, 114. *In the last-mentioned case, the majority of the Court described the rule as fundamental or essential and held that it was not confined to judicial or quasi-judicial proceedings."*

103 Since s. 43 of the FOI Act is not subject to a public interest balancing test, I find that the sole question for determination by the Department was whether the documents to which Mr Smith sought access would or would not be privileged from production in a legal proceeding on the ground of legal professional privilege. Countervailing public interest considerations which may favour disclosure are irrelevant to this determination, and Mr Smith's arguments concerning the public interest in disclosure cannot assist him in the circumstances of this case.

Personal interest

104 In Mr Smith's view, the information contained in the documents in question should be released to him because it is in the public interest to do so, and because "personal details are involved". The Department's position was that where its determination on Mr Smith's access application was made in reliance on the s. 43 exemption in the FOI Act, it was entirely irrelevant that the documents in question may have related to Mr Smith's personal affairs.

105 I conclude that the Department's position on this issue is the correct view of the matter. Section 6 of the FOI Act cannot be called in aid by the applicant because the satisfaction of the test of exemption under s. 43 does not call for any consideration of public interest factors, or of the effects that the disclosure of matter might have. Rather it calls for a characterisation of documents according to whether they fall within the application of the legal test derived from the general law which is discussed above.

Conclusion

106 For the foregoing reasons, I find that the Administrative Services Department was entitled to refuse Mr Smith access to the relevant documents, in reliance on s. 43 of the FOI Act. I therefore affirm both decisions under review (namely, the decision of Ms S A Porter made on 13 January 1993, in respect of a document dated 1 October 1991; and the decision of Mr R W Dunning, made on 8 March 1993, in respect of a document dated 17 September 1991).

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F N ALBIETZ
INFORMATION COMMISSIONER