OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 99010
Application S 87/94

Participants:

LEONARD HASTINGS AINSWORTH
AINSWORTH NOMINEES PTY LTD
Applicants

CRIMINAL JUSTICE COMMISSION
Respondent

'A'
Third Party

'B'
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - applicants challenging sufficiency of search for documents falling within the terms of the applicants' FOI access application - whether there are reasonable grounds for believing that additional responsive documents exist in the possession, or under the control, of the respondent - whether the searches and inquiries made by the respondent in an effort to locate all requested documents have been reasonable in all the circumstances of the case.

FREEDOM OF INFORMATION - refusal of access - documents prepared by the respondent for presentation to a Parliamentary committee - whether disclosure would infringe the privileges of Parliament - application of s.50(c)(i) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - matter which identifies sources of information provided to the respondent - whether sources qualify as confidential sources of information - application of s.42(1)(b) of the *Freedom of Information Act 1992* Qld.

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FREEDOM OF INFORMATION - refusal of access - criminal intelligence information provided to respondent by law enforcement agencies of other governments - application of s.38(b) of the *Freedom of Information Act 1992* Qld - observations on the overlap between the tests for exemption under s.46(1)(b) and s.38(b) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - record of a request for information made to the respondent by a law enforcement agency of another government - whether disclosure could reasonably be expected to prejudice the effectiveness of a lawful method or procedure for dealing with a possible contravention of the law - application of s.42(1)(e) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - report prepared by the respondent's Intelligence Division - whether s.48(1) of the *Freedom of Information Act 1992* Qld is to be applied in its present form or in the form in which it was enacted at the commencement of the review - application of s.20 of the *Acts Interpretation Act 1954* Qld.

FREEDOM OF INFORMATION - refusal of access - opinions expressed by officers of the respondent in reports concerning intelligence data - whether matter of a kind which falls within the terms of s.41(1)(a) of the *Freedom of Information Act 1992* Qld - whether disclosure would, on balance, be contrary to the public interest - application of s.41(1) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - criminal intelligence data comprising unsubstantiated suggestions of criminal activity or other wrongdoing on the part of identifiable individuals - whether information concerning the personal affairs of those persons - whether disclosure would, on balance, be in the public interest - application of s.44(1) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - criminal intelligence data comprising unsubstantiated suggestions of criminal activity or other wrongdoing on the part of identifiable businessmen and business organisations - whether disclosure could reasonably be expected to have an adverse effect on their business affairs - whether disclosure would, on balance, be in the public interest - application of s.45(1)(c) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.22(c), s.27(3), s.28(1), s.38(a), s.38(b), s.41(1), s.42(1)(b), s.42(1)(e), s.44(1), s.45(1)(c), s.46(1)(b), s.48(1), s.50(c)(i), s.78, s.80, s.85, s.87(1), s.88(1)(b), s.88(2), s.102, s.103, s.104
Freedom of Information Act 1982 Cth s.36
Freedom of Information Act 1989 NSW
Freedom of Information Act 1982 Vic s.31(3)
Freedom of Information (Review of Secrecy Provision Exemption) Amendment Act 1994 Qld
Acts Interpretation Act 1954 Qld s.4, s.20

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Bill of Rights 1688 Article 9
Constitution Act 1867 Qld s.8, s.40A
Criminal Justice Act 1989 Qld s.58(2)(a), s.58(2)(c)
Parliamentary Papers Act 1992 Qld s.3

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564
"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Bartlett and Department of Prime Minister and Cabinet, Re (1987) 12 ALD 659, 7 AAR 355
Bayliss and Queensland Health, Re (1997) 4 QAR 1
Boyle and Australian Broadcasting Corporation, Re (Commonwealth AAT, No. 92/322, McMahon DP, 5 March 1993, unreported)
Cairns Port Authority and Department of Lands, Re (1994) 1 QAR 663
Cannon and Australian Quality Egg Farms Limited, Re (1994) 1 QAR 491
Commissioner of Police v The District Court of New South Wales and Perrin (1993) 31 NSWLR 606
Criminal Justice Commission and Director of Public Prosecutions, Re (1996) 3 QAR 299
Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (1993) 1 QAR 60
Ferrier and Queensland Police Service, Re (1996) 3 QAR 350
Gordon and Commissioner for Corporate Affairs, Re (1985) 1 VAR 114
Griffith and Queensland Police Service, Re (1997) 4 QAR 109
Holt and Education Queensland, Re (1998) 4 QAR 310
Howard and Treasurer of Commonwealth of Australia, Re (1985) 3 AAR 169
"JM" and Queensland Police Service, Re (1995) 2 QAR 516
Kahn and Australian Federal Police, Re (1985) 7 ALN N190
McEniery and Medical Board of Queensland, Re (1994) 1 QAR 349
Morris and Queensland Treasury, Re (1995) 3 QAR 1
Murphy and Queensland Treasury (No. 2), Re (Information Commissioner Qld, Decision No. 98009, 24 July 1998, unreported)
Norman and Mulgrave Shire Council, Re (1994) 1 QAR 574
Pearce and Queensland Rural Adjustment Authority and Others, Re (Information Commissioner Qld, Decision 99008, 4 November 1999, unreported)
Pope and Queensland Health, Re (1994) 1 QAR 616
Price and Nominal Defendant, Re (Information Commissioner Qld, Decision No. 99003, 30 June 1999, unreported)
Robbins and Brisbane North Regional Health Authority, Re (1994) 2 QAR 30
Shepherd and Department of Housing, Local Government & Planning, Re (1994) 1 QAR 464
State of Queensland v Albietz [1996] 1 Qd R 215
Stewart and Department of Transport, Re (1993) 1 QAR 227
"T" and Queensland Health, Re (1994) 1 QAR 386
Trustees of the De La Salle Brothers and Queensland Corrective Services Commission, Re (1996) 3 QAR 206
University of Melbourne v Robinson [1993] 2 VR 177
Wong and Department of Immigration and Ethnic Affairs, Re (1984) 2 AAR 208
Woodyatt and Minister for Corrective Services, Re (1995) 2 QAR 383

DECISION

I decide to vary the decision under review (which is identified in paragraph 5 of my accompanying reasons for decision), by finding that -

(a) having regard to the additional searches and inquiries made by the respondent (and the additional documents thereby located and dealt with) during the course of my review, I am satisfied that -

(i) there are no reasonable grounds for believing that additional documents, responsive to the terms of the applicants' FOI access application dated 2 November 1993, exist in the possession or under the control of the respondent; and

(ii) the searches and inquiries made by the respondent in an effort to locate all documents in its possession or under its control, which are responsive to the terms of the applicants' FOI access application dated 2 November 1993, have been reasonable in all the circumstances of this case;

(b) the matter in issue identified in paragraph 63 of my accompanying reasons for decision is exempt matter under s.50(c)(i) of the *Freedom of Information Act 1992* Qld;

(c) the matter in issue identified in paragraph 98 of my accompanying reasons for decision is exempt matter under s.38(b) of the *Freedom of Information Act 1992* Qld;

(d) the matter in issue identified in paragraphs 138 and 150 of my accompanying reasons for decision is exempt matter under s.44(1) and/or s.45(1)(c) of the *Freedom of Information Act 1992* Qld; and

(e) the balance of the matter remaining in issue does not qualify for exemption from disclosure to the applicants under the *Freedom of Information Act 1992* Qld.

Date of decision: 17 December 1999

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicants seek review of the respondent's decision to refuse them access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to certain documents, or parts of documents, falling within the terms of an FOI access application dated 2 November 1993 which (so far as relevant for present purposes) stated:

> *I request that your Commission provide me with access to all documents pertaining to Leonard Hastings Ainsworth and/or Ainsworth Nominees Pty. Ltd. pursuant to s.25 of the* Freedom of Information Act 1992.
>
> *In particular, I wish to review all documents pertaining to the 1990 Criminal Justice Commission Report on gaming machines and concerns.*

2. By way of background, it will be useful if I refer to the history of events following the publication on or about 30 May 1990 of the Criminal Justice Commission (CJC) "Report on Gaming Machine Concerns and Regulations" (hereinafter referred to as "the GM Report"). The GM Report recommended that the Ainsworth group of companies should not be allowed to participate in the gaming machine industry in Queensland. It appears that neither applicant was aware of the adverse comments in the GM Report until it had been tabled in

the Queensland Parliament and publicised. The applicants commenced legal action against the CJC, with an appeal ultimately reaching the High Court of Australia, which found that the CJC had failed to observe the requirements of procedural fairness in adversely referring to the applicants (and harming their business or commercial reputation) in the GM Report without giving them an adequate opportunity to be heard in relation to the proposed adverse comments before their publication (see *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564).

3. I note also that Mr John Perrin (an employee legal consultant for the Ainsworth group of companies) had, on 4 December 1991, lodged with the New South Wales (NSW) Commissioner of Police an access application under the *Freedom of Information Act 1989* NSW (the NSW FOI Act) seeking documents relating to information supplied by the NSW Police Service, or officers thereof, to the CJC (for the purposes of the inquiry which culminated in the publication of the GM Report), and access to the names of police officers responsible for the supply or preparation of that information. An appeal by Mr Perrin against one aspect of the decision made on behalf of the NSW Commissioner of Police (i.e., the deletion from documents supplied of all names and identifying particulars of the individual police officers and public servants involved in the preparation of the documents forwarded to the CJC) was successful in the NSW District Court, and upheld by the NSW Court of Appeal: see *Commissioner of Police v The District Court of New South Wales and Perrin* (*Perrin's* case) (1993) 31 NSWLR 606.

4. The initial decision in response to the FOI access application set out in paragraph 1 above was made on behalf of the CJC by Mr K B George on 28 January 1994, and notified to the applicants' solicitor in a letter dated 31 January 1994. Mr George decided to grant access in full to more than 200 documents, but granted access to some documents subject to the deletion of exempt matter, and refused access to other documents in their entirety.

5. By letter dated 15 February 1994, the applicants' solicitor, Mr Lawrence Diercke (then of Barker Gosling, Solicitors, now of O'Shea Corser and Wadley, Solicitors) sought internal review of Mr George's decision in respect of more than 80 documents which were individually specified by reference to the Schedule number and document number used by Mr George to identify the documents dealt with in his decision. The internal review decision on behalf of the CJC was made by Ms B L Springer on 18 March 1994. Ms Springer varied Mr George's internal review decision by deciding to give access to some documents which had been claimed to be exempt, and by finding that some documents were exempt on grounds other than, or additional to, those relied upon by Mr George.

6. By letter dated 10 May 1994, the applicants' solicitor applied to me for review, under Part 5 of the FOI Act, of Ms Springer's decision in respect of 62 specified documents, and also asserted that (and requested me to investigate whether) the CJC held additional documents, falling within the terms of the relevant FOI access application, which had not been identified and dealt with by the CJC under the FOI Act.

External review process

7. The documents in issue were obtained and examined. Assistant Information Commissioner Sammon was instructed to conduct a mediation process with the participants (as contemplated by s.80 of the FOI Act) to try to effect a settlement, or at least to narrow as far as possible the issues requiring determination. The issues raised by this external review were complex, and the documents in issue were voluminous, which has caused numerous

practical difficulties and protracted the review process. However, each participant did make some concessions to reduce the number of issues requiring a formal decision. The CJC agreed to provide access to additional documents, and the applicants indicated (in a letter from their solicitor dated 9 October 1995) that they did not wish to pursue access to documents claimed by the CJC to be exempt on the ground of legal professional privilege (and which, I was satisfied, from my examination of them, clearly qualified for legal professional privilege) or to documents relating to the CASPALP investigation (an investigation into donations made by Mr Ainsworth to the Queensland Branch of the Australian Labor Party in 1980 - see Appendix 2 to the GM Report).

8. I have referred to the two third parties as 'A' and 'B', since their identities are claimed to be exempt matter. Each objected to the disclosure of the information in issue which concerned them, and each was granted status as a participant in this review, in accordance with s.78 of the FOI Act.

9. Ultimately, each participant was given the opportunity to lodge formal evidence and written submissions in support of their respective cases in this review. The CJC lodged evidence consisting of a number of statutory declarations. The applicants did not lodge sworn affidavits or statutory declarations, but through their solicitor, Mr Diercke, the applicants lodged a number of documents which are evidentiary in nature. Each participant lodged written submissions. The submissions and evidence lodged on behalf of each participant were exchanged, and opportunities were given for reply. I will refer to relevant parts of the evidence and submissions, where appropriate, in the reasons for decision which follow.

Scope of the applicants' FOI access application

10. In a letter dated 27 July 1994, which set out the applicants' contentions in respect of 'sufficiency of search' issues, the solicitor for the applicants asserted:

> *Moreover, it should be noted that Ainsworth Nominees Pty Ltd (commonly referred to as such in the CJC material) changed its name to Aristocrat Leisure Industries Pty Ltd on 18 December 1992. The adequacy search should therefore extend to any documents or information under or referable to that changed name.*

11. The CJC responded, by letter dated 19 August 1994, as follows:

> *... as you are aware from the request for access, .. there was no mention of Aristocrat Leisure Industries Pty Ltd. In the absence of that name being mentioned in the request, it is unreasonable to expect the searches conducted by the* [CJC] *to have covered any document involving that name. The person undertaking the searches should not be expected to have knowledge about the persons or entities in respect of whom access to documents is sought beyond that which is contained in the request. In particular, that person should not be required to undertake corporate searches to ascertain whether the person or other entity referred to in the request operated under another name or has changed its name.*
>
> *.. if access is sought to documents pertaining to Aristocrat Leisure Industries Pty Ltd, that should be the subject of a separate application.*

12. I consider that the CJC's stance in respect of this issue is correct. The terms of the relevant FOI access application (see paragraph 1 above), which was prepared and lodged by a legal adviser to the applicants, were quite specific in seeking access to "all documents pertaining to Leonard Hastings Ainsworth and/or Ainsworth Nominees Pty Ltd", even though the name of the latter company had apparently been changed to Aristocrat Leisure Industries Pty Ltd approximately a year before the lodgment of the relevant FOI access application. In my view, that was unlikely to have been an oversight. The legal adviser to the applicants understood that the applicants were primarily seeking access to the information (and the sources thereof) acquired by the CJC prior to the publication of the GM Report in May 1990, and which formed a basis for the adverse comments about the applicants contained in the GM Report.

13. However, if the applicants wished to obtain any documents held by the CJC pertaining to Aristocrat Leisure Industries Pty Ltd, it was incumbent on the applicants to make a clear and specific access application in those terms. As I observed in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at pp.497-498 (paragraph 8):

> *8. The terms in which an FOI access application is framed set the parameters for an agency's response under Part 3 of the FOI Act, and in particular set the direction of the agency's search efforts to locate all documents of the agency which fall within the terms of the FOI access request. The search for relevant documents is frequently difficult, and has to be conducted under tight time constraints. Applicants should assist the process by describing with precision the document or documents to which they seek access. Indeed the FOI Act itself makes provision in this regard with s.25(2) not only requiring that an FOI access application must be in writing, but that it must provide such information concerning the document to which access is sought as is reasonably necessary to enable a responsible officer of the agency to identify the document.*

14. Moreover, an applicant cannot unilaterally extend the terms of an FOI access application at the stage of external review: see *Re Robbins and Brisbane North Regional Health Authority* (1994) 2 QAR 30 at p.36, paragraph 17. I find that the scope of the applicants' FOI access application did not extend to documents pertaining to Aristocrat Leisure Industries Pty Ltd, and that the CJC was under no obligation to locate and deal with any documents in its possession or control which answered that description.

15. A second issue arose as to the scope of the applicants' FOI access application. It concerned several documents which contain reference to the applicants in discrete segments of the documents, while the balance of the documents deal with other unrelated persons or corporations. For example, one lengthy document in issue is entitled "Diversification of Criminal Interests Within the N.S.W. Gaming Industry" and was prepared in March 1984 by investigative staff attached to the Superintendent of Licenses Office, NSW (according to the document identification system used by the CJC in dealing with the applicants' FOI access application, it is document 10 in Schedule 17, i.e., document 17/10). The report is essentially a collection of intelligence data on a number of individuals and corporations. The applicants have been given access to the segments of document 17/10 which concern or refer to them. The balance of the document consists of intelligence data on persons or corporations which are unrelated to the applicants.

16. The CJC has taken the position that discrete segments of documents which deal with persons or corporations unrelated to the applicants fall outside the scope of the applicants' FOI access application, or, alternatively, are exempt from disclosure to the applicants under s.44(1), s.45(1)(c), s.46(1)(b) and (in some instances) s.38 of the FOI Act. On 26 June 1996, the Deputy Information Commissioner wrote to the applicants' solicitor seeking:

> *... your clients' response to a proposal that they consent to the reframing of the relevant FOI access application so that there is no doubt that the words "access to all documents pertaining to Leonard Hastings Ainsworth and/or Ainsworth Nominees Pty. Ltd ..." are able to be interpreted as "all documents in so far as they pertain to Leonard Hastings Ainsworth and/or Ainsworth Nominees Pty Ltd ...".*
>
> *Such an interpretation will have the effect that matter which is clearly extraneous to your clients, such as matter that refers to other persons unrelated to your client, will not have to be dealt with by the Information Commissioner in his reasons for decision. If the Information Commissioner must deal with that extraneous matter in his reasons for decision, then this will involve consideration of the application of a broader range of exemption provisions under the* [FOI Act] *than are presently in issue, and delay even further the finalisation of the Information Commissioner's reasons for decision.*

17. By letter dated 8 August 1996, the applicants' solicitor informed me that one of his clients, Mr L H Ainsworth, was prepared to consent to the reframing of the FOI access application as proposed, but that his other client, Ainsworth Nominees Pty Ltd (now Aristocrat Leisure Industries Pty Ltd), was not prepared to so consent. I consider that the natural and ordinary meaning of the words used in the relevant FOI access application (see paragraph 1 above) is apt to embrace the whole of a document that contains information pertaining to the applicants only in respect of a discrete segment or segments of the document, and that, given the stance taken by one of the applicants (*cf.* s.27(3) of the FOI Act), I am obliged to treat documents of that kind as falling within the scope of the relevant FOI access application.
That stance by one of the applicants has necessitated careful consideration of a substantial amount of information that is unrelated to the applicants, so as to satisfy myself whether or not it qualifies for exemption. My findings in respect of that information are set out at paragraphs 139-151 below.

'Sufficiency of search' issues

18. During the course of this external review, the applicants have contended that the CJC failed to locate, and deal with, all documents in its possession, or under its control, which fall within the terms of their FOI access application dated 2 November 1993. That contention was not without justification since, as a result of further searches and inquiries undertaken during the course of the review, the CJC has located further responsive documents, and, where no claim for exemption has been made by the CJC or by third parties, the applicants have been given access to those documents. However, the applicants assert that they are still not satisfied that all responsive documents in the possession or control of the CJC have been identified and dealt with.

19. I explained the principles applicable to 'sufficiency of search' issues in *Re Shepherd and Department of Housing, Local Government & Planning* (1994) 1 QAR 464 at pp.469-470 (paragraphs 18 and 19):

> *18. It is my view that in an external review application involving 'sufficiency of search' issues, the basic issue for determination is whether the respondent agency has discharged the obligation, which is implicit in the FOI Act, to locate and deal with (in accordance with Part 3, Division 1 of the FOI Act) all documents of the agency (as that term is defined in s.7 of the FOI Act) to which access has been requested. It is provided in s.7 of the FOI Act that:*
>
> > "'**document of an agency**' or '**document of the agency**' means a document in the possession or under the control of an agency, or the agency concerned, whether created or received in the agency, and includes -
> >
> > (a) a document to which the agency is entitled to access; and
> >
> > (b) a document in the possession or under the control of an officer of the agency in the officer's official capacity;"
>
> *19. In dealing with the basic issue referred to in paragraph 18, there are two questions which I must answer:*
>
> *(a) whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency (as that term is defined in s.7 of the FOI Act);*
>
> *and if so,*
>
> *(b) whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.*

20. The applicants have raised specific issues about the sufficiency of search by the CJC for particular documents, and have persisted with a general complaint about the sufficiency of search by the CJC for documents responsive to their FOI access application. I will deal first with the specific issues raised by the applicants.

Specific issues

(1) Documents prepared by the principal author of the GM Report.

21. Following the mediation conference conducted with the participants in July 1994, the applicants' solicitor forwarded a letter dated 27 July 1994 setting out some of the grounds which the applicants had for believing that there must be further documents, falling within the scope of the applicants' FOI access application, in the possession or control of the CJC. That letter stated that: "... our clients would find it highly surprising if no diary notes, telephone or other internal memoranda, or other record existed of and/or concerning the CJC's investigations and inquiries into our clients which may have led up to and formed part of the [GM Report], or consequently."

22. The person primarily responsible for the research and drafting of the GM Report was Mr Phillip Dickie. By the commencement of this external review, Mr Dickie had ceased to be employed as an officer of the CJC. When my staff made contact with him to request his attendance at a conference to make inquiries as to the existence and location of any further documents falling within the terms of the applicants' FOI access application, Mr Dickie indicated that he would respond to a formal requirement for his attendance. Accordingly, I issued a notice to Mr Dickie under s.85 of the FOI Act, requiring him to attend at my office to answer questions relevant to the 'sufficiency of search' issues which I was required to investigate.

23. Mr Dickie attended at my office in September 1994, when he was interviewed at length regarding the existence and location of documents responsive to the terms of the applicants' FOI access application, which had been obtained or created in the course of preparation of the GM Report. The searches undertaken by the CJC to that point in an effort to locate documents responsive to the applicants' FOI access application, and the description of the documents already located, were discussed with Mr Dickie. Mr Dickie recalled visits to a number of agencies during the course of his preparation of the GM Report. He referred to the existence of documents, consisting of notes made during those visits, which were held in what he described as "suspended" or "hanging" files - so described because of their physical appearance as being a series of manilla folders suspended from a drawer in a desk in the office which Mr Dickie occupied at the CJC. Mr Dickie was certain that all documents located in his office were removed at the time of his departure from the CJC, and this was confirmed by Mr George (who then held the position of Executive Officer, Corporate Services Division, at the CJC, and who was principally responsible for conducting the searches for documents falling within the scope of the applicants' FOI access application).

24. I required the CJC to undertake further searches in an effort to locate the "hanging" files, and identify any documents contained in them which refer to the applicants. The CJC subsequently reported on those investigations in its letter to me dated 28 November 1994 (a copy of which was provided to the applicants' solicitor, subject to the deletion of references to matter claimed to be exempt). The CJC reported that, while a considerable amount of material was collated in the "hanging" files, very little of it pertained to the applicants (noting that Mr Dickie's inquiries dealt with the gaming machine industry generally, not merely with the applicants). The CJC identified additional documents, responsive to the terms of the applicants' FOI access application, in a schedule (numbered as Schedule 21) attached to the CJC's letter dated 28 November 1994. A number of documents, including copies of newspaper and magazine articles, results of searches conducted through the former National Companies and Securities Commission, and some handwritten notes, were disclosed to the applicants. Claims for exemption were made by the CJC in respect of the balance of the documents described in Schedule 21, and those documents that are still in issue are dealt with later in these reasons for decision.

25. Prior to his employment by the CJC, Mr Dickie had, through his work as an investigative journalist, acquired various books and reports dealing with the gaming machine industry in Australia and overseas (and, more generally, with organised crime), which, although referred to in the preparation of the GM Report (several are cited in the GM Report), remained his personal property which he took with him on his departure from the CJC. Whether or not those books and reports ever became documents of an agency while being used by Mr Dickie when he was employed as an officer of the CJC (*cf. Re Holt and Education Queensland* (1998) 4 QAR 310 at pp.316-317, paragraphs 21-22), there is no doubt that,

once Mr Dickie ceased his employment with the CJC, the books and reports comprising his

personal property, which he took away with him, did not fall within the definition of "document of an agency" in s.7 of the FOI Act, and were not subject to the application of the FOI Act: see *Re Holt* at pp.317-318, paragraphs 24-27.

26. I am satisfied that, apart from the documents described by the CJC in schedule 21, no additional documents of the kind suggested by the applicants (in the passage set out in paragraph 21 above) now exist in the possession, or under the control, of the CJC. I am also satisfied that the searches and inquiries made by the CJC in that regard (including those undertaken at the behest of my office during this review) have been reasonable in all the circumstances of this case.

(2) Research volumes on the gaming industry obtained from other authorities

27. By letter dated 11 October 1994, the applicants' solicitor asserted that the CJC had failed to identify the following documents (the first five of which, he asserted, a NSW police officer had delivered to Mr Dickie, or posted to the CJC, in March 1990):

(1) "The Organisation and Overlapping of Legal and Illegal Gaming Industries - a Licensing and Economic Analysis" (being a document comprising four volumes);

(2) "An Overview of Gaming in Nevada, USA";

(3) "Annual Report of the Licensing Investigation Section, 1984-1985, Superintendent of Licences Office NSW";

(4) "Diversification of Criminal Interests Within the NSW Gaming Industry, Interim Report, 1984";

(5) "A Bundle of Documents Relating to Gambling in Queensland and a Background to Gaming Procedures in Nevada, USA, Licensing Investigative Unit, NSW";

(6) "Report of the Board of Inquiry into Poker Machines, Victoria, November 1983 (Mr M. Wilcox, QC)"; and

(7) "Allegations by Messrs. L.H. Ainsworth and E.P. Vibert re Conduct of Police, NSW Ombudsman's Report No. 2, 14 October, 1986".

28. The CJC responded in a letter dated 8 November 1994 (a copy of the relevant parts of that letter was provided to the applicants' solicitor under cover of my letter dated 14 December 1994) which explained that documents (3), (4) and (7) above had in fact been identified and dealt with in the CJC's decision under review as documents 14/18, 17/10 and 17/4, respectively. I am satisfied that that is correct.

29. In the last three paragraphs on p.4 of a letter to me dated 10 January 1995, the applicants' solicitor argued that document (6) above (the Wilcox Report), and any other document referred to in the bibliography to the GM Report which contained a reference to his clients -

(a) must of necessity have merged with and become an integral part of the GM Report; or

(b) should be at least under the control, if not in the possession, of the CJC.

30. I do not accept that contention (a) correctly states the effect of including, in a bibliography, reference to the publications, or documentary sources, consulted in the course of preparing a report. Furthermore, contention (b) is too broad an assertion to be correct. In the course of researching a publication, an officer of the CJC may examine a particular book or report held in a public or private library, or held by an interstate agency, and make an accurate citation of that particular book or report, without that book or report ever becoming a "document of the agency" (i.e., of the CJC) for the purposes of the FOI Act. To be subject to the application of the FOI Act, a document must be in the possession, or under the control, of an agency, in the sense explained in *Re Price and Nominal Defendant* (Information Commissioner Qld, Decision No. 99003, 30 June 1999, unreported) at paragraph 18.

31. In its letter dated 8 November 1994, the CJC referred to the fact that Mr Dickie owned his own copy of the Wilcox Report, which he took with him when he ceased employment with the CJC. I am satisfied (for the reasons indicated in paragraph 25 above) that Mr Dickie's copy of the Wilcox Report is not a document of the CJC, and is not subject to the application of the FOI Act. In its written submission dated 5 June 1995, the CJC acknowledged that it held a copy of the Wilcox Report in the CJC Library. The CJC explained that it did not have a practice of registering publicly available reports, such as the Wilcox Report, on its computerised records management system (Recfind), or of including Library reference material in its document search processes for freedom of information applications, and hence the Wilcox Report was not identified and dealt with in the CJC's decisions in response to the relevant FOI access application. I am sure that the applicants have ready access to a copy of the Wilcox Report. I consider that their purpose in raising a specific 'sufficiency of search' issue in respect of it, was to make a point about the adequacy of the CJC's efforts to identify and deal with all documents responsive to the terms of the applicants' FOI access application, given that the CJC did not identify and deal with the Wilcox Report, which was one of the primary sources relied upon for the GM Report, and for the material adverse to the applicants that appears in the GM Report.

32. I am satisfied that the CJC's library copy of the Wilcox Report is a "document of the agency", and subject to the application of the FOI Act. However, I am also satisfied that the Wilcox Report is a document that is reasonably available for public inspection at the State Library of Queensland (I have made specific inquiries to confirm that fact), and probably in several other public libraries. I consider that the CJC is entitled to refuse access, under the FOI Act, to its copy of the Wilcox Report, pursuant to s.22(c) of the FOI Act, which provides:

> ***22.*** *An agency or Minister may refuse access under this Act to—*
>
> ...
>
> *(c) a document that is reasonably available for public inspection in the Queensland State Archives or a public library; ...*

However, the CJC has indicated that it is prepared to make its library copy of the Wilcox Report available for inspection by the applicants, if they so desire.

33. The CJC also explained (in its letters dated 8 November 1994 and 17 March 1995) that the documents numbered (1) (at least in respect of Volumes 3 and 4 thereof), (2) and (5) in paragraph 27 above, were returned to the NSW Police Service, at the request of the NSW

Police Service, on 28 January 1994. The applicants' solicitor queried the coincidence of this timing, since 28 January 1994 was also the date on which the initial decision in response to the relevant FOI access application was made on behalf of the CJC by Mr George. I consider that the coincidence of timing was satisfactorily explained in the statutory declaration of Mr George (whose evidence I accept) that was attached to the CJC's letter to my office dated 19 June 1996. In summary, Mr George explained that an officer of the NSW Police Service contacted the CJC on 6 and 7 January 1994 seeking the return of documents which the NSW Police Service had provided to the CJC in March 1990 (for its assistance in the preparation of the GM Report). The NSW Police Service required the documents to assist it in respect of an investigation being undertaken into a complaint lodged with the NSW Ombudsman by solicitors acting for Mr Leonard Ainsworth. The documents in question had not been registered on Recfind, but were located in Mr Dickie's office. However, volumes 1 and 2 of document (1) (identified in paragraph 27 above) could not be found despite extensive searches, and the CJC was unable to return those volumes to the NSW Police Service.

34. The CJC also asserts that documents (1), (2) and (5) identified in paragraph 27 above fall outside the scope of the relevant FOI access application because they do not mention either of the applicants. Mr George travelled to Sydney on 2 June 1995 and arranged with the NSW Police Service to examine documents (2) and (5), together with volume 4 of document (1) (volume 3 being unavailable). In its written submission dated 5 June 1995, the CJC asserted that "Mr George's examination of these documents did not reveal any reference to Leonard Hastings Ainsworth or Ainsworth Nominees Pty Ltd, or, for that matter, to the name Ainsworth in any of the documents", and hence that the documents fell outside the scope of the relevant FOI access application. Mr George was unable to verify that volumes 1, 2 and 3 of document (1) contained no mention of either of the applicants.

35. I consider it unnecessary to rule on this issue. I am satisfied on the material before me that documents (1), (2) and (5) identified in paragraph 27 above remained the property of the NSW Police Service, which had been provided to the CJC on long-term loan to assist the CJC in its preparation of the GM Report (and which were probably retained for some years thereafter for reference purposes, in respect of the litigation that followed the publication of the GM Report), and which the CJC was obliged to return to the NSW Police Service on request. Having been returned to their lawful owner prior to the CJC giving its decision in response to the applicants' FOI access application, those documents were not "documents of the agency" (i.e., of the CJC) for the purposes of the application of the FOI Act (see *Re Holt* at pp.317-318, paragraphs 24-26).

36. It is arguable that there are some grounds for believing that volumes 1 and 2 of document (1) still exist in the possession of the CJC (since there is evidence to indicate that they were provided to the CJC, and the CJC has been unable to locate them and return them to the NSW Police Services, as requested). However, I am satisfied that the CJC has made all the searches it could reasonably be required to make in an effort to locate those volumes. If the volumes were to be located, they remain the subject of an unsatisfied request for their return to the NSW Police Service, and the CJC would be obliged to comply with that request rather than dealing with the volumes under the FOI Act.

(3) "Notes of interview, Dickie and Detectives Hanrahan and Clark..."

37. In his letter to my office dated 11 October 1994, the applicants' solicitor asserted that:

> *... on 10 May 1990, Sir Max Bingham QC* [the then Chairman of the CJC] *wrote to the then NSW Commissioner of Police, Mr Avery, seeking a copy of a transcript of interview taken by NSW Police Task Force "II". A copy of that transcript was sent to the CJC by facsimile transmission on 14 May 1990 by then Sergeant P Favret of the NSW Commissioner's Office.*
>
> ...
>
> *The documents in question are listed in the References of the* [GM Report] *as "Notes of Interview, Dickie and Detectives Hanrahan and Clark, undated ... .*

38. I have examined the GM Report and it contains no such reference. The only reference in the GM Report with similar wording appears as reference/footnote (110) on p.103, which is in these terms: "Notes of interview, Casey and Detectives Hanrahan and Clark, undated, p.3.".
Reference/footnote (110) is cited in Appendix Two of the GM Report which deals with the CASPALP investigation (the name "Casey" is that of the Leader of the Australian Labor Party in Queensland's Legislative Assembly in 1980). Moreover, the text of document 2/4 (which has been disclosed to the applicants subject to the deletion of some matter claimed to be exempt) makes it quite clear that the document requested by Sir Max Bingham QC on 10 May 1990, and faxed to the CJC by Sergeant Favret on 14 May 1990, was a transcript of interview between Detectives Hanrahan and Clark of NSW Police Task Force Two, and Mr Edmund Casey, concerning the CASPALP investigation. In a letter to me dated 9 October 1995, the applicants' solicitor advised that the applicants no longer wished to pursue access to documents relating solely to the CASPALP investigation.

39. By letter dated 8 November 1994, the applicants' solicitor provided me with a list describing some 26 documents obtained by his clients under the NSW FOI Act following the decision of the NSW Court of Appeal in *Perrin's case*. The list was provided to me on the basis that neither the list itself, nor its contents, were to be disclosed to the CJC. Despite requests from me or my staff, the applicants have declined to provide me with copies of any documents on that list, apart from the two documents referred to in paragraph 51 below.

40. In a letter to me dated 10 January 1995, the applicants' solicitor asserted that one of the documents on the aforementioned list (being a report by a NSW police officer) makes reference to the CJC's request for a copy of "a transcript of interview" and goes on to conclude in the terminology referred to in his letter dated 11 October 1994 (which was "Notes of Interview, Dickie and Detectives Hanrahan and Clark, undated ..."). The applicants' solicitor has not provided me with a copy of the relevant document from the aforementioned list, to enable me to verify the wording used. If it did refer to a transcript of interview between Dickie (rather than Casey) and Detectives Hanrahan and Clark, then I consider that, on the balance of the probabilities, it did so in error. Detectives Hanrahan and Clark would have had no occasion to compile a transcript of interview with Mr Dickie, and if Mr Dickie ever did take notes of an interview conducted jointly with Detectives Hanrahan and Clark (there is no material before me which suggests that such an interview ever took place), then it is inherently unlikely that the CJC would be asking the NSW Police Service for a copy of Mr Dickie's notes of the interview. The second last paragraph on page

2 of the letter from the applicants' solicitor dated 10 January 1995 suggests that the transcript

that is sought is of an interview held in 1982. If so, the reference must be to the interview in 1982 with Mr Casey. The CJC did not exist in 1982, and Mr Dickie would not have been interviewing Detectives Hanrahan and Clark, for the purposes of the GM Report, in 1982.

41. I find that there are no reasonable grounds for believing that the CJC has possession or control of a document answering the description "Notes of interview, Dickie and Detectives Hanrahan and Clark, ..", as set out in letters from the applicants' solicitor dated 11 October 1994 and 10 January 1995.

42. I also note that, in his letter dated 11 October 1994, the applicants' solicitor asserted that:

> *It is well known, including in some cases publicly, that other documents have been acquired by or provided to the CJC of and concerning our clients - for example, reference is made to then media coverage in late 1990 concerning considerable volumes of material sent by "the Phantom Faxer".*
>
> *We have been unable to identify this material from the information provided to us by the CJC to date under the current FOI application.*

However, I am satisfied that all documents in the possession or control of the CJC relating to the "Phantom Faxer" episode were identified in Schedule 7 to Mr George's initial decision on behalf of the CJC (and indeed no claim for exemption was made in respect of them).

General 'sufficiency of search' issue

43. When 'sufficiency of search' issues were raised in the first conference between the participants, the CJC was requested (by a letter from me dated 1 August 1994) to provide a detailed written account of the searches and inquiries undertaken to locate documents falling within the terms of the relevant FOI access application. The CJC's response dated 9 September 1994 was provided to the applicants' solicitor. The search processes undertaken by the CJC have been scrutinised by my staff, and cross-checked by a careful examination of the contents of the documents in issue (including new documents located by the CJC during the course of the review) for the purpose of identifying any references to documents, or CJC files, that had not been identified and dealt with in the CJC's responses to the relevant FOI access application. A number of additional responsive documents were located during the course of the review. Any specific 'sufficiency of search' issues raised by the applicants' solicitor have been followed up, as outlined above.

44. Notwithstanding the efforts of my staff and staff of the CJC, the applicants have persisted in a general complaint that they are not satisfied that the CJC has identified and dealt with all documents in its possession or control that fall within the terms of the relevant FOI access application. Correspondence from the applicants' solicitor hinted at the existence of documents obtained by the applicants under the NSW FOI Act, or otherwise, which indicated that the CJC had further documents, responsive to the terms of the applicants' FOI access application dated 2 November 1993, which had not been identified and dealt with. However, the applicants were not prepared to provide me with copies of those documents (see paragraph 39 above), or particulars of the additional documents they claimed must exist in the possession or control of the CJC, or particulars of the evidence which afforded a reasonable basis for their belief in that regard. The attitude of the applicants to the

'sufficiency of search' issue was exemplified in this passage of a letter from the applicants' solicitor dated 27 March 1995:

> *... our clients (and quite reasonably in our view) do not consider it is for them to identify the documents/information held by the CJC; nor does it behove the CJC, or anyone else for that matter, to require our clients to continue to "show their hand" on the issue as to whether the CJC has made full and proper disclosure as it is obliged to do under the FOI legislation.*

45. In a letter to me dated 4 May 1995, the applicants' solicitor asserted:

> *Our detailed references to various documents and material in our clients' possession in the past have simply drawn the CJC's response (where we get any response) to each such illustration; this process has failed to adequately address the wider issue of the sufficiency/adequacy of the CJC's disclosure to date. Our clients continue to remain of the belief that any further disclosure of specific documents to the CJC will do nothing more than draw piecemeal responses to each such disclosure ... .*
>
> *... It is pernicious to our clients entire understanding and appreciation of the FOI process, including this review that, somehow, they are the ones who are charged with the obligation for a full and unfettered disclosure in their own application.*

46. I consider that the applicants' understanding and appreciation of the FOI process may be deficient so far as concerns the practical exigencies of the pursuit of 'sufficiency of search' issues. It is true that, in accordance with s.81 of the FOI Act, the CJC carries the onus of establishing that the Information Commissioner should give a decision adverse to the applicants. However, s.25(2) of the FOI Act requires an applicant for access to provide such information concerning a document sought in an access application as is reasonably necessary to enable the agency to identify the document. In a 'sufficiency of search' case, where an applicant asserts that the respondent agency has failed to identify a requested document, and the applicant has information that will enable the agency to identify the document so that it can conduct appropriate searches, it is incumbent on the applicant to provide that information to the authorised decision-maker (be it an agency decision-maker on internal review, or the Information Commissioner on external review). Moreover, it is a practical consequence of the issues to be determined in 'sufficiency of search' cases (see paragraph 19 of *Re Shepherd* - quoted at paragraph 19 above) that applicants will ordinarily need to explain fully their grounds for believing that the respondent agency holds additional responsive documents, and to disclose any relevant documentary or other evidence which tends to support the existence of reasonable grounds for such a belief. If the information provided to me by the respondent agency supports a finding that the questions posed in paragraph 19 of *Re Shepherd* should be answered in favour of the agency, and I am unable, independently, to identify any further relevant avenues of search or inquiry that an agency could reasonably be required to undertake, then, in the absence of evidence to the contrary from the applicant, there will be only one course open to me - to answer the aforementioned questions in favour of the agency. (Moreover, there is arguably a moral obligation on a person who is making a claim on the resources of two publicly-funded agencies (the CJC and the Office of the Information Commissioner) to undertake extensive searches and inquiries to locate requested documents, to provide as much assistance as possible to ensure that such searches and inquiries are as well directed as possible, and that resources that could be available to serve the needs of other citizens are not inefficiently diverted.)

47. On one level, a request for all documents pertaining to two named applicants seems reasonably precise. However, the practical reality is that, given—

(a) the fact that the applicants intended to seek access to documents which pertained to them only in the sense of containing some segments referring to them in the course of dealing with a broad subject matter, and a broad range of other individuals and corporations; and

(b) the inherent limitations of most records management, or document tracking, systems;

a good deal more information was probably necessary to enable the identification of all responsive documents. While there was an element of the speculative in the relevant FOI access application (i.e., the applicants were anticipating the disclosure of documents about them, the existence of which they suspected, but of which they had no actual knowledge), any specific documents which the applicants believed to be in the possession or control of the CJC should have been described in as much detail as possible, to assist the CJC's search efforts.

48. The limitations of the CJC's records management/document tracking system were outlined in the CJC's letter to me dated 19 June 1996 (a copy of which was provided to the applicants' solicitor under cover of a letter from the Deputy Information Commissioner dated 26 June 1996). As at that time, the Recfind database comprised information on nearly 330,000 documents on 65,000 files. Recfind was not a text retrieval system. A precis only of pertinent information was recorded in document abstracts, which permitted a summary of a document limited to five lines each of 65 characters, i.e., a maximum of 325 characters. Document abstracts usually comprised such details as to whom a document was directed and its general subject matter. Thus, a document might contain reference to the name Ainsworth, but if the document did not relate specifically to Ainsworth, or the person who prepared the abstract did not consider the reference(s) to Ainsworth to be an essential part of the subject matter, the name Ainsworth may not be mentioned in the relevant document abstract or file title (as was found to be the case with several documents located during the course of this review), and hence the document or file would not be caught by text searches available in Recfind using the name "Ainsworth". As a backup to a records management system of that kind, an agency can also make inquiries of relevant personnel who might recall the type of files on which responsive documents might be located, and also check the contents of files whose titles indicate that their general subject matter is such that they might contain documents responsive to a particular access application. I am satisfied that the CJC has now made all searches and inquiries of that kind which could reasonably be expected of it, in an effort to locate documents responsive to the terms of the applicants' relevant FOI access application.

49. In a letter to the applicants' solicitor dated 4 April 1995, the Deputy Information Commissioner had requested that Mr Diercke obtain his clients' instructions on:

> *1. Whether your clients are prepared to provide me with copies of the documents referred to in your letter of 8 November 1994. To date, you have only provided me with a list describing those documents.*
>
> *2. Whether or not your clients are prepared to provide copies of those documents, I request an indication as to how my office is expected to*

progress the 'sufficiency of search' issue without providing the CJC with

> *particulars of documents in respect of which further searches and inquiries are considered to be warranted. I am presently unable to see any practicable way to progress this issue, without providing such particulars. The CJC claims to have now made further searches with a view to locating all documents responsive to the terms of your clients' FOI access application. I have no power to unilaterally search the CJC's premises, and if the CJC permitted me to undertake a supervised search, I would have to explain what I was looking for, so I could be guided through the CJC's record-keeping systems. Nor is it practicable to question the CJC on this issue without providing particulars of documents which are alleged to be in the possession or control of the CJC, but which have not been identified and dealt with in the CJC's response to your clients' FOI access application. Your clients do not seem to appreciate just how frustratingly impractical is the stance which they are presently adopting on this issue.*

50. While, in his response dated 5 April 1995, the applicants' solicitor said that his clients rejected the proposition that they were adopting a stance which was "frustratingly impractical", he continued:

> *They* [the applicants] *accept the Information Commissioner's limitations and/or the impracticality of searching the CJC's premises. However, all our clients are endeavouring to do is put on record that they do not believe the CJC has made full and adequate disclosure of all relevant documentation and material which are or may have been in its possession at the time of or subsequent to the subject application.*

51. The applicants' solicitor later provided me with two documents from the list referred to in paragraph 39 above, which were able to be provided to the CJC; however, those documents were provided in support of the applicants' final submissions in relation to certain exemptions claimed by the CJC, and they do not assist with respect to 'sufficiency of search' issues. Without assistance of the kind requested in the Deputy Information Commissioner's letter dated 4 April 1996, I am unable to take the applicants' generalised complaint about the 'sufficiency of search' by the CJC any further.

52. On the material before me, I am not satisfied that there are reasonable grounds to believe that any further documents (i.e., other than the documents which have been identified and dealt with in the decisions made on behalf of the CJC, and during the course of this external review), which are responsive to the terms of the relevant FOI access application, now exist in the possession or control of the CJC.

53. Moreover, in respect of the second question posed in paragraph 19 of *Re Shepherd* (see paragraph 19 above), I am satisfied that the searches and inquiries made by the CJC (including those made at the request of my office during the course of this review) in an effort to locate all documents in the possession or control of the CJC, which fall within the terms of the relevant FOI access application, have been reasonable in all the circumstances of this case.

Claims for exemption under s.50(c)(i) of the FOI Act - Parliamentary privilege

54. The CJC claims that some matter in issue is subject to Parliamentary privilege and therefore qualifies for exemption under s.50(c)(i) of the FOI Act, which provides:

> ***50.*** *Matter is exempt matter if its public disclosure would, apart from this Act and any immunity of the Crown—*
>
> ...
>
> *(c) infringe the privileges of—*
>
> *(i) Parliament; ... .*

55. The following matter is claimed to be exempt under s.50(c)(i) of the FOI Act:

(a) document 14/7 - titled "Response to [Parliamentary Criminal Justice] Committee [PCJC] Queries of 19 July 1990";
(b) document 22/6 - a letter dated 17 August 1990 from the Chairman of the CJC to the Chairman of the PCJC;
(c) document 8/49 - a letter dated 7 January 1991 from the Chairman of the CJC to the Chairman of the PCJC;
(d) parts of document 18/1 - an internal memorandum dated 7 July 1993 from the CJC's Director of Intelligence to the CJC's Chairman, together with a report (and annexure) titled "Report on Criminal Justice Commission's Holdings on Leonard Hastings Ainsworth". (The claim for exemption under s.50(c)(i) is confined to the last sentence of the second full paragraph on page 2 of the report, and to the last paragraph on page 6 of the annexure to the report).

56. It appears that the Parliamentary Criminal Justice Committee (PCJC) conducted a review of the circumstances surrounding the production by the CJC of the GM Report. The matter claimed to be exempt from disclosure under s.50(c)(i) of the FOI Act, as described above, relates to communications between the CJC and the PCJC in respect of that review.

57. Article 9 of the *Bill of Rights 1688* provides *"that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament"*. By virtue of s.40A of the *Constitution Act 1867* Qld, the privilege in Article 9 is a privilege of the Queensland Legislative Assembly, its members and committees. The PCJC is a Committee of Parliament and is therefore entitled to all of the privileges enjoyed by Parliament.

58. Standing Order 206 of the Legislative Assembly, made pursuant to s.8 of the *Constitution Act*, provides:

> *The evidence taken by a Select Committee and documents presented to such Committee which have not been reported to the House shall not, unless authorised by the House, be disclosed, published or referred to in the House.*

59. An unauthorised disclosure of 'proceedings in Parliament' will constitute an infringement of the privileges of Parliament, and hence, if the matter in issue can properly be characterised as a 'proceeding in Parliament', it will be exempt matter under s.50(c)(i) of the FOI Act, unless its public disclosure has been authorised by Parliament or by the PCJC.

60. Section 3 of the *Parliamentary Papers Act 1992* Qld defines 'proceedings in Parliament' as follows:

> ***3.(1)*** *This section applies for the purposes of—*
>
> *(a) article 9 of the Bill of Rights (1688) as applying to the Queensland Parliament; and*
>
> *(b) this Act.*
>
> ***(2)*** *All words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the House or a committee are "**proceedings in Parliament**".*
>
> ***(3)*** *Without limiting subsection (2), "**proceedings in Parliament**" include—*
>
> *(a) giving evidence before the House, a committee or an inquiry; and*
>
> *(b) evidence given before the House, a committee or an inquiry; and*
>
> *(c) presenting or submitting a document to the House, a committee or an inquiry; and*
>
> *(d) a document laid before, or presented or submitted to, the House, a committee or an inquiry; and*
>
> *(e) preparing a document for the purposes of, or incidental to, transacting business mentioned in paragraph (a) or (c); and*
>
> *(f) preparing, making or publishing a document (including a report) under the authority of the House or a committee; and*
>
> *(g) a document (including a report) prepared, made or published under the authority of the House or a committee.*
>
> ***(4)*** *If a document is dealt with in a way that, under an Act or the rules, orders, directions or practices of the House, the document is treated or accepted as having been laid before the House for any purpose, then, for the purposes of this Act, the document is taken to be laid before the House.*

61. On the basis of my examination of documents 14/7, 22/6 and 8/49, I am satisfied that each was prepared for presentation or submission to the PCJC by the CJC. Further, the PCJC has confirmed that it received those documents. I am therefore satisfied that each document is a 'proceeding in Parliament' for the purposes of s.3(3)(c) of the *Parliamentary Papers Act*, and that the disclosure or publication of each, without the authority of Parliament or the PCJC,

would infringe the privileges of Parliament. The PCJC has confirmed (in a letter to me dated 12 August 1994, and in a letter exhibited to the statutory declaration of Bronwyn Springer dated 5 June 1995) that it has not authorised the disclosure or publication of those documents, and that the documents have not been tabled in Parliament. Accordingly, I am satisfied that documents 14/7, 22/6 and 8/49 are subject to parliamentary privilege, and qualify for exemption under s.50(c)(i) of the FOI Act.

62. The claim for exemption under s.50(c)(i) in respect of parts of document 18/1 arises not on the basis that document 18/1 itself has been presented or submitted to the PCJC, but on the basis that it contains references to the contents of document 14/7 (which document has been presented or submitted to the PCJC). I have reviewed the information contained in document 18/1 which is claimed to be subject to Parliamentary privilege. I am satisfied that disclosure of that information would not only disclose information that is contained in document 14/7, but would also disclose the fact that that information has been extracted from document 14/7 (which is a document subject to Parliamentary privilege, the publication or disclosure of which has not been authorised by Parliament or the PCJC). Accordingly, I am satisfied that the relevant parts of document 18/1 qualify for exemption under s.50(c)(i) of the FOI Act.

63. I find that documents 14/7, 22/6 and 8/49, and the parts of document 18/1 described in parentheses in paragraph 55(d) above, are subject to Parliamentary privilege and have not been publicly disclosed, and that they therefore comprise exempt matter under s.50(c)(i) of the FOI Act.

Claims for exemption under s.42(1)(b) of the FOI Act - confidential source of information

64. Section 42(1)(b) of the FOI Act provides:

> ***42.(1)*** *Matter is exempt matter if its disclosure could reasonably be expected to—*
>
> *...*
>
> *(b) enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained; ...*

65. The matter remaining in issue which is claimed by the CJC (and by one of the third parties) to be exempt matter under s.42(1)(b) of the FOI Act consists of identifying references to one of the third parties which have been deleted from the following documents (that have been disclosed in part to the applicants):

- document 2/1A - a memorandum dated 10 January 1990 from the General Counsel of the CJC to the Director, Research and Co-ordination Division, of the CJC;
- document 2/1B - a letter dated 8 February 1990 from the Chairman of the CJC to the Chairman of the State Drug Crime Commission of NSW;
- document 2/1C - a letter dated 16 February 1990 from the Chairman of the State Drug Crime Commission of NSW to the Chairman of the CJC;

- document 2/3 - a memorandum dated 13 May 1991 from Mr P. Dickie, Special Advisor, of the CJC to the General Counsel of the CJC - re information supplied by NSW Police;

- document 2/4 - a letter dated 21 May 1991 (and attachments) from the General Counsel of the CJC to Superintendent W S Molloy (NSW Police) - response to facsimile message of 2/4/91; and

- document 14/11 - a memorandum dated 8 February 1990 from Mr P Dickie to the Chairman of the CJC - re poker machines.

Likewise, identifying references to the relevant third party which appear in the following parts of document 18/1 (described at paragraph 55(d) above) are claimed to be exempt under s.42(1)(b):

- the ninth and tenth lines, and the first three words in the eleventh line, of the second full paragraph on p.2 of the report; and
- the name of the relevant third party where it appears in lines 3, 6, 7, 9 and 14 of the second paragraph on page 5 of the annexure to the report.

66. In *Re McEniery and Medical Board of Queensland* (1994) 1 QAR 349, at pp.356-357, paragraph 16, I identified the following requirements which must be satisfied in order to establish that matter is exempt under s.42(1)(b) of the FOI Act:

(a) there must exist a confidential source of information;
(b) the information which the confidential source has supplied (or is intended to supply) must relate to the enforcement or administration of the law; and
(c) disclosure of the matter in issue could reasonably be expected to—
  (i) enable the existence of a confidential source of information to be ascertained; or
  (ii) enable the identity of the confidential source of information to be ascertained.

67. A "confidential source of information", for the purposes of s.42(1)(b), is a person who supplies information on the understanding, express or implied, that his or her identity will remain confidential: see *Re McEniery* at p.358, paragraphs 20-21. Relevant factors in determining whether there was an implied understanding of confidentiality are discussed at p.371, paragraph 50, of *Re McEniery*.

68. In a letter to me dated 7 February 1997, the relevant third party asserted:

> *I would like to record my strongest opposition to any release of my name in any capacity. The information given was given in confidence and I was told that under no circumstances would that become known to persons outside the CJC. Any disclosure would not only reveal this to be a major ethical inconsistency of the Commission but also provide a major area of concern to any person or organisation wishing to provide information to that organisation in the future.*

69. However, even assuming in the third party's favour that he was a confidential source at the time he supplied information, confidentiality may be lost with the passage of time, as I explained in *Re McEniery* at p.357:

> *17. ... some obvious points are worth making at the outset. In* Re Croom and Accident Compensation Commission *(1989) 3 VAR 441 at p.459, Jones J (President) of the Victorian Administrative Appeals Tribunal (the Victorian AAT) said of s.31(1)(c) of the Victorian FOI Act (which corresponds, though not precisely, to s.42(1)(b) of the Queensland FOI Act):*
>
> > "It is designed to protect the identity of the informer and has no application where that identity is known or can easily be ascertained independently of the document in question. ..."
>
> ...
>
> *18. The question of whether the identity of a source of information is confidential is to be judged as at the time the application of s.42(1)(b) is considered. Thus, if the identity of a source of information was confidential when the information was first communicated to a government agency, but the confidentiality has since been lost or abandoned, the test for exemption under s.42(1)(b) will not be satisfied. (See* Re Anderson and Department of Special Minister for State (No. 2)*, Commonwealth AAT, Deputy President Hall, No. N83/817, 21 March 1986, at p.36, paragraph 77;* Re Chandra and Department of Immigration and Ethnic Affairs, *Commonwealth AAT, Deputy President Hall, No V84/39, 5 October 1984, at p.21, paragraph 47).*

70. On the other hand, a mere assertion by an applicant for access that he/she knows the identity of the confidential source of information is not enough to undermine an otherwise legitimate claim for confidentiality. It is not the role of the Information Commissioner to confirm or dispel an applicant's suspicions or guesswork. Ordinarily, the applicant would need to demonstrate that confirmation of the identity of the alleged confidential source of information has been, or can readily be, obtained from an authoritative source (*cf. Re Bayliss and Queensland Health* (1997) 4 QAR 1 at pp.10-11, paragraph 32).

71. The applicants were able to demonstrate that the identity of the relevant third party was disclosed in the version of document 2/3 which was released to them (subject to deletions) by the CJC under the FOI Act. I am satisfied that that disclosure was unintentional on the part of the CJC, and occurred as a result of a clerical error. The CJC submitted that the inadvertent disclosure should be disregarded for the purpose of applying s.42(1)(b), relying upon the finding made by Deputy President McMahon of the Commonwealth Administrative Appeals Tribunal in *Re Boyle and Australian Broadcasting Corporation* (No. 92/322, 5 March 1993) at paragraph 23.

72. I find it unnecessary to rule on that issue, since I am satisfied that, quite apart from the inadvertent disclosure by the CJC, the identity of the relevant third party as a source of information supplied to the CJC to assist it in the preparation of the GM Report, has long ceased to be confidential *vis-à-vis* the applicants. Paragraph 2.16 of the CJC's submissions dated 5 June 1995 contains an admission that this source is named in public documents of

the CJC. I am satisfied that the identity of the relevant third party, as a source of information provided to the CJC, has been disclosed in documents obtained by the applicants under the NSW FOI Act following the decision of the NSW Court of Appeal in *Perrin's* case. The matter in issue in *Perrin's* case was the name(s) of the person(s) who provided information to the CJC (see *Perrin's* case at p.611 and p.628). The decision in *Perrin's* case was that this information was not exempt. In particular, I note that, by that means, the applicants have obtained a materially unedited copy of the document which is document 2/4 in the present review.

73. Accordingly, the relevant third party can no longer qualify as a confidential source of information, and I find that none of the matter identified in paragraph 65 above qualifies for exemption under s.42(1)(b) of the FOI Act. For like reasons, the identity of the source is not information of a confidential nature, and hence cannot satisfy the first element of the test for exemption under s.46(1)(b) of the FOI Act (which was an alternative claim for exemption put by the CJC in some instances).

74. The CJC has also claimed that the last sentence on p.2 of document 18/1 is exempt matter under s.42(1)(b). I am not satisfied that this exemption claim can be sustained. One of the sources is identified in the CJC's own evidence given in this review (which has been provided to the applicants) and the other falls within a group of sources described generally in the evidence reproduced at paragraph 87 below. In *Re Ferrier and Queensland Police Service* (1996) 3 QAR 350 at p.365 (paragraph 42), I said:

> *42. The QPS contends that organisations which communicated information to the Special Branch qualify for protection under s.42(1)(b) of the FOI Act, in that they are confidential sources of information. However, I consider it well known that law enforcement organisations co-operate in the exchange of information for law enforcement purposes. For example, I have already quoted above a passage from the Fitzgerald Report which publicly acknowledged the fact that the Special Branch was the usual QPS point of contact with ASIO (see paragraph 12 above). The CTS Charter also lists numerous law enforcement agencies to which dissemination of information is authorised. It is only reasonable to expect that reciprocal arrangements apply. I do not rule out the possibility that an organisation not normally expected to provide information to the QPS could be protected under this provision, or that (having regard to the circumstances of a particular investigation) extreme sensitivity could attach to the fact that a particular law enforcement agency was the source of particular information. However, I am not satisfied that s.42(1)(b) extends to the protection from disclosure of routine interchanges of information between law enforcement agencies of the kind evident in folios 25-26 and 34-37.*

I cannot see anything in the nature of the very general information recorded in the last sentence on p.2 of document 18/1 that might be sufficient to warrant a finding that the sources of information there referred to qualified as confidential sources of information for the purposes of s.42(1)(b) of the FOI Act.

Matter communicated in confidence/disclosure prejudicial to the effectiveness of law enforcement methods or procedures - claims for exemption under s.46(1)(b), s.38(b) and s.42(1)(e) of the FOI Act

75. This case has exemplified the difficulties that can arise in the application of the FOI Act when (even after significant concessions by both sides have reduced the number of documents in issue) hundreds of folios remain in issue, frequently with different segments of matter in issue on individual folios, and multiple exemption claims being made for each segment of matter in issue. In several instances, the CJC has added, or substituted, alternative exemption claims as the review has progressed. To save time and space in these reasons for decision, once I have found a particular document or segment of matter to be exempt, I have not addressed alternative exemption claims made in respect of it. I have also endeavoured, as far as practical, to make findings under the exemption provision which most clearly and straightforwardly applies to a particular document, or segment of matter, in issue.

76. The CJC has claimed exemption for intelligence information under both s.46(1)(b) and s.42(1)(e) of the FOI Act, and on a basis which seems essentially interchangeable. Moreover, in respect of intelligence information provided by law enforcement agencies of another government, the CJC's case could have been more straightforwardly put under s.38(b) of the FOI Act. (I note that some other documents obtained from interstate law enforcement agencies were found to be exempt under s.38(b) in the CJC's internal review decision, and that the applicants' written submissions briefly addressed s.38(a) and s.38(b) of the FOI Act. However, in respect of the documents found in the internal review decision to be exempt under s.38(b), the CJC subsequently agreed to disclose to the applicants the segments of information which pertained to the applicants. In its written submission dated 5 June 1995, the CJC abandoned reliance on the s.38(b) exemption in respect of those documents, and made alternative exemption claims under s.44(1) and s.45(1)(c) for the balance of the information in those documents, being information which does not pertain to the applicants.)

77. Section 46(1)(b) of the FOI Act provides:

> ***46.(1)*** *Matter is exempt if—*
>
> *...*
>
> *(b) it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*

78. The elements of s.46(1)(b) are discussed in some detail in my reasons for decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.337-342 (paragraphs 144-162, 167). In order to establish the *prima facie* ground of exemption under s.46(1)(b) of the FOI Act, three cumulative requirements must be satisfied:

(a) the matter in issue must consist of information of a confidential nature (see *Re "B"* at pp.337-338, paragraph 148, and at pp.306-310, paragraphs 71-73);

(b) that was communicated in confidence (see *Re "B"* at pp.338-339, paragraphs 149-153); and

(c) the disclosure of which could reasonably be expected to prejudice the future supply of such information (see *Re "B"* at pp.339-341, paragraphs 154-161).

If the *prima facie* ground of exemption is established, it must then be determined whether the *prima facie* ground is displaced by the weight of identifiable public interest considerations which favour the disclosure of the particular information in issue (see *Re "B"* at p.342, paragraph 167).

79. Section 38(b) of the FOI Act provides:

> ***38.*** *Matter is exempt matter if its disclosure could reasonably be expected to—*
>
> *...*
>
> *(b) divulge information of a confidential nature that was communicated in confidence by or on behalf of another government;*
>
> *unless its disclosure would, on balance, be in the public interest.*

80. As I explained in *Re Morris and Queensland Treasury* (1995) 3 QAR 1 at p.20 (paragraph 61):

> *61. When s.38(b) is contrasted with s.46(1)(b), it can be seen that its key elements, i.e., that the information in issue is of a confidential nature and that it was communicated in confidence, are in essence identical to the first and second requirements of s.46(1)(b) (save that the relevant communication must be made by or on behalf of another government). Section 38(b) contains no equivalent to the third requirement of s.46(1)(b) (i.e. that disclosure could reasonably be expected to prejudice the future supply of like information), but, like s.46(1)(b), s.38(b) is qualified by a public interest balancing test.*

81. The elements of s.46(1)(b) (three of which correspond to the elements that must be satisfied for matter to be exempt under s.38(b)) were fully addressed in the written submissions lodged on behalf of the applicants and the CJC, so I can see no basis on which the applicants might be disadvantaged if I consider the application of s.38(b). There is no doubt that I have power to do so (see s.88(1)(b) of the FOI Act) and the terms of s.88(2) of the FOI Act indicate that if it is established during the course of a review that a document is an exempt document, I have no power to direct that access to the document is to be granted. In practical terms, this means that, if I am satisfied on the material before me (including the contents of the matter in issue, which of course cannot be disclosed to the applicant for access during the course of a review: see s.87(1) of the FOI Act) that a document is an exempt document, I must make a finding to that effect, even if the particular claim for exemption made by the respondent agency could not be established.

82. The matter I am about to deal with was claimed by the CJC to be exempt under both s.46(1)(b) and s.42(1)(e) (and in one instance, under s.42(1)(b)). Section 42(1)(e) of the FOI Act provides:

> ***42.(1)*** *Matter is exempt matter if its disclosure could reasonably be expected to—*
>
> *...*
>
> *(e) prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law);*

83. The correct approach to the interpretation and application of s.42(1)(e) was explained in *Re "T" and Queensland Health* (1994) 1 QAR 386. The lawful method or procedure which the CJC asserts would be prejudiced by disclosure of matter in issue is identified in the CJC's evidence and submissions as co-operative sharing of information with law enforcement agencies of other governments.

84. It is well known that law enforcement agencies co-operate in the exchange of information for law enforcement purposes (*cf.* my comments in *Re Ferrier* at p.365, paragraphs 42-43). The apprehended prejudice to this method or procedure asserted in the CJC's submission would be occasioned by disclosure of information in contravention of the obligation of confidence imposed on the CJC in respect of sensitive law enforcement information communicated to it by a law enforcement agency of another government. Thus, the CJC's case for the application of s.42(1)(e) is in substance identical to its case for the application of s.46(1)(b) which, as I have explained above, transposes more straightforwardly to a case under s.38(b) of the FOI Act.

85. The documents, and segments of matter, in issue that are identified in paragraph 98 below were all communicated to the CJC by or on behalf of a law enforcement agency of another government. I am satisfied that each comprises information of a confidential nature. The information was not published or referred to in the GM Report. I am satisfied that it has the requisite degree of secrecy/inaccessibility to answer the description 'information of a confidential nature'.

86. The nature of the test for exemption posed by the words "communicated in confidence" was explained in *Re "B"* at pp.338-339 (paragraphs 149-153). The test inherent in the phrase "communicated in confidence" requires an authorised decision-maker under the FOI Act to be satisfied that a communication of confidential information has occurred in such a manner, and/or in such circumstances, that a need or desire, on the part of the supplier of the information, for confidential treatment (of the supplier's identity, or information supplied, or both) has been expressly or implicitly conveyed (or must otherwise have been apparent to the recipient) and has been understood and accepted by the recipient, thereby giving rise to an express or implicit mutual understanding that the relevant information would be treated in confidence.

87. In a statutory declaration dated 16 December 1994, Mr Paul Roger, Director of the Intelligence Division of the CJC, stated:

> *7.* [The CJC] *has expended substantial effort and resources in painstakingly building a network of contacts and persons or bodies who co-operate with the CJC, from whom intelligence information is drawn. The linchpin of that is the CJC being prepared, and being perceived as being prepared, to protect both the confidentiality of its sources (where appropriate) and of the information provided.*
>
> ...
>
> *10. ... Continued access to those databases* [i.e., of law enforcement agencies of other governments] *is on the basis of Memoranda of Understanding between the Commission and the respective agencies. Those arrangements require that all information provided between the respective agencies will be subject to various caveats upon release of the information. ... The disclosure of the information without the consent of the agency which controls the database will contravene the caveats which apply in respect of access to the database.*

88. In a statutory declaration dated 16 December 1994, Mr L J Wellings, an officer of the Queensland Police Service on secondment to the CJC, identified document 21/5 as a document obtained from the database of the Australian Bureau of Criminal Intelligence (ABCI). Mr Wellings stated that it is a condition of the CJC's access to the ABCI database that information from that database is not authorised to be released from the CJC without the prior written consent of the Director of ABCI. (In a later statutory declaration dated 5 June 1995, Mr Wellings annexed a copy of the standard caveat setting out the terms - as to confidential treatment and other matters - on which information is released from ABCI.) In paragraphs 6 and 7 of his statutory declaration dated 16 December 1994, Mr Wellings stated that the CJC had written to ABCI to ascertain whether ABCI had any objection to disclosure of document 21/5. The Chairman of ABCI had replied in writing refusing consent to the disclosure of the document.

89. I am satisfied that document 21/5 was communicated to the CJC pursuant to an express mutual understanding that it would be treated in confidence.

90. Documents 21/1 and 21/2 were obtained by the CJC from the Victoria Police (VP). The documents are not primarily concerned with either of the applicants, who receive only passing mention in the documents. Evidence has been given about these documents in the statutory declarations of Bronwyn Springer dated 16 December 1994, and of Keith George dated 5 June 1995. The documents were created by the Bureau of Criminal Intelligence of the VP. Documents of that kind are accorded exemption as a class under s.31(3) of the *Freedom of Information Act 1982* Vic. It does not follow that a document of that kind, in the hands of an agency subject to the Qld FOI Act, automatically qualifies for exemption under the FOI Act. However, it is a factor which indicates the expectation of confidential treatment that the VP would have in respect of such documents. The nature and sensitivity of the information contained in documents 21/1 and 21/2 leads me to conclude that the documents were supplied to the CJC pursuant to an implicit mutual understanding that they would be treated in confidence. The VP has refused consent to the disclosure of the documents.

91. Other segments of matter in issue described in paragraph 98 below comprise information communicated to the CJC by law enforcement agencies of other governments, the sensitivity of which (e.g., information concerning subjects of investigation) is such as to satisfy me that the information was communicated pursuant to an implicit mutual understanding that it would be treated in confidence.

92. I am satisfied that disclosure of the matter in issue described in paragraph 98 below could reasonably be expected to divulge information of a confidential nature that was communicated in confidence by or on behalf of another government, and hence that it is *prima facie* exempt under s.38(b) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.38(b).

93. In the written submissions lodged on behalf of the applicants, the following arguments were made as to why disclosure of the matter in issue to the applicants would, on balance, be in the public interest:

> *16. Disclosure of such information to the Applicants is, on balance, in the public interest because it will:*
>
> *(a) permit the Applicants to examine the source documents upon which the CJC acted in compiling and publishing its 1990 report;*
>
> *(b) permit the Applicants to seek to correct information which is inaccurate, incomplete, out of date, or misleading;*
>
> *(c) demonstrate that the CJC acted, not only unfairly in publishing its 1990 report, but in reliance upon information which was false and defamatory.*
>
> *17. To deprive the Applicants of the opportunity of pursuing such remedies and to vindicate their reputations is against the public interest.*
>
> *18. The public interest considerations which may apply in respect of information and reports communicated to a law enforcement agency in the conduct of its investigations (see* Re Bryant, *per Helman A/J, Supreme Court of Queensland, unreported, 1 September 1992 relied upon by the CJC in appendix "B") do not apply since information was communicated to the Commission in the conduct of a law reform function. In any event, the public interest that information supplied to the Commission in the course of its investigations remain confidential only applies until the Commission makes the information public. There is no suggestion that the information in question is the subject of an ongoing investigation which would be "irreparably prejudiced"* (cf. Bryant).
>
> *19. Instead, the information supplied to the Commission was publicly released without any prior opportunity to the Applicants to correct it or comment upon it prior to its public release. The Applicants having been damaged in their reputations should, in the public interest, be granted access to the information which formed the basis for the Commission's report and be able to demonstrate its falsity, establish that the*

information was supplied with a malicious or improper intent, and thereby correct the public record.

...

31. ... Clearly, there is little public interest in the non-disclosure of documents which contain information which has already been released, information which is dated or discredited, or of no value to current investigations.

32. There is a public interest in the disclosure of information which formed the basis of a widely-publicised report which blasted the Applicants' reputation. There is a public interest in the release of information upon which such a widely-publicised report was based in order to enable the public to assess whether the assertions made about the Applicants were well-founded. Absent disclosure, such an assessment cannot be made, and sections of the public may act on the assumption that the CJC had a reliable basis in fact for the allegations which it made concerning the Applicants. An informed public debate in relation to this matter may subject the officers responsible for the writing and release of the report to criticism, but this is an indispensable element in a representative democracy. Moreover, the accountability which such an informed public debate may bring to the activities of the CJC and similar bodies may operate to prevent the repetition of such an episode whereby innocent reputations can be damaged by the public release of unreliable information.

33. Apart from the general public interest in disclosure, there is a public interest in remedying the injustice perpetrated by the CJC against the Applicants. See Re Eccleston *(supra), paras.54-57. The public interest necessarily comprehends an element of justice to the individual and there is a public interest that individuals, such as the Applicants, receive fair treatment in accordance with the law in their dealings with government. This is an interest common to all members of the community. Justice will be denied to the Applicants unless they are able to make a fully informed assessment of whether the CJC had information in its possession which entitled it to make the damning allegations which it did in its June 1990 report. As a matter of justice, the Applicants have a need to know whether the CJC acted in reliance upon malicious information from one or two sources.*

34. In resisting the Applicants' claims the CJC invokes arguments and assertions more appropriate to high level intelligence in relation to current operational activities, than documents which are now of a largely historical interest only. The Applicants submit that little reliance should be placed upon general assertions by the CJC in relation to its reliance upon confidential information from other law enforcement agencies in assessing where the public interest lies in relation to these particular documents. This is not a case in which a target of an ongoing operation seeks to obtain information which may imperil a current investigation or cause other law enforcement agencies to be reluctant to provide information in the future.

> *35. In assessing the public interest, regard should be had to the prejudice caused to the Applicants by the CJCs unfair treatment in the publication of the 1990 report, and the Applicants' ongoing need to vindicate its reputation by verifying that those allegations were untrue and made without a proper foundation. It is contrary to the public interest that a powerful government agency, such as the CJC, should blast the reputations of individuals and companies, but then, years later, invoke a variety of exceptions to prevent access by those individuals to information which will permit them to establish whether or not the allegations were based on inaccurate, incomplete, and maliciously-inspired information.*
>
> *36. Generally, if the information is not disclosed, the Applicant will be prevented from making an informed assessment about:*
>
> *(i) whether the CJC acted in good faith in making the allegations which it did;*
> *(ii) whether the CJC's allegations were supported by reliable information in its possession.*
>
> *37. Without disclosure the public record will be incomplete, and sections of the public will be unable to form any proper assessment on whether the allegations made by the CJC were well-founded. This leaves the Applicant open to suspicion that the allegations made against it had a reliable basis in fact.*
>
> *38. It is contrary to the public interest that individuals should not be permitted to redress the damage which has been done to their reputations by a powerful state instrumentality such as the CJC. Further, there is a powerful public interest in the activities of the CJC being the subject of public examination and discussion.*

94. The CJC submitted that:

> *The ability to obtain information from other agencies is a necessary part of the* [CJC's] *functions and responsibilities to enable it to prepare reports. Without co-operation from other agencies, the* [CJC] *will not be able to effectively perform its functions, whether in relation to research reports, investigations or intelligence gathering.*

95. The nub of the applicants' case is that fairness requires that they be given the opportunity to demonstrate that their reputations have been damaged in a way that was not only procedurally unfair (as declared by the High Court), but substantively unfair because the slurs to their reputations were based on information that was inaccurate, incomplete, misleading *et cetera*.

96. None of the information identified in paragraph 98 below was disclosed or referred to in the GM Report. As I found above, it remains information that is confidential in nature. Some of it is principally about persons other than the applicants, and contains only incidental references to the applicants. The information relied on as a basis for the adverse comments about the applicants in the GM Report has nearly all been disclosed to the applicants (to the

extent that it remains in the possession or control of the CJC) during the course of this review. Two of the principal sources of that information were reports well known to the applicants - the Wilcox Report and the NSW Ombudsman Report No. 2 into Allegations made by Mr Ainsworth, and a business associate Mr E P Vibert, about the conduct of NSW police officers (14 October 1986).

97. I consider that the balance of public interest tells against disclosure of the matter in issue identified in paragraph 98 below. It is in the nature of criminal intelligence gathering that information may be collected about suspected illegal activity that turns out to involve no illegality, or in respect of which insufficient evidence can be adduced to prove the commission of criminal offences. It remains strongly in the public interest that information about suspected illegal activity and its participants be collected and exchanged between law enforcement agencies, whose efforts to adduce sufficient evidence to secure convictions are more likely to prove fruitful if the information is kept confidential to law enforcement officers. It may seem a superficially attractive argument that a person whose reputation has been maligned in a procedurally unfair manner should have the right to know and correct all the information held about them by a law enforcement agency. But a similar argument could be made by a person heavily engaged in illegal activity (although never convicted and still entitled to the presumption of innocence) who would be significantly advantaged by the opportunity to ascertain the extent of information held by law enforcement authorities about his/her activities.

98. I am not satisfied that the public interest considerations favouring disclosure which have been raised by the applicants are sufficiently strong (when weighed against the public interest consideration inherent in the satisfaction of the test for *prima facie* exemption under s.38(b), and other public interest considerations telling against disclosure, as outlined above) to warrant a finding that disclosure to the applicants would, on balance, be in the public interest. Accordingly, I find that the matter in issue specified below is exempt matter under s.38(b) of the FOI Act:

    (a) documents 21/1, 21/2 and 21/5;

    (b) in document 14/11, the sixth and eighth paragraphs on page two of the notes attached to the memorandum by Mr Dickie dated 8 February 1990 (this matter also qualifies for exemption under s.44(1) of the FOI Act on the same basis explained below at paragraphs 141-142);

    (c) in document 18/1, the last three sentences of the second last paragraph on page three of the report.

99. Document 18/2, which cannot qualify for exemption under s.38(b) or s.46(1)(b) (because it is not a record of information communicated to the CJC in confidence; rather it is a record of an inquiry made of the CJC by an interstate law enforcement agency, and the CJC's response), was claimed to be exempt under s.42(1)(e) of the FOI Act. The terms of s.42(1)(e) are set out at paragraph 82 above. I note that a key element of the test for exemption under s.42(1)(e) is that imposed by the phrase "could reasonably be expected to". In *Re "B"* at pp.339-341, paragraphs 154-160, I analysed the meaning of the phrase "*could reasonably be expected to*", by reference to relevant Federal Court decisions interpreting the identical phrase as used in exemption provisions of the *Freedom of Information Act 1982* Cth (the Commonwealth FOI Act). Those observations are also relevant here. In particular, I said in *Re "B"* (at pp.340-341, paragraph 160):

> *The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.*

The ordinary meaning of the word "expect" which is appropriate to its context in the phrase "could reasonably be expected to" accords with these dictionary meanings: "to regard as probable or likely" (Collins English Dictionary, Third Aust. ed); "regard as likely to happen; anticipate the occurrence ... of" (Macquarie Dictionary, 2nd ed); "Regard as ... likely to happen; ... Believe that it will prove to be the case that ..." (The New Shorter Oxford English Dictionary, 1993).

100. The lawful method or procedure apprehended as liable to be prejudiced is, again, the co-operative exchange of information between law enforcement agencies. The CJC has argued that another agency ought to be entitled to assume that the CJC will not disclose the fact that the other agency, or a certain officer of the other agency, has made inquires about a particular matter.

101. I accept that instances could occur where the disclosure of the fact that a particular law enforcement agency (or officer thereof) has sought information about a particular matter could reasonably be expected to have prejudicial consequences. However, the inquiry recorded in document 18/2 is so patently ordinary and routine in character (seeking the identity of a contact person in another organisation to whom a request could be made as to whether certain information was available for disclosure), and the interest of that interstate agency in obtaining information of the kind indicated in document 18/2 is so obvious and predictable from the standpoint of the applicants, that I cannot accept that disclosure of document 18/2 could reasonably be expected to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law. I find that document 18/2 does not qualify for exemption under s.42(1)(e) of the FOI Act.

Claims for exemption under the former s.48(1) of the FOI Act

102. The CJC has argued that documents 18/1 and 18/2 are exempt matter under s.48(1) of the FOI Act in the form that provision took before its amendment in 1994, and that it is entitled to have s.48(1) applied in its pre-amendment form. The general nature of document 18/2 was indicated in paragraph 99 above. Document 18/1 was described in the statutory declaration of Mr Roger, Director of the Intelligence Division of the CJC, as follows:

> *4. The memorandum and report (with attached annexure) comprising* [document 18/1] *were prepared pursuant to a direction by me to an Intelligence Analyst within the Intelligence Division. That direction was given as a consequence of an oral request of the (then recently appointed) Chairperson, to enable him to familiarise himself with the information held for the purpose of preparation of the Report on Gaming Machine Concerns and Regulations (May 1990) as that Report had given rise to the legal proceedings instituted by Mr Ainsworth.*

5. [Document 18/1], *is a summary and analysis of information compiled from other documents held by the* [CJC], *the existence of which documents has otherwise been disclosed in the response to the access request. The document was intended solely for internal CJC use.*

103. Prior to its amendment on 20 August 1994, s.48 of the FOI Act was in the following terms:

> ***48.(1)*** *Matter is exempt matter if—*
>
> *(a) there is in force an enactment applying specifically to matter of that kind, and prohibiting persons mentioned in the enactment from disclosing matter of that kind (whether the prohibition is absolute or subject to exceptions or qualifications); and*
>
> *(b) its disclosure would, on balance, be contrary to the public interest.*
>
> ***(2)*** *Matter is not exempt under subsection (1) if it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to the document containing the matter is being made.*
>
> ***(3)*** *This section has effect for only 2 years from the date of assent.*

104. The correct approach to the interpretation and application of that provision was explained (by reference to relevant decisions of the Federal Court of Australia) in *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 at pp.727-730 (paragraphs 161-170).

105. The secrecy provisions which the CJC relies upon as a basis for the application of the former s.48(1) of the FOI Act are s.58(2)(a) and s.58(2)(c) of the *Criminal Justice Act 1989* Qld, which provide:

> ***(2)*** *It is the function of the Intelligence Division—*
>
> *(a) to build up a data base of intelligence information concerning criminal activities and persons concerned in criminal activities, using for the purpose information acquired by it from—*
>
> *(i) its own operations;*
> *(ii) the Official Misconduct Division of the Commission;*
> *(iii) the Police Service;*
> *(iv) sources of the Commonwealth or any State or Territory which supplies such information to it;*
>
> *and to disseminate such information to such persons, authorities and agencies, and in such manner, as the Commission considers appropriate to the discharge of its functions and responsibilities;*
>
> *...*
>
> *(c) to secure such data base and records in its possession and control so that only persons who satisfy the director of the Intelligence Division or the chairperson that they have a legitimate need of access to the same are able to have access to them.*

106. Following a report by the Queensland Law Reform Commission, the *Freedom of Information (Review of Secrecy Provision Exemption) Amendment Act 1994* Qld amended the FOI Act so as to list in a Schedule to the FOI Act those specific statutory secrecy provisions whose effect was to be preserved by an amended s.48 of the FOI Act. The provisions from the *Criminal Justice Act 1989* that are set out above were not included in Schedule 1 of the FOI Act, and I note that there is no possible basis on which the arguments put by the CJC could be sustained under s.48 of the FOI Act in its current form. However, the CJC contends that, because this review commenced prior to the date on which s.48 was amended, it is entitled to have s.48 applied in its pre-amendment form, by virtue of s.20 of the *Acts Interpretation Act 1954* Qld which (so far as relevant for present purposes) provides:

> ***(2)*** *The repeal or amendment of an Act does not—*
>
> *...*
>
> *(b) affect the previous operation of the Act or anything suffered, done or begun under the Act; or*
>
> *(c) affect a right, privilege or liability acquired, accrued or incurred under the Act; or*
>
> *(d) affect a penalty incurred in relation to an offence arising under the Act; or*
>
> *(e) affect an investigation, proceeding or remedy in relation to a right, privilege, liability or penalty mentioned in paragraph (c) or (d).*
>
> ***(3)*** *The investigation, proceeding or remedy may be started, continued or completed, and the right, privilege or liability may be enforced and the penalty imposed, as if the repeal or amendment had not happened.*

107. Also relevant is s.4 of the *Acts Interpretation Act* which provides:

> ***(4)*** *The application of this Act may be displaced, wholly or partly, by a contrary intention appearing in any Act.*

108. In *Re Woodyatt and Minister for Corrective Services* (1995) 2 QAR 383 at pp.398-406 (paragraphs 35-58), I explained in some detail the application of s.20 of the *Acts Interpretation Act*, as it affected the rights of an applicant for access to documents under the FOI Act. The CJC contends that if s.48(1) did not continue to operate as it existed at the commencement of this review, the previous operation of the FOI Act would have been affected, and a right or privilege would have been withdrawn.

109. I consider that the reliance on s.20 of the *Acts Interpretation Act* by the CJC (as an agency which is subject to the obligations imposed on agencies by the FOI Act) is misconceived. The FOI Act confers no relevant rights or privileges on agencies subject to its application (the protections conferred by ss.102, 103 and 104 of the FOI Act are not relevant for present purposes). The FOI Act confers certain rights on citizens (which rights are subject to exceptions provided for in the FOI Act itself: see *Re Woodyatt* at pp.402-403, paragraphs 46-48), but it predominantly imposes duties and obligations on agencies subject to the application of the FOI Act. Agencies are conferred with discretionary powers to refuse access to requested

information, provided that the requested information satisfies certain criteria specified in relevant provisions of the FOI Act (see, for example, s.28(1) of the FOI Act, the meaning and effect of which was explained in *Re Norman and Mulgrave Shire Council* (1994) 1 QAR 574 at p.577, paragraph 13; and s.22 of the FOI Act, the meaning and effect of which was explained in *Re "JM" and Queensland Police Service* (1995) 2 QAR 516 at p.524, paragraph 21 and following). Having regard to the manner in which those discretionary powers conferred on agencies are intended to operate in the scheme of the FOI Act (see *Re Murphy and Queensland Treasury (No. 2)* (Information Commissioner Qld, Decision No. 98009, 24 July 1998, unreported) at paragraphs 61-62), I do not accept that they qualify as "rights" or "privileges", of the kind that s.20 of the *Acts Interpretation Act* was designed to protect against unjust interference occasioned by a subsequent legislative amendment.

110. I am satisfied that the relevant law to be applied is the law in force at the time of making my decision, there being no applicable legislative provision that warrants a conclusion to the contrary: see *Re Woodyatt* at p.398 (paragraph 35) and the authorities there cited. Therefore, s.48(1) in its pre-amendment form has no application, and s.48(1) in its current form affords no basis for the CJC's case. As I remarked in *Re Woodyatt* at p.406 (paragraph 58), an applicant will ordinarily be entitled to any benefit from a change in the law, unless the statute effecting the amendment makes provision to the contrary, and no such provision to the contrary has been made.

111. Even if my conclusion in paragraph 109 above were mistaken, I consider that the scheme of the FOI Act manifests a contrary intention (as contemplated by s.4 of the *Acts Interpretation Act*) sufficient to displace any application of s.20 of the *Acts Interpretation Act* for the benefit of the CJC in the circumstances under consideration. The scheme of the FOI Act places no prohibition on an applicant for access applying again for access to a document to which access has previously been refused. Provided it is not abused through excessive and unwarranted use by an applicant for access, this aspect of the scheme of the FOI Act is logical and fair, since information may cease to qualify for exemption with the passage of time or due to a material change of circumstances, and *a fortiori* where the legislature has seen fit to amend an exemption provision so as to narrow its sphere of operation (as occurred with s.48 of the FOI Act).

112. If s.48 in its pre-amendment form had been the only basis for refusal of access to documents 18/1 and 18/2 before 20 August 1994, there would have been nothing to prevent the applicants from making a fresh access application for those documents after s.48 was amended. If a review was in progress when s.48 was amended, I consider that the necessary implication to be drawn from the scheme of the FOI Act is that the amended provisions, designed to narrow the sphere of operation of the prior exemption, should be the applicable law for the benefit of an applicant for access.

113. In the circumstances, it is unnecessary for me to decide whether s.58(2)(a) and s.58(2)(c) are secrecy provisions that satisfied the requirements of s.48(1) of the FOI Act in its pre-amendment form (a proposition that I consider to have been attended by considerable doubt, having regard to the principles set out in *Re Cairns Port Authority* at pp.729-730, paragraph 168).

114. I find that documents 18/1 and 18/2 do not qualify for exemption under s.48 of the FOI Act. I note that the CJC has made alternative claims for exemption in respect of those documents, (or for segments of the document in the case of document 18/1, much of which comprises summaries of the information contained in documents already disclosed to the applicants under

the FOI Act), which I have dealt with under other headings in these reasons for decision. However, this is an appropriate point to note that document 18/1 contains discrete segments of matter which solely concern the CASPALP investigation. Consistently with the concession made in the letter from the applicants' solicitor dated 9 October 1995 (see paragraph 7 above), I have proceeded on the basis that those segments of matter in document 18/1 which solely concern the CASPALP investigation are no longer in issue in this review. They comprise:

(a) the segment of matter which commences on p.12 of the annexure to the report, under the heading "Matters involving the payment of political donations by Ainsworth - CASPALP promotion fund", through to the sentence "These matters were referred to in Appendix Two of the Commission's Report on Gaming Machine Concerns and Regulations"; and

(b) the two paragraphs under the heading "Ainsworth and CASPALP" on page 19 of the annexure to the report.

Claims for exemption under s.41(1) of the FOI Act

115. The only matter remaining in issue which has been claimed by the CJC to be exempt under s.41(1) consists of the third paragraph on page one of document 18/1, and the balance of the already partially-disclosed third paragraph on the second page of document 14/11.

116. Section 41(1) of the FOI Act provides:

> ***41.(1)*** *Matter is exempt matter if its disclosure—*
>
> *(a) would disclose—*
>
> *(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or*
>
> *(ii) a consultation or deliberation that has taken place;*
>
> *in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and*
>
> *(b) would, on balance, be contrary to the public interest.*

117. A detailed analysis of s.41 of the FOI Act can be found in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.66-72, where, at p.68 (paragraphs 21-22), I said:

> *21. Thus, for matter in a document to fall within s.41(1), there must be a positive answer to two questions:*
>
> *(a) would disclosure of the matter disclose any opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, (in either case) in the course of, or for the purposes of, the deliberative processes involved in the functions of government? and*
>
> *(b) would disclosure on balance be contrary to the public interest?*

> *22. The fact that a document falls within s.41(1)(a) (i.e., that it is a deliberative process document) carries no presumption that its disclosure would be contrary to the public interest. ...*

118. An applicant for access is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; an applicant is entitled to access unless an agency can establish that disclosure of the relevant deliberative process matter would be contrary to the public interest. In *Re Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206, I said (at p.218, paragraph 34):

> *The correct approach to the application of s.41(1)(b) of the FOI Act was analysed at length in my reasons for decision in* Re Eccleston, *where I indicated (see p.110, paragraph 140) that an agency or minister seeking to rely on s.41(1)(a) needs to establish that specific and tangible harm to an identifiable public interest (or interests) could result from disclosure of the particular deliberative process matter in issue. It must further be established that the harm is of sufficient gravity that, when weighed against competing public interest considerations which favour disclosure of the matter in issue, it would nevertheless be proper to find that disclosure of the matter in issue would, on balance, be contrary to the public interest.*

119. One argument put by the CJC, in respect of the first question posed in paragraph 21 of *Re Eccleston* (see above), was, in my view, misconceived. In paragraph 9 of his statutory declaration, Mr Roger stated:

> *9. The memorandum comprising part of* 18/1, *contains assumptions made and opinions based on the documents referred to in the report attached to the memorandum. Those assumptions and opinions were made or formed in the course of a deliberative process, namely a decision being made as to what ought to be included in a document designed to brief the Chairperson of the* [CJC].

I do not accept that it is sufficient to satisfy the requirements of s.41(1)(a) to rely on the deliberative process involved in selecting information for inclusion in a briefing paper. The preparation of any document ordinarily requires some thought as to its contents. If this argument were to be accepted, virtually every document created by a public servant would qualify as a deliberative process document.

120. In the case of a briefing paper prepared for information purposes only, it may not be possible to identify any deliberative process involved in the functions of government, in the course of, or for the purposes of which, any advice or opinion contained in the briefing paper was prepared or recorded. However, I am satisfied from reading the contents of documents 14/11 and 18/1 that each of them was prepared not only for information purposes, but to seek a decision or direction from the Chairman of the CJC on recommendations put forward in them. Moreover, I consider that the evaluation by the Chairman of the CJC of reports regarding intelligence information obtained by CJC officers would ordinarily constitute a deliberative process involved in the functions of that government agency, since the Chairman would usually make decisions or issue directions as to whether (and what) follow-up action was required. I am satisfied that the specific passages identified in paragraph 115 above consist of opinion prepared for the purposes of a deliberative process involved in the functions of the CJC, and

hence that they fall within the terms of s.41(1)(a) of the FOI Act. Accordingly, it is necessary to determine whether disclosure of the two passages in issue would, on balance, be contrary to the public interest.

121. In its submission dated 5 June 1995, the CJC raised a number of arguments favouring non-disclosure (e.g., that there is a public interest in maintaining confidence in the administration of criminal justice, and that the interests of the CJC can equate to the public interest) which I have since addressed in *Re Criminal Justice Commission and Director of Public Prosecutions* (1996) 3 QAR 299 at p.308 (paragraph 30) ff. The general comments I made in that decision are equally relevant here. Other public interest considerations relied on by the CJC as favouring non-disclosure correspond broadly to the third and fourth criteria from *Re Howard and Treasurer of Commonwealth of Australia* (1985) 3 AAR 169, about which I expressed my views in *Re Eccleston* at pp.103-108.

122. The CJC argued (at page 8 of its submissions dated 5 June 1995):

> *Release of information, such as opinions given, advices and recommendations made at a stage in the deliberative process, can lead to public confusion and unnecessary debate, and thus harm to the public interest. This is because the context in which the opinion, advice or recommendation was given may not be understood by those to whom it is disclosed.*

I am not satisfied that there would be any confusion or misunderstanding, to an extent that would be contrary to the public interest, if the passages in issue were disclosed. The tenor of the passage in issue from document 18/1 substantially accords with the tenor of comments about the applicants published in the GM Report. The passage in issue from document 14/11 expresses an opinion by a former CJC officer about an investigation (that occurred some 17 years ago) into incidents that occurred some 19 years ago, in respect of which there is no real likelihood of further investigation or action. In my opinion, the comments are now merely of historical interest, and their disclosure is incapable of causing harm to the public interest.

123. As to the 'candour and frankness' argument raised by the CJC, the views I expressed in *Re Eccleston* at pp.106-107 (paragraphs 132-135) remain relevant. However, the CJC argued that there was a specific basis for upholding a 'candour and frankness' argument, setting out (at p.9 of its written submission dated 5 June 1995) the following four step argument:

1. The CJC submits that it is public knowledge that the CJC, perhaps more than many other Government Department or agency, is subject to constant media scrutiny.

2. The CJC submits that there is ample evidence in the public arena of the willingness of the media, and others, to subject the CJC and a number of its officers to speculation about the propriety of decisions, to ridicule, and even to vilification.

3. The CJC submits that such public questioning of decisions made by officers of the CJC, who have often been publicly named is at the least embarrassing and potentially harmful to their personal and professional reputation.

4. Finally, the CJC submits that if the numerous officers of the CJC who take part in the many deliberative processes of the CJC cannot be assured that their opinions, advices and recommendations will remain confidential, there is a very real basis for them to

believe that they themselves may become the subject of public speculation, ridicule or

> vilification. Such expectation will inevitably result in the officers being inhibited, subconsciously or otherwise, in expressing their opinions, advice or recommendations. A lack of candour and frankness by officers advising the CJC throughout its deliberative processes will adversely affect the proper and effective conduct of its functions and responsibilities by the CJC.

124. This argument is not based on the particular contents of the passages in issue. Rather it amounts to a class claim for exemption of opinions, advice and recommendations expressed by officers of the CJC for the purpose of the CJC's deliberative processes. I am not prepared to accept class claims in the application of s.41(1), as I explained in *Re Eccleston* at p.111, paragraph 149, where I noted that the Commonwealth Administrative Appeals Tribunal in *Re Bartlett and Department of Prime Minister and Cabinet* (1987) 12 ALD 659, at p.662, had affirmed that "disguised class claims" would not be permitted under s.36 of the *Freedom of Information Act 1982* Cth (which broadly corresponds to s.41(1) of the Queensland FOI Act).

125. I am not satisfied that disclosure of the passages in issue would cause investigators and intelligence analysts of the calibre employed at the CJC to refrain from expressing (or vary their manner of expressing) relevant opinions, advice or recommendations, to such an extent as to adversely affect the efficiency and effectiveness of the CJC's operations, and thereby harm the public interest. Existing law recognises the sensitivity that may attach to opinions and recommendations of criminal investigators and intelligence analysts. In *Re Gordon and Commissioner for Corporate Affairs* (1985) 1 VAR 114 at p.117, Higgins J, sitting as the Presiding Member of the Victorian Administrative Appeals Tribunal, said:

> *I believe that there is a public interest in allowing investigators to canvass fully, issues particularly where there are breaches of the law involved. Where an agency is charged with the prosecution and investigation of serious breaches of the law, there is an important public interest which should protect documents which are used as the basis of that decision making process. The officers ought to be given the freedom to canvass all possibilities and to make what are in fact subjective evaluations of individuals and fact situations, without fear that such comments, assessments and recommendations will go beyond the office or the agency itself. I do wish to stress the view that each case must depend upon its own facts but that where a law enforcement agency is involved, then I believe that a closer examination of the public interest is required than would otherwise be the case.*

I note that Higgins J was not describing a class of documents which ought to qualify for exemption from disclosure, and appropriate emphasis must be given to Higgins J's qualification that each case must depend on its own facts. The passage in issue in document 18/1 contains opinion of a kind that might qualify for protection from disclosure if expressed in respect of a current or recent investigation that had received no public attention.

However, that passage expresses an opinion that substantially accords with the tenor of comments about the applicants published in the GM Report, and by reference to largely the same material on which the comments in the GM Report were based. I am not satisfied that disclosure of that passage (or of the passage from document 14/11, which I consider to be merely of historical interest at this time) would be contrary to the public interest.

126. I find that the matter in issue identified in paragraph 115 above does not qualify for exemption under s.41(1) of the FOI Act.

Claims for exemption under s.44(1) and/or s.45(1)(c) of the FOI Act

127. Section 44(1) of the FOI Act provides:

> ***44.(1)*** *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

I note that this provision clearly extends the scope of its protection to information concerning the personal affairs of deceased persons.

128. In applying s.44(1) of the FOI Act, one must first consider whether disclosure of the matter in issue would disclose information that is properly to be characterised as information concerning the personal affairs of a person. If that requirement is satisfied, a *prima facie* public interest favouring non-disclosure is established, and the matter in issue will be exempt, unless there exist public interest considerations favouring disclosure which outweigh all identifiable public interest considerations favouring non-disclosure, so as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.

129. In my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, I identified the various provisions of the FOI Act which employ the term "personal affairs", and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) as it appears in the FOI Act. In particular, I said that information concerns the "personal affairs of a person" if it relates to the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:

- family and marital relationships;
- health or ill-health;
- relationships and emotional ties with other people; and
- domestic responsibilities or financial obligations.

Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, to be determined according to the proper characterisation of the information in question.

130. Four documents comprising copies of correspondence from the NSW Ombudsman are claimed to be exempt under s.44(1) of the FOI Act. Documents 17/4A and 17/5 are copies of letters from the office of the NSW Ombudsman to third party 'A' relating to complaints made by Mr L H Ainsworth and Mr E P Vibert about the conduct of NSW police officers. Documents 17/8 and 17/9 are copies of letters from the office of the NSW Ombudsman to third party 'B' relating to a subsequent set of complaints made by Mr Ainsworth and Mr Vibert about the conduct of NSW police officers.

131. In January 1997, I wrote to third parties 'A' and 'B' informing them of my preliminary view that the information in these documents concerned their employment affairs, rather than their personal affairs, and did not qualify for exemption under s.44(1) of the FOI Act. I also asked a number of specific questions of third party B. A solicitor acting for third party B responded by letter dated 24 February 1997 asserting that documents 17/8 and 17/9 did qualify for exemption under s.44(1), and asserting in particular that his client's former residential address, appearing on those letters, was exempt matter under s.44(1). The solicitor also provided

answers to my specific questions. Third party A responded personally, communicating his objection to disclosure. Subsequently, a letter was received from the aforementioned solicitor stating that he also acted on behalf of third party A, who objected to disclosure on grounds previously communicated.

132. In my decision in *Re Pope and Queensland Health* (1994) 1 QAR 616, after reviewing relevant authorities (at pp.658-660), I expressed the following conclusion at p.660 (paragraph 116):

> *Based on the authorities to which I have referred, I consider that it should now be accepted in Queensland that information which merely concerns the performance by a government employee of his or her employment duties (i.e., which does not stray into the realm of personal affairs in the manner contemplated in the* Dyrenfurth *case) is ordinarily incapable of being properly characterised as information concerning the employee's "personal affairs" for the purposes of the FOI Act.*

The general approach evidenced in this passage was endorsed by de Jersey J (as he then was) of the Supreme Court of Queensland in *State of Queensland v Albietz* [1996] 1 Qd R 215, at pp.221-222.

133. In reviewing relevant authorities in *Re Pope*, I had specifically endorsed the following observations, concerning s.33(1) (the personal affairs exemption) of the *Freedom of Information Act 1982* Vic, made by Eames J of the Supreme Court of Victoria in *University of Melbourne v Robinson* [1993] 2 VR 177 at p.187:

> *The reference to the* "personal affairs of any person" *suggests to me that a distinction has been drawn by the legislature between those aspects of an individual's life which might be said to be of a private character and those relating to or arising from any position, office or public activity with which the person occupies his or her time* [emphasis added].

134. I am satisfied from my examination of documents 17/4A, 17/5, 17/8 and 17/9 that they comprise information concerning the performance by the third parties of their duties as police officers, which must properly be characterised as information concerning their employment affairs, not their personal affairs. The fact that the NSW Ombudsman was investigating allegations of misconduct in the performance of their duties as police officers does not alter this characterisation, for the reasons I explained in *Re Griffith and Queensland Police Service* (1997) 4 QAR 109 at pp.126-127 (paragraphs 50-53). Apart from the information dealt with in paragraph 138 below, I find that documents 17/4A 17/5, 17/8 and 17/9 do not qualify for exemption under s.44(1) of the FOI Act. (I should note the answers to my specific questions provided in the letter dated 24 February 1997 from the solicitor acting for third party 'B' confirmed that the substantive information appearing in documents 17/8 and 17/9 was known to the applicants, and I consider that the same must be true in respect of documents 17/4A and 17/5. The procedural steps involved in an Ombudsman's investigation would have required that similar letters be sent to the complainants, one of whom was Mr L H Ainsworth.)

135. In *Re Stewart* at p.261 (paragraph 88), I said:

> *The address at which a person chooses to reside and make their home seems to me to fall within that zone of domestic affairs which is clearly central to the concept of "personal affairs". A business address would be materially different.*

136. Likewise, in *Re Pearce and Queensland Rural Adjustment Authority and Others* (Information Commissioner Qld, Decision 99008, 4 November 1999, unreported) at paragraph 38, I held that: *Information concerning an individual's residential address is information the dissemination of which (whether by publication in a telephone directory or otherwise) that individual should be entitled to control.*

137. I am satisfied that the address which appears on documents 17/8 and 17/9, being a former residential address of third party 'B', must properly be characterised as information concerning the personal affairs of third party B, which is therefore *prima facie* exempt under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.44(1). In a brief submission on behalf of the applicants dated 24 April 1997, it was suggested that: *A person's name and former residential address are justified in certain circumstances to be disclosed on the grounds of public interest - e.g., in assisting parties to criminal or civil proceedings against that person on issues which may be relevant to the then domicile of that person.*

138. However, I am not satisfied of the existence of any public interest considerations which would warrant a finding that disclosure of the former residential address of third party 'B' would, on balance, be in the public interest. I find that the address appearing under the name of the addressee on documents 17/8 and 17/9 is exempt matter under s.44(1) of the FOI Act.

139. At paragraph 15 above, I explained that several documents in issue contain discrete segments of information relating to the applicants, with the rest of the documents dealing with other unrelated persons or corporations. There are also some documents (e.g., document 18/1) that deal predominantly with the applicants, but contain a discrete segment or segments of information (usually dealing with the activities of business competitors of the applicants) that do not relate to the applicants at all. Following concessions made by the CJC during the course of this review, the applicants have been given access to all those segments of information in documents 14/11, 14/15, 14/18, 14/20, and 17/10 which relate to the applicants (including all information which, although primarily relating to other persons or corporations, refers to the applicants), or which are general in nature.

140. The CJC has claimed that segments of information which only relate to the activities of persons or corporations other than the applicants are exempt matter under s.44(1) or s.45(1)(c) of the FOI Act. (The CJC's primary submission was that information of that kind fell outside the scope of the relevant FOI access application, but because of the stance taken by one of the applicants - see paragraphs 16-17 above - I am obliged to consider the exemption claims on which the CJC relies in the alternative.)

141. Information that indicates or suggests that an identifiable individual has been involved in some alleged (but unproven) criminal activity or other wrongdoing is properly to be characterised as information concerning the personal affairs of that individual: see *Re Stewart* at p.257, paragraph 80; *Re Wong and Department of Immigration and Ethnic Affairs* (1984) 2 AAR 208; *Re Kahn and Australian Federal Police* (1985) 7 ALN N190. Moreover the weight of

the privacy interest attaching to information of that kind is ordinarily strong. Intelligence data compiled by law enforcement agencies of the kind now under consideration does not frequently consist of admissible evidence that demonstrates the commission of criminal offences. As explained by Mr Paul Roger, Director of the Intelligence Division of the CJC, in paragraph 6 of his statutory declaration dated 16 December 1994: *Intelligence information, by its nature, often consists of unsubstantiated allegations, innuendo and rumour, which may not have been substantiated. It is open to a number of interpretations. To make information of that nature public, may result in unfairness to persons referred to directly or indirectly in the information*. I consider that significant weight attaches to the public interest in the protection of an individual's reputation against suggestions of criminal activity or wrongdoing, that is unable to be proven in court proceedings.

142. While there is a general public interest in accountability of law enforcement agencies for the performance of their functions, I am unable to discern any other public interest considerations that favour disclosure to the applicants of the matter in question. The public interest considerations stressed in the applicants' written submission (see paragraph 93 above) are not apt to apply to the information now under consideration, which, as I have observed, is unrelated to the applicants. I am not satisfied that there are any public interest considerations favouring disclosure of the matter in question that are strong enough to outweigh the privacy interests of the relevant individuals and warrant a finding that disclosure would, on balance, be in the public interest. I therefore find that the matter in question (see paragraph 150 below) is exempt matter under s.44(1) of the FOI Act.

143. Corporations are incapable of having personal affairs, as that term is used in the context of the FOI Act: see *Re Stewart* at p.237, paragraphs 20-21. However, I am satisfied that the information now under consideration concerns the business affairs of the corporations that are referred to. Section 45(1)(c) of the FOI Act provides:

> ***45.(1)*** *Matter is exempt matter if—*
>
> *...*
>
> *(c) its disclosure—*
>
> *(i) would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person; and*
>
> *(ii) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;*
>
> *unless its disclosure would, on balance, be in the public interest.*

144. The correct approach to the interpretation and application of s.45(1)(c) was explained in *Re Cannon* at pp.516-523 (paragraphs 66-88). Matter will be exempt from disclosure under s.45(1)(c) of the FOI Act if:

(a) the matter in issue is properly to be characterised as information concerning the business, professional, commercial or financial affairs of an agency or another person (s.45(1)(c)(i)) (see paragraphs 67-77 of *Re Cannon* pp.516-520); and

(b) disclosure of the matter in issue could reasonably be expected to have either of the prejudicial effects contemplated by s.45(1)(c)(ii), namely:

(i) an adverse effect on those business, professional, commercial or financial affairs of the agency or other person, which the information in issue concerns; or

(ii) prejudice to the future supply of such information to government (see paragraphs 78-86 of *Re Cannon*, pp.520-522);

unless disclosure of the matter in issue would, on balance, be in the public interest (see paragraphs 87-88 of *Re Cannon*, pp.522-523).

145. The meaning of the phrase "could reasonably be expected to", in the context of s.45(1)(c), is the same as I have explained at paragraph 99 above.

146. For similar considerations to those set out at paragraph 141 above, I am satisfied that disclosure of information that indicates or suggests that a businessman or business organisation has been involved in some alleged (but unproven) criminal activity or other wrongdoing, which has attracted the attention of law enforcement agencies, would have such an adverse impact on business reputation and goodwill as to warrant a finding that disclosure could reasonably be expected to have an adverse effect on the business affairs of the relevant businessman or business organisation. As to the application of the public interest balancing test incorporated in s.45(1)(c), the matters referred to in paragraph 142 above are also relevant. Again given that the information in question consists of unsubstantiated intelligence data, I am not satisfied that its disclosure would, on balance, be in the public interest.

147. Some exceptions to my findings in respect of s.44(1) and s.45(1)(c) should be noted. There are some passages in the matter in issue which substantially correspond to information published on page 50 of the GM Report. I am not satisfied that those passages qualify for exemption under s.44(1) or s.45(1)(c). They are -

(a) the matter deleted from pages 6, 7 and 14 of document 14/15;

(b) the first sentence deleted from page 12 of document 14/15;

(c) the second last sentence of paragraph 25.1 in document 17/10;

(d) the matter deleted from paragraphs 25.6, 26.1, 26.4 and 26.8 of document 17/10.

148. There is some matter in issue which is unrelated to the applicants, but in respect of which there is no adverse comment made against another person or corporation, for example, the last two paragraphs of document 14/11, which simply contain a general and (non-critical) comment. Also, there are six paragraphs on page four of the notes attached to the memorandum by Mr Dickie (which together comprise document 14/11) which refer to a gaming machine manufacturer named Universal Australia, and which contain no adverse comment about that

organisation. Moreover, virtually the same information was published on page 35 of the GM Report. I am not satisfied that the segments of document 14/11 identified in this paragraph qualify for exemption under s.44(1) or s.45(1)(c) of the FOI Act.

149. There are other passages which were intended to convey a generalised adverse comment, but not one that can be related to an identifiable individual or organisation, e.g., the paragraph which spans pages 14-15 of document 14/18; the introductory part, plus subparagraph (a), of the paragraph which follows it on page 15; and subparagraph (d) on page 16. Some of that matter was directly quoted in the GM Report at p.50, and pp.51-52. I am not satisfied that information of that kind qualifies for exemption under s.44(1) or s.45(1)(c) of the FOI Act (and I consider that, as criminal intelligence information, it is too dated to require protection for operational purposes). Another segment of matter in issue, which I find does not qualify for exemption, for the same reason, is the first paragraph on page 3 of document 17/10.

150. The nature of the intelligence data I have examined in making my findings at paragraphs 142 and 146 above is such that, in many places, information concerning individuals that qualifies for exemption under s.44(1) of the FOI Act is intermingled (or coincides) with information about businessmen or business organisations that qualifies for exemption under s.45(1)(c) of the FOI Act. While in many places, it will be clear enough from the context which exemption provision applies, I do not propose to attempt the exercise of delineating the matter which qualifies for exemption under s.44(1) from that which qualifies for exemption under s.45(1)(c) (or under both), in the many places referred to in the first sentence of this paragraph. The matter which I have found is exempt matter under s.44(1) and/or s.45(1)(c) of the FOI Act is as follows:

(a) the seven paragraphs (and their associated headings) which appear on pages 4-5 of the notes comprising part of document 14/11, between the end of the segment dealing with Universal Australia and the heading "Other Manufacturers";

(b) in document 14/15 -

(i) the fourth last paragraph (numbered 2) on page 12;

(ii) the matter deleted from the last paragraph on page 12;

(iii) the second and third paragraphs on page 13;

(iv) the matter deleted from the first paragraph on page 15;

(c) in document 14/18 -

(i) the fourth and fifth paragraphs on page 14;

(ii) the subparagraphs marked (b) and (c) on pages 15-16;

(d) all matter deleted from document 14/20 (as per the highlighted copy of that document provided to me under cover of a letter dated 8 November 1994 from the CJC);

(e) all matter deleted from document 17/10 (as per the highlighted copy of that document provided to me under cover of a letter dated 8 November 1994 from the CJC), except for the passages specified in paragraphs 147 and 149 above which I have found do not comprise exempt matter;

(f) in document 18/1 -

(i) the first full paragraph (commencing with the words "In relation to ...") on page 10 of the annexure;

(ii) the second full paragraph (commencing with the words "The subject ...") on page 11 of the annexure; and

(iii) the last four sentences of the paragraph headed "Comment:" which spans pages 17-18 of the annexure.

151. I note that, in respect of documents 22/1, 22/2, 22/3 and 22/4, the CJC agreed to disclose to the applicants the segments in which the applicants were mentioned, but claimed that the balance of the documents was not within the scope of the relevant FOI access application. Having regard to the stance taken by one of the applicants (see paragraphs 16-17 above), it is preferable that I deal with the balance of the information in those documents, even though I consider it highly unlikely that the applicants have any real interest in obtaining it. The four documents in question comprise lists of business organisations or businessmen who submitted expressions of interest in April/May 1990 for the supply, delivery, installation and/or repair or maintenance of gaming machines in licensed clubs and hotels throughout Queensland. Each of them was listed, and commented upon, at pages 71-80 of the GM Report. In the circumstances, I am not satisfied that disclosure of documents 22/1, 22/2, 22/3 and 22/4 could reasonably be expected to have either of the prejudicial effects contemplated in s.45(1)(c)(ii) of the FOI Act, and I find that they do not qualify for exemption under s.45(1)(c) of the FOI Act.

Conclusion

152. For the foregoing reasons, I vary the decision under review, by finding that -

(a) having regard to the additional searches and inquiries made by the CJC (and the additional documents thereby located and dealt with under the FOI Act) during the course of my review, I am satisfied that -

(i) there are no reasonable grounds for believing that additional documents, responsive to the terms of the applicants' FOI access application dated 2 November 1993, exist in the possession or under the control of the CJC; and

(ii) the searches and inquiries made by the CJC in an effort to locate all documents in its possession or under its control, which are responsive to the terms of the applicants' FOI access application dated 2 November 1993, have been reasonable in all the circumstances of this case.

(b) the matter in issue identified in paragraph 63 above is exempt matter under s.50(c)(i) of the FOI Act;

(c) the matter in issue identified in paragraph 98 above is exempt matter under s.38(b) of the FOI Act;

(d) the matter in issue identified in paragraphs 138 and 150 above is exempt matter under s.44(1) and/or s.45(1)(c) of the FOI Act; and

(e) the balance of the matter remaining in issue does not qualify for exemption from disclosure to the applicants under the FOI Act.

.....
F N ALBIETZ
INFORMATION COMMISSIONER