SECOND REPORT

OFFICE

of the

QUEENSLAND
INFORMATION COMMISSIONER

1 JULY 1993 TO 30 JUNE 1994

PRESENTED TO PARLIAMENT

BY AUTHORITY
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The Honourable J Fouras, MLA, B.Sc., B.Econ. (Qld)
Speaker of the Legislative Assembly
Parliament House
BRISBANE Q 4000

Dear Mr Speaker

I have the honour to submit to the Assembly a report pursuant to s.101 of the *Freedom of Information Act* 1992 (Qld).

This is the second Annual Report of the Office of the Information Commissioner.

Yours faithfully

F N ALBIETZ
INFORMATION COMMISSIONER

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EXECUTIVE SUMMARY

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The Information Commissioner is the independent external review authority established by s.61 of the *Freedom of Information Act 1992* Qld (the FOI Act) to whom aggrieved persons may apply for investigation and review of decisions made by agencies or Ministers (in the administration of the FOI Act) that fall within the categories of decision specified in s.71 of the FOI Act.

1993/94 has been a year of solid achievement. With only four full-time professional staff, the Office of the Information Commissioner resolved 125 applications for review under Part 5 of the FOI Act: 20 by formal decision and 105 by informal methods of dispute resolution. In absolute terms, this compares very favourably with results achieved by the comparable external review authorities under the Commonwealth and Victorian freedom of information statutes in the early years of operation of those statutes (see paragraphs 2.9 - 2.10 and Table 4 of this Report). Moreover, the formal decisions issued during the year have contributed significantly to the educative and normative (i.e., standard setting) role expected of an independent external review authority, by providing (for the guidance of FOI administrators and the general public wishing to make use of the FOI Act) detailed explanations of key provisions of the FOI Act, especially the most frequently relied upon exemption provisions, and by illustrating the application of relevant principles in particular cases. Notes on the significance of the formal decisions issued during 1993/94 appear in Chapter 3 of this Annual Report.

Unfortunately, the achievements made during 1993/94 have been overshadowed by the fact that while applications for review were resolved at an average rate of 2.5 per week during the year (125 in all), applications for review were received at an average rate of 5.5 per week (274 in all). Notwithstanding their hard work and professionalism, the staff of my Office had the frustrating experience of seeing the backlog of unresolved cases accumulate at an average rate of 3 per week, on top of the backlog of 93 cases that (for the reasons explained in paragraphs 3.4 to 3.12 of my first Annual Report) had accumulated by 30 June 1993. To give the figures in the following table some perspective, I note that the 394 applications for review received by my Office, in the 18 months to 30 June 1994, exceeds by 44% the total number of appeals received by the Commonwealth Administrative Appeals Tribunal in FOI cases (274), throughout Australia, in the first 18 months following the commencement of the Commonwealth's freedom of information legislation (see Table 4 in Chapter 2).

Table 1 - Applications for Review under Part 5 of the FOI Act - 1993/94

Pending from previous reporting period (19.11.92 to 30.6.93)93	
Opened during the reporting period	274
Completed during the reporting period	125
Pending at end of reporting period	242

Note 1: the numerical distribution of the 274 applications for review received during 1993/94, across the categories of decision subject to investigation and review by the Information Commissioner (as specified in s.71 of the FOI Act) is set out in the table which appears at Appendix 1.

Note 2: a table showing the distribution of the 274 applications for review according to the identity of the respondent agency appears at Appendix 2.

The Office of the Information Commissioner is demand driven and has little or no control over the number and complexity of the applications for review made to it. The disparity between the volume of cases received and the available staff resources has unfortunately meant that many applicants have not received the speedy resolution of their disputes that the Office of the Information Commissioner had hoped to be able to provide. This has been recognised by the government, which allocated funding sufficient to employ two additional members of professional staff, boosting the Office's complement of full-time professional staff from 4 to 6 with effect from June 1994. By that time, however, the accumulated backlog of unresolved cases had grown to 242, and is unlikely in the near future to be reduced to manageable proportions so as to enable speedy resolution of all or nearly all cases.

The demand for the services of the Information Commissioner has significantly exceeded my expectations, and certainly the expectations on which the allocation of resources to the Office of the Information Commissioner was based. In paragraph 3.4 of my first Annual Report (1992/93), I explained that 125 appeals were expected in the first full year of operation. In the financial year 1993/94, the Office demonstrated that it was capable of resolving 125 appeals in a year, but the statistics in Table 1 demonstrate the extent to which the demand for the Information Commissioner's services has exceeded those expectations. There appear to be two main reasons for this. The first is the extraordinarily high rate of usage of the FOI Act by Queenslanders, which far exceeds that experienced in other state jurisdictions, including the more populous states: see page 34, and Figure 5.1, of the Second Annual Report (1993/94) on the operation of the FOI Act published by the Minister for Justice and Attorney-General.

The second factor is that the proportion of the total number of FOI access applications made in Queensland which carry through to external review has been more than twice as high as the comparable figures experienced in the Commonwealth and in Victoria in the years following the passage of FOI legislation in those jurisdictions (see Tables 5A, 5B and 5C in Chapter 2 of this Report). A clear aim of the Information Commissioner model is to provide a dispute resolution service that is speedier, cheaper for participants, more informal and more user-friendly than the court system and court-like tribunals. If those aims were achieved, it was anticipated that a higher proportion of aggrieved applicants would seek to use the Information Commissioner's services than would have been the case with the more formal (and, to the average citizen, more expensive and more intimidating) external review authorities in other jurisdictions which have not followed the Information Commissioner model. A more than 100% increase on user rates in those jurisdictions is perhaps unexpectedly high. Yet it is evidence that the Information Commissioner model is meeting some of its expectations, in that members of the public who use the FOI Act appreciate this more user-friendly model of dispute resolution.

While the Office of the Information Commissioner has not managed to achieve the goal of speedy resolution of disputes in all or most of the cases received, it has achieved all other goals expected of it, as is explained in more detail in Chapter 3 of this Report. In particular, it is managing to keep down the costs of participation in the external review process, not only for applicants but also for agencies (and hence for the public purse). In jurisdictions which have a court, or a tribunal which follows adversarial procedures, as the external review authority under freedom of information legislation, government agencies (and many applicants) ordinarily incur the expense of legal representation, and of preparing a formal case for presentation at a formal hearing. The Office of the Information Commissioner consciously strives to reduce or eliminate unnecessary expense and formality for participants, as least so far as the duty to accord procedural fairness, and the complexity of the issues for determination in any particular case, will allow. I note that 105 of 125 cases resolved during 1993/94 were resolved without the need for a formal determination. This represents a proportion of 84% of matters resolved by informal means.

Table 2 - Outcome of External Reviews completed during the Reporting Period

No jurisdiction	7
Decision not to review/review further under s.77 of the FOI Act	0
Agency granted further time to deal with application	1
Withdrawn/Resolved following mediation	98
Decision issued - affirming decision under review	13
Decision issued - varying decision under review	3
Decision issued - setting aside decision under review; making decision in substitution therefor	3
TOTAL	125

Of the 98 cases withdrawn or resolved following mediation, 58 resulted in the applicant successfully obtaining, in whole or in part, access to documents, or amendment of personal affairs information, which had previously been refused by an agency. Six of the remaining 40 cases were "reverse FOI" applications by third parties, who had been consulted under s.51 of the FOI Act, seeking to overturn decisions of agencies to disclose documents to an initial applicant for access under the FOI Act. Those 6 cases were resolved in a manner that allowed the initial applicant to have access to the material in issue. In the remaining 34 cases, the applicant either accepted the correctness of the agency's decision or for other reasons resolved not to pursue the application further.

A more detailed overview of operations during the reporting period can be found in Chapter 2 and an assessment of performance against established performance criteria in Chapter 3.

Table 3 - Time for Resolution of Cases Completed during 1993/94.

Under 1 month13	
1 - 3 months	31
3 - 6 months	34
6 - 9 months	26
9 - 12 months	11
12 - 15 months	9
15 - 18 months	1
TOTAL	**125**

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CHAPTER

CONSTITUTION & FUNCTIONS; STRUCTURE AND ORGANISATION

PART A : CONSTITUTION & FUNCTIONS

Enabling Legislation; Statutory Powers and Functions

1.1 The Office of the Information Commissioner is established by s.61(1) of the *Freedom of Information Act* 1992 Qld (the FOI Act). That subsection is the first provision in Part 5 of the FOI Act, the title of Part 5 being "External Review of Decisions". The Information Commissioner is the independent external review authority established by the FOI Act to investigate and review decisions of agencies and Ministers of the kind specified in s.71(1) of the FOI Act, which is in the following terms:

> ***71.(1)*** *The functions of the Commissioner are to investigate and review decisions of agencies and Ministers of the following kinds -*
>
> *(a) decisions under section 20 not to publish statements of affairs or as to whether a statement of affairs complies with Part 2;*
>
> *(b) decisions refusing to grant access to documents in accordance with applications under section 25;*
>
> *(c) decisions deferring providing access to documents;*
>
> *(d) decisions giving access to documents subject to the deletion of exempt matter;*
>
> *(e) decisions as to the amount of charges required to be paid before access to documents is granted, whether or not the charge has already been paid;*
>
> *(f) decisions -*
>
> *(i) to disclose documents contrary to the views of a person obtained under section 51; and*
>
> *(ii) to disclose documents if an agency or Minister should have taken, but has not taken, steps to obtain the views of a person under section 51; and*
>
> *(iii) not to amend information in accordance with applications under section 53.*

1.2 In respect of these categories of decisions, the Information Commissioner is empowered to conduct a complete review of the merits of the decision, and a formal determination by the Information

Commissioner in effect substitutes for the decision of the agency or Minister which was under review.

1.3 The Information Commissioner is also empowered by s.71(2) of the FOI Act to investigate and review the grounds for a decision by the Minister for Justice and Attorney-General to issue a certificate under s.36 (Cabinet matter), s.37 (Executive Council matter) or s.42 (matter relating to law enforcement or public safety) of the FOI Act, certifying that matter is exempt matter under those respective exemption provisions. Pursuant to s.84 of the FOI Act, the Information Commissioner's role in respect of this category of decisions is confined to determining whether reasonable grounds exist for the issue of the Minister's certificate - the Information Commissioner's decision does not substitute for the Minister's decision.

1.4 Section 71(3) of the FOI Act provides that the Information Commissioner has power to do all things that are necessary or convenient to be done for or in connection with the performance of the Information Commissioner's functions. Specific powers conferred on the Information Commissioner under Part 5 of the FOI Act include:

power to determine the procedure to be followed on a review under Part 5 of the FOI Act (s.72(1)(a));

power to give directions to participants in a review as to the procedure to be followed on a review under Part 5 of the FOI Act (s.72(2));

power to extend the time limit for lodging an application for review (s.73(1));

power to make preliminary inquiries of an applicant, or a respondent agency or Minister, in order to determine whether the Information Commissioner has power or jurisdiction to review the matter to which the application relates, or whether the Commissioner may decide not to review the matter under s.77 of the FOI Act (s.75);

power to require the production of a document or matter for inspection for the purpose of enabling the Information Commissioner to determine whether the document or matter is exempt, or is an official document of a Minister (s.76(1));

power to decide not to review, or not to review further, a decision in respect of which the Information Commissioner is satisfied that the application for review is frivolous, vexatious, misconceived or lacking in substance (s.77);

power to permit third parties to be participants in the review process (s.78);

power to grant an extension of time to an agency or Minister to deal with an application under the FOI Act, and to grant such an application subject to conditions such as reduction or waiver of charges (s.79(2) and (3));

power to try to effect a settlement between the participants, or suspend a review to allow the participants to negotiate a settlement (s.80);

power to require an agency or Minister to provide an additional statement of reasons for a decision under review, where the initial statement of reasons is considered to be inadequate (s.82);

power, for the purposes of a review, to obtain information from such persons, and make such inquiries, as the Information Commissioner considers appropriate (s.83(4));

power to permit a participant to be represented by another person when appearing before the Information Commissioner (s.83(4));

power to give to persons written notices requiring the giving of information in writing, or the production of documents to the Information Commissioner, or requiring a person to attend before the Information Commissioner and answer questions relevant to a review (s.85);

power to examine witnesses on oath or affirmation (s.86);

power to refer a question of law arising from a review under Part 5 of the FOI Act to the Supreme Court for decision (s.97).

1.5 Section 89 of the FOI Act provides that the Information Commissioner, after conducting a review of a decision (other than a review of a decision of the Minister for Justice and Attorney-General to issue a certificate under ss.36, 37 or 42 of the FOI Act) must make a written decision:

(a) affirming the decision; or
(b) varying the decision; or
(c) setting aside the decision and making a decision in substitution for the decision.

Section 89(2) provides that the Information Commissioner must include in the decision the reasons for the decision. Section 89(5) provides that the Information Commissioner may arrange to have decisions published. During the reporting period, I made arrangements with the Law Book Company to have my formal decisions published in the new looseleaf service by Professor Chris Gilbert and Mr William Lane, Queensland Administrative Law.

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I understand that the decisions will eventually be published in a bound series of reports to be known as the Queensland Administrative Reports (QAR).

1.6 Section 88(1) of the FOI Act provides that in the conduct of a review, the Information Commissioner has, in addition to any other power, power to:

(a) review any decision that has been made by an agency or Minister in relation to the application concerned; and

(b) decide any matter in relation to the application that could, under the FOI Act, have been decided by an agency or Minister

and any decision of the Information Commissioner has the same effect as a decision of the agency or Minister. This very broad grant of power is limited by s.88(2) which provides that, if it is established that a document is an exempt document, the Information Commissioner does not have power to direct that access to the document is to be granted. This means that the Information Commissioner is specifically deprived of the discretion possessed by agencies or Ministers under s.28(1) of the FOI Act to permit access to exempt documents or exempt matter.

1.7 The Information Commissioner can properly be described as a specialist tribunal. The Information

Commissioner has been conferred with powers and functions, and a role in the scheme of the FOI Act, which are comparable to those of the Commonwealth Administrative Appeals Tribunal (the Commonwealth AAT) and the Victorian Administrative Appeals Tribunal (the Victorian AAT) which undertake the function of independent external review authority in the scheme of the *Freedom of Information Act 1982* Cth (the Commonwealth FOI Act) and the *Freedom of Information Act 1982* Vic (the Victorian FOI Act), respectively. Unlike those two bodies, however, which are tribunals of general jurisdiction, the Information Commissioner provides a specialised dispute resolution service confined to disputes under the FOI Act. Moreover, it is clear from Part 5 of the FOI Act and its legislative history that the Queensland Parliament intended that the Information Commissioner provide a speedier, cheaper, more informal and more user-friendly method of dispute resolution than the court system or tribunals such as the Commonwealth AAT and the Victorian AAT, which adopt court-like procedures. In Chapter 2 of my first Annual Report (1992/1993) I traced the evolution of the Information Commissioner model of dispute resolution for FOI cases. I note that that model has been embraced in the freedom of information statutes of Western Australia, South Australia and Tasmania, though in the last two instances the South Australian Ombudsman and the Tasmanian Ombudsman have been given determinative powers in FOI matters, without the creation of a new statutory office of Information Commissioner.

1.8 Since one of the professed objects of freedom of information legislation (see s.5(1)(a) of the FOI Act) is to enhance the accountability of the executive branch of government, it is essential to the credibility of the entire scheme of the legislation that the opportunity is provided for aggrieved applicants to have adverse decisions reviewed on their merits by an authority independent of the executive government. The public is not likely to accept the administration of the FOI Act as being credible, fair and just, if the ultimate decision-making power on whether to grant or refuse access to information which may reflect on the efficacy or propriety of operations of the executive branch of government, were to remain in the hands of officials within the executive branch of government. Many of the exemption provisions in the FOI Act are unavoidably couched in terms which call for the making of value judgments, for example, as to whether disclosure (of particular documents) would involve a reasonable expectation of prejudice (see s.39, s.40, s.42 of the FOI Act) or a reasonable expectation of a substantial adverse effect (see s.40, s.47(1)(a), s.49 of the FOI Act) or as to where the balance of public interest lies when competing public interests favouring disclosure and non-disclosure are identified and weighed. If the public is to have confidence in the administration of the FOI Act, it requires the assurance that judgments made by agency officials and by Ministers (who are potentially subject to institutional pressures which may cause their judgments to favour the interests of their own organisation or the interests of the government of the day) can be tested by independent review.

1.9 Section 61(2) of the FOI Act provides that the Parliamentary Commissioner for Administrative Investigations (the Parliamentary Commissioner), appointed under the *Parliamentary Commissioner Act 1974* is to be the Information Commissioner (unless another person is appointed as the Information Commissioner by the Governor-in-Council on an address from the Legislative Assembly - this has not occurred, and so far as I am aware, is not proposed). By virtue of my appointment as Parliamentary Commissioner, therefore, I also hold the separate statutory office of Information Commissioner. The reasons for the government's decision to adopt this policy choice doubtless included a desire to effect financial savings on the usual costs of establishing a new statutory body. I also consider, however, that the government's choice reflects favourably on the reputation of the Office of the Parliamentary Commissioner as:

(a) an office independent of the executive branch of government which has some 20 years experience of impartial and objective investigation and review of complaints by members of the public against administrative actions of State government departments and statutory authorities and of local government authorities; and

(b) an office with 20 years accumulated experience in pursuing cheap, flexible, informal and non-confrontational methods of dispute resolution, making it best suited to adapt those methods to the task of resolving disputes under the FOI Act.

Public Finance Standards - Program Structure and Goals

1.10 Although the Office of Information Commissioner and the Office of Parliamentary Commissioner are separate statutory offices, Queensland Treasury has provided funding for the Office of the Information Commissioner as a new initiative under the program budgeting arrangements for the Office of the Parliamentary Commissioner. The Office of the Information Commissioner has its corporate services functions of finance, personnel, administration and information technology performed by the Organisational Services Division of the Office of the Parliamentary Commissioner. In terms of program management, the Office of the Information Commissioner does not have its own separate financial program. It forms part of the program "Complaint Investigation and Resolution", Office of the Parliamentary Commissioner. The financial statements for 1993/94 in respect of that program are published in the 20th Annual Report of the Parliamentary Commissioner. An amount of $350,000 was allowed for the Office of the Information Commissioner for 1993/94. $346,000 was paid in salaries and related costs, with other costs, including administration costs, totalling $34,000. The additional operating costs of $30,000 were met from the budget of the Office of the Parliamentary Commissioner. In recognition of the high caseload and need for additional staff, a sum of $483,400 has been allocated for 1994/95.

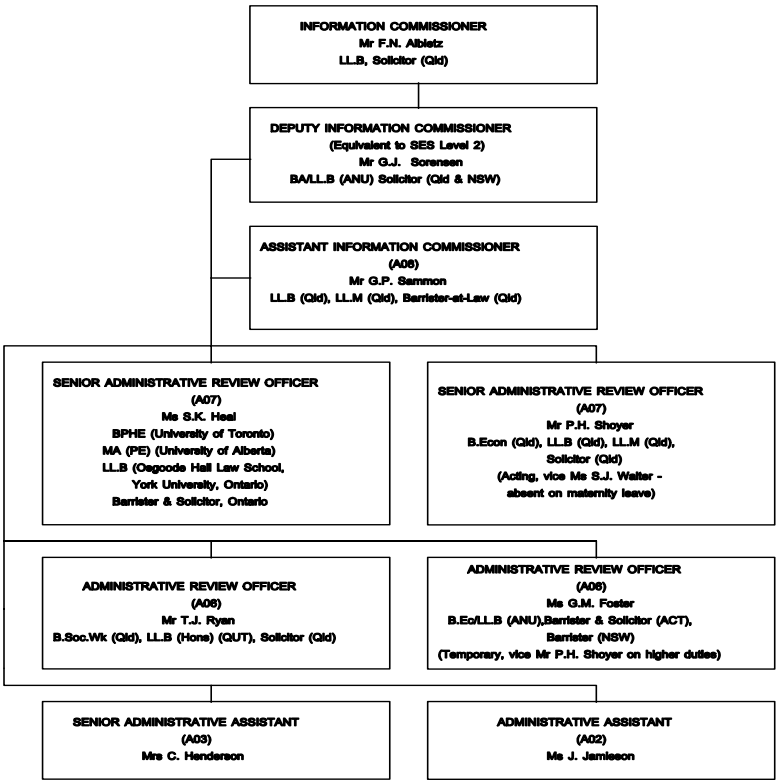
1.11 The program goal for the program "Complaint Investigation and Resolution" is to ensure responsive, independent and impartial investigation and resolution of grievances from members of the public. While this goal is in a general sense appropriate to the role and functions of the Information Commissioner, its wording was obviously chosen for the Parliamentary Commissioner's role which covers most of state government administration and all local government administration, and which involves attempting to resolve grievances without the aid of determinative powers. In contrast, the role of the Information Commissioner is confined to grievances of specified kinds arising under the FOI Act, and the Information Commissioner can exercise determinative powers, i.e. can make decisions which are binding on the participants to a dispute (subject to a participant's right to seek judicial review by the Supreme Court if an error of law in the Information Commissioner's decision can be demonstrated). I have endorsed more specifically appropriate goals and performance indicators for the staff of the Office of the Information Commissioner which are explained in Chapter 3 of this report.

PART B : STRUCTURE & ORGANISATION

1.14 The principal place of business of the Office of the Information Commissioner is Level 25, Jetset Centre, 288 Edward Street, Brisbane, 4000 (telephone (07) 246 7100).

1.15 I, Frederick Norman Albietz, was appointed by the Governor-in-Council on 16 May 1991 to a three year term as Parliamentary Commissioner for Administrative Investigations pursuant to s.5 of the *Parliamentary Commissioner Act* 1974, and on 16 May 1994 was re-appointed to a further three year team. By virtue of that appointment, I also hold office as Information Commissioner pursuant to s.61(2) of the FOI Act.

1.16 The following organisational chart sets out the structure of the Office of the Information Commissioner, as at 30 June 1994 (though it should be noted that the expansion from four professional staff to six professional staff occurred only during June 1994) and also identifies the staff member occupying each position:



1.17 Additional administrative support is provided by the Organisational Services Division of the Office of the Parliamentary Commissioner.

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CHAPTER 2\ df rm txt x0

OVERVIEW OF OPERATIONS DURING THE REPORTING YEAR

2.1 In Chapter 3 of my first Annual Report, I explained that the Office of the Information Commissioner received its first application for review under Part 5 of the FOI Act on 18 January 1993 and that by 30 June 1993 (i.e., a period of 24 weeks) it had received a total of 120 applications for review, at an average rate of receipt of five per week or one per working day. This occurred at a time when, for reasons explained in paragraph 3.10 of my first Annual Report, there were only two full-time professional staff available to deal with this unforeseen deluge of applications for review. The net result was an immediate, large and growing backlog of unresolved applications for review (93 as at 30 June 1993). During 1993/94, when four full-time professional staff were available, 274 applications for review were received at an average rate of approximately 5.5 per week. To give that figure some perspective, if an agency had received 274 FOI access applications during 1993/94, it would have ranked sixth on the list of most applications received (see table 5.1 at page 35 of the Freedom of Information Annual Report 1993/94, published by the Minister for Justice and Attorney General). Moreover, decisions which proceed through to the external review stage can ordinarily be expected to involve the more difficult issues of principle which are capable of arising under the FOI Act. The purpose of an external review authority is to take a more detailed and careful look at the more complex and contentious issues that arise in the administration of the FOI Act, and to provide the opportunity for participants in a review to provide detailed inputs to the decision-making process by way of evidence and/or submissions on the issues for determination.

2.2 The experience of the year under review has brought home to me just how complex freedom of information cases can be. Fortunately, the vast majority of FOI access applications, particularly by applicants seeking information which relates to them personally, do not raise many difficult issues, and are usually dealt with satisfactorily in the initial processing stage. But there has been no shortage of challenging and complex issues among the cases which have proceeded to the stage of external review, and which have raised scenarios to test the margins of the broad and open-textured language in which the FOI Act, and the exemption provisions in particular, are framed. Conversations with members of tribunals of general jurisdiction (i.e. the Commonwealth AAT and the Victorian AAT) which also undertake FOI work, have confirmed my impression that the more difficult FOI cases are among the more complex and time-consuming categories of work undertaken by those tribunals.

2.3 Although it is best, whenever possible, to avoid an unduly legalistic approach to the application of the FOI Act, that is generally not possible with respect to applications for external review that cannot be resolved informally by negotiation, and must proceed to a formal decision by the Information Commissioner. In the usual case, an applicant is asserting a legal right (in accordance with s.21 of the FOI Act) to be given access to requested documents, and the respondent agency is asserting that the matter in issue falls within one of the exceptions to the right of access provided for in the FOI Act, usually one of the exemption provisions in Part 3, Division 2. The participants are entitled to have such a dispute resolved according to law, and I am obliged to resolve it according to proper legal standards and principles. A participant who is aggrieved by a formal decision of the Information Commissioner has the right to apply to the Supreme Court for judicial review if the participant considers that a legal error has been made. Moreover, Australian law imposes fairly onerous obligations as to the extent, and substantive content, of the reasons which must be furnished by a tribunal which (like the Information Commissioner pursuant to s.89(2) of the FOI Act) is required to give reasons for decisions : see H. Katzen "Inadequacy of Reasons as a Ground of Appeal", (1993) Australian Journal of Administrative

Law, p.33.

2.4 The FOI Act has its fair share of legal complexities. Some exemption provisions import tests from reasonably complex areas of the general law, such as breach of confidence (s.46; s.38(b)), trade secrets (s.45(1)(a)), legal professional privilege (s.43), contempt of court and contempt of parliament (s.50). Other exemption provisions turn on sometimes difficult questions of characterisation of the information contained in documents, for example -

whether information relates to the personal affairs of a person - s.44;
whether information is merely factual or statistical, or in the nature of expert opinion or analysis, under s.41(2);

or turn on sometimes difficult value judgments, for example -

whether the balance of public interest favours disclosure of a document in issue when competing public interest considerations, some favouring disclosure and some favouring non-disclosure, are found to exist; or
whether expectations of prejudice from the disclosure of a document in issue are reasonably based, under provisions like s42(1) of the FOI Act.

2.5 The amount of information in issue also has a significant impact on the complexity of cases and especially the time involved in properly dealing with them. The cases which have reached external review have ranged from those involving a few words on one page to those involving thousands of pages with multiple exemption claims. It is common for a single page in issue to have a number of different segments of information, each of which is claimed to be exempt under several different exemption provisions. This may be repeated over dozens or hundreds (in some cases, even thousands) of pages in issue in a particular case. It is rare for the material facts and circumstances which would attract the application of an exemption provision to appear sufficiently from the face of the document or information in issue. Ordinarily the material facts and circumstances which attract the application of an exemption provision must be established by inquiry or by evidence from the participants, and that inquiry or evidence must relate to each discrete segment of matter in issue.

2.6 The according of due process to all of the participants who may be affected by a decision under review has proven to be one of the more significant causes of delay in reviews under Part 5 of the FOI Act. Section 74 of the FOI Act casts on me a mandatory obligation to notify any person who might be affected by a decision which is subject to review under Part 5 of the FOI Act, so that they may apply, if they wish, to participate in the review: see s.78 of the FOI Act. Notification of third parties has been required in approximately half of the cases which come before me, and in a substantial proportion of cases contact has had to be made with several individuals or organisations, in some instances up to 20 individuals (and in one case which fortunately was resolved following mediation, more than 50 individuals would have had to be notified of the review, and invited to participate, if it had proceeded to a formal determination). Obtaining inputs from third parties, as well as from applicant and respondent, inevitably adds to the delay involved in resolving applications for review. In many cases, it is only proper that the third parties should fully participate. The legal requirements of procedural fairness would dictate that they be given the opportunity to do so, in any event. In other cases, however, it is not necessary, and I have suggested at paragraphs 2.20 - 2.26 below that s.74 should be amended so as to reduce unnecessary expense, delay and inconvenience in such cases.

2.7 The performance standards for the Office of the Information Commissioner which I discussed in Chapter 3 of my first Annual Report emphasised quality, timeliness and informality/user friendliness of procedure. Unfortunately, the Office of Information Commissioner has been unable to achieve the

standards of timeliness, in all cases, that were aspired to upon the establishment of the Office (see paragraph 3.2 below and Appendix 4 to this Report) and which are expected by many participants. The sheer number of applications for review, and the speed at which they were received, made it for all practical purposes impossible to have a speedy resolution of all or most applications for review. There are practical limits to the number of cases which an office with limited staff resources is capable of handling in a timely way, while still maintaining high standards of quality, and reducing expense and inconvenience for participants. (The last-mentioned goal is primarily achieved by having the professional staff of my office undertake investigations into issues in dispute so that, to the extent which is appropriate having regard to the nature of the particular issues in dispute, some or all of the participants may be relieved of the burden of presenting a formal case on every issue in dispute). Unfortunately, those practical limits have been well and truly exceeded by the unforeseen influx of applications for review under Part 5 of the FOI Act. The apparent reasons for the extent of the demand for the Information Commissioner's services are noted in the Executive Summary to this Report.

2.8 If the demand for the Information Commissioner's services, and the allocation of resources to meet the demand, can be brought into a reasonable balance, then I have no doubt that the Information Commissioner model for dispute resolution in FOI cases is capable of meeting all its goals, including timeliness. I note that, in its first 8 months of operation, the Office of the Western Australian Information Commissioner (with 4 full-time professional staff devoted to dispute resolution during that period) received applications for review at a rate of approximately 2 per week (61 in less than 30 weeks) and managed to achieve excellent standards of timeliness in the resolution of cases (source: the First Annual Report of the Western Australian Information Commissioner, 1993/94). My Office resolved 125 applications for review during 1993/94, i.e. an average rate of 2.5 per week, and achieved substantial progress towards resolution of the majority of other applications for review on hand. In absolute terms, I consider this to have been a very good achievement (and one which compares favourably to the record achieved by the external review authorities under the Commonwealth and the Victorian FOI Acts in the early years of their operation: see the following paragraph) but there is no doubt that many applicants for review have been left unsatisfied with the fact that their cases have not been speedily resolved. This is understandable since it is often the case that the value to an applicant in obtaining particular information lies in obtaining it quickly for some particular purpose. As I remarked in paragraph 3.13 of my First Annual Report, it is a fine question of judgement for a government (in the current climate of pressure to restrain public sector outlays) as to what is a tolerable level of delay in the resolution of FOI disputes, and what level of resourcing the government should consequently be prepared to commit to an independent external review authority for FOI disputes.

2.9 The performance of the Office of the Information Commissioner in its first full year of operation (1993/94) can be contrasted with the performance of the Commonwealth AAT in dealing with appeals under the Commonwealth FOI Act in the first full year following the commencement of the Commonwealth FOI Act. The Commonwealth AAT is, of course, a tribunal of general jurisdiction, with FOI appeals constituting a small proportion of its work, while the Information Commissioner is a specialist tribunal. Unfortunately, no details are available for the number of staff hours devoted by the Commonwealth AAT to FOI appeals in the relevant year, which would have allowed for a more detailed comparison of performance against the equivalent figure for the Office of the Information Commissioner. (Another interesting comparison, if figures were available, would be that between the amount of legal expenses, including the time of salaried legal staff, incurred by Commonwealth government agencies in the handling of FOI appeals to the Commonwealth AAT, and the comparable expenses for Queensland government agencies in the handling of cases before the Office of the Information Commissioner. I consider that the latter would be considerably lower than the former, since Queensland government agencies are rarely required to incur substantial legal expense in the preparation of a formal case for presentation to the Information Commissioner). The following table illustrates relative performance.

Table 4: Comparison of Performance of Commonwealth AAT & Qld. Information Commissioner

	Commonwealth	Queensland
	Period: 1.12.82 - 30.6.83	**Period: 19.11.92 - 30.6.93**
Applications to External Review Authority	71	120
Resolved by formal decision	3	7
Resolved without formal decision	16	20
Pending at end of period	52	93
	Period: 1.7.83 - 30.6.84	**Period: 1.7.93 - 30.6.94**
Applications to External Review Authority	203	274
Resolved by formal decision	16	20
Resolved without formal decision	125	105
Pending at end of period	83	242

2.10 It is more difficult to make comparisons with Victoria, where the County Court was initially designated as the external review authority under the Victorian FOI Act, but the jurisdiction was transferred to the Victorian AAT on 1 March 1985. In 1983/84, 59 appeals were lodged with the County Court. In 1984/85, 112 appeals were lodged with either the County Court or the Victorian AAT, which represents a rate of activity considerably lower than that experienced in Queensland. In 1984/85, 16 appeals were resolved by formal decision (of either the County Court or the Victorian AAT), 38 were resolved without formal decision, and 58 remained pending. I have chosen to make comparisons with the Commonwealth and Victoria since the number of applications made to the relevant external review authorities in other Australian jurisdictions have been much lower, and do not afford meaningful comparisons (except for Western Australia which is referred to in paragraph 2.8 above).

2.11 One other interesting comparison with the Commonwealth and Victoria (illustrated in Tables 5A, 5B and 5C below) is that the percentage of total FOI access applications which proceed through to the stage of external review is more than twice as high in Queensland, which tends to suggest that the less formal Information Commissioner model for dispute resolution in FOI cases, is less expensive and less intimidating for applicants aggrieved by agency decisions.

Table 5A - Commonwealth of Australia - Proportion of External Review Applications to Total FOI Access Applications

Period	No. of Appeals to Commonwealth AAT	Total No. of FOI Access Applications	As a %
01/12/82 to 30/06/83	69	5,669	1.2%
1983/84	203	19,227	1.06%
1984/85	310	32,956	0.94%

1985/86	267	36,956	0.73%

Table 5B - Victoria - Proportion of External Review Applications to Total FOI Access Applications

Period	No. of Appeals to Victorian County Court or AAT	Total No. of FOI Access Applications	As a %
1983/84	59	4,557	1.3%
1984/85	112	5,038	2.22%
1985/86	119	9,431	1.26%

Source: Annual Reports on the Freedom of Information Act of each jurisdiction.

Table 5C - Queensland - Proportion of External Review Applications to Total FOI Access Applications

Period	**No. of Applications for Review by Information Commissioner**	**Total No. of FOI Applications**	**As a %**
19.11.92 - 30.6.93	120	5,123	2.34%
1.7.93 - 30.6.94	274	8,272	3.3%

2.12 Given the practical impossibility of achieving speedy resolution of all cases received by the Office of the Information Commissioner, I considered it more important, for the better administration generally of the FOI Act, that my staff should not sacrifice quality in the pursuit of timeliness. One of the most important functions of my Office is to provide authoritative guidance for FOI administrators on the correct interpretation and application of the provisions of the FOI Act. Especially in the early stages of the operation of the FOI Act in Queensland, I considered it important to give priority to the educative and normative (i.e. standard-setting) role of an external review authority. This strategy was given effect not only through the issue of formal decisions, but through attempting, in the mediation/negotiation phase of the review process, to explain to agencies, both in conference and in correspondence, the basis on which my Office considered that an agency may have misunderstood or misapplied the FOI Act in a particular case.

2.13 Obviously, in pursuing this policy, the formal decisions published by the Information Commissioner are of primary importance. Since I regarded the accountability and public participation objects of the FOI Act to be its most important, I ensured that two of my earliest formal decisions, *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 and *Re Hudson, as agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123, would analyse in detail the two exemption provisions which were of most significance with respect to those objects, i.e., respectively, s.41 (the deliberative process exemption) and s.36 (the Cabinet matter exemption). During the course of 1993, however, it became apparent, from monitoring the nature of the issues raised in applications for review received by my Office, that the issues in respect of which FOI administrators had the most pressing need for authoritative guidance were:

the ambit of the key phrase "information concerning the personal affairs of a person", which is of importance for determining -

which FOI access applications are subject to charges;

the scope of the s.44(1) exemption;

the scope of a person's right to seek amendment of personal affairs information, under Part 4 of

the FOI Act; and
the circumstances in which s.6 of the FOI Act may apply.

the proper interpretation and application of the s.46 exemption (matter communicated in confidence).

the proper interpretation and application of s.42(1)(b) of the FOI Act (confidential sources of information), there being an extraordinary number of applicants wishing to identify who had provided information to an agency with law enforcement responsibilities, concerning an alleged breach of the law by the applicant.

the proper interpretation and application of s.45 of the FOI Act (the business affairs exemption).

the proper interpretation and application of s.43(1) of the FOI Act (the legal professional privilege exemption). The leading case, *Re Smith and Administrative Services Department* (1993) 1 QAR 22 was decided on 30 June 1993.

the principles applicable to "sufficiency of search" cases, that is, cases where the applicant claims that an agency or Minister has failed to locate and deal with all documents falling within the terms of the relevant FOI access application.

2.14 Suitable cases, involving a relatively small number of documents, were selected as a vehicle for providing a detailed, and hopefully authoritative, explanation of the proper interpretation and application of these provisions of the FOI Act. (The most complex of these provisions was s.46, especially s.46(1)(a) which depends on the application of fairly complex legal tests derived from the general law relating to breach of confidence. It was considered important to follow up the detailed analysis given in the leading case, *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, which many FOI administrators found fairly intimidating, with a number of other cases which more concisely explained and illustrated the proper application of the principles set out in *Re "B"*.) The reception to this strategy has generally been favourable with feedback from FOI practitioners suggesting that the leading cases have been valuable in explaining and clarifying issues which tend to recur in the administration of the FOI Act.

2.15 Without the resources to deal with all cases in a timely fashion, I have had to make choices as to which cases are deserving of priority treatment. Obviously, I have given priority to cases selected as test cases on particular issues which have been identified as arising in a substantial number of other pending appeals. A variety of other factors have been taken into account in assessing whether particular cases are more deserving of priority treatment than others. These have included whether disclosure of the documents in issue may be of general public interest, having regard to the objects of the FOI Act, e.g., where disclosure of documents in issue relates to the accountability and public participation objects of the FOI Act; or where a particular applicant has an interest in obtaining access to particular documents that appears to be deserving of priority, for instance, where the applicant requires the documents for effective presentation of a case to some administrative authority. (Generally speaking, the availability of the coercive powers of a court to compel the production of information relevant to the issues raised in litigation before that court, has meant that applications by litigants for documents to assist in litigation have not been accorded a high priority).

2.16 Another important factor was this Office's preliminary assessment of whether or not the documents or information in issue in a particular case appeared to have been wrongly withheld from an applicant. As a general guiding principle, my Office has endeavoured to give priority to progressing cases which appeared likely, on preliminary assessment, to result in the disclosure of documents to an applicant for

access under the FOI Act, rather than to progressing cases which appeared likely to result in a confirmation of the correctness of an agency decision refusing access. In general, I consider it a better use of limited resources to encourage agencies to grant access to documents where preliminary assessment indicates that access should be given. For the same reason, my Office generally accords priority to the resolution of "reverse FOI" cases, i.e. cases in which a third party seeks review of an agency's decision to grant access to an applicant for access under the FOI Act. The "reverse FOI" procedures in the FOI Act are capable of abuse by a third party who merely wishes to delay access by an applicant for as long as possible, and where this appeared to me to be a possible motive of the applicant for review in a "reverse FOI" case, or where, regardless of motive, it appeared that a "reverse FOI" application was unnecessarily delaying the giving of access to documents which did not appear to be exempt, I have ordinarily given priority to such cases. Regrettably, the complexity of a case has also been a factor, in that some cases, involving large numbers of documents and complex issues, have had to be given lower priority because it appeared they would consume a disproportionate amount of the limited resources available to the Office, and would thereby most likely delay the resolution of a great many less complex cases.

2.17 In Chapter 4 (pp.24-29) of my First Annual Report (1992/93), I explained the procedural approach that would ordinarily be adopted for the resolution of FOI disputes. That approach has been adhered to during 1993/94. The main emphasis of that approach is on negotiation with the participants to resolve as many issues in dispute as possible. When that process is exhausted, opportunities are given to the participants to lodge evidence and written submissions in support of their respective cases, preparatory to a formal determination.

2.18 The procedures adopted are intended to keep the costs for participants (including government agencies) as low as possible. However, when no further concessions from either side are able to be obtained by negotiation, and there are documents remaining in issue which are not, on their face, clearly exempt, it is generally necessary to invite the agency claiming exemption to lodge formal evidence and written submissions to establish the material facts and circumstances which attract the application of the exemption provisions relied upon. Other participants are then given the opportunity to respond. Thus some expense may be incurred (depending on whether the participants choose to seek professional legal assistance) when issues requiring formal determination make these more formal procedures necessary.

Need for Amendments to Part 5 the FOI Act

Additional Powers for Sufficiency of Search cases

2.19 In paragraphs 4.9 - 4.15 of my first Annual Report, I called for two amendments to be made to the FOI Act concerning the Information Commissioner's powers and procedures under Part 5. The first one concerned the conferring of powers on the Information Commissioner equivalent to those conferred on the Parliamentary Commissioner by s.20 of the *Parliamentary Commissioner Act 1974* (i.e. the power to enter into any premises occupied or used by an agency subject to the FOI Act, and power to inspect those premises or anything for the time being therein) so as to strengthen the powers available to me to deal with "sufficiency of search" cases. I note that no action has been taken by the government in respect of this issue.

Section 74

2.20 The second amendment which I called for was an amendment to s.74 of the FOI Act. Section 74 was amended by the *Freedom of Information Amendment Act 1993*, but not in a manner which

appropriately dealt with all of the practical difficulties which s.74 poses. The amendments made to s.74 did not repair the structural flaws inherent in it, but merely left it intact, renumbered as s.74(1), while adding a new s.74(2) to deal with particular problem cases that were causing concern to one agency. One of those problem cases was before me, and was resolved (by negotiation) during the reporting period. It involved an applicant for review who had been convicted of sexual offences against children and was seeking access to the statements provided by the children during the course of investigation. Pursuant to s.74 as originally enacted, I was probably obliged to attempt to inform those children that the application for review had been made, because they might have been affected by the decision the subject of the review. The documents in issue, however, were almost certain to have been found exempt, if formal determination had been required, and there seemed to be no logical reason to contact the children, perhaps causing them fresh distress, unless and until it appeared that the documents in issue might be liable to disclosure under the FOI Act. The new s.74(2) of the FOI Act is intended to cover situations of a similar kind to that case. However, the amendment to s.74 which I suggested in my first Annual Report would have met not only that situation, but other, less dramatic, situations that nevertheless cause significant practical difficulties in the conduct of reviews under Part 5 of the FOI Act.

2.21 In my opinion, s.74 needs to be given further attention by the legislature. Section 74 is merely a notice provision. It purports to impose a mandatory obligation on the Information Commissioner to notify certain persons, before commencing a review, that a decision is to be reviewed. However, the only mandatory obligation for notification of persons which it is necessary, appropriate, and practicable to require, before starting a review, is an obligation to notify the applicant for review and the agency or Minister responsible for the decision of which review is sought. All that the scheme of Division 4 of Part 5 of the FOI Act requires of an applicant to initiate a Part 5 review, is that the applicant lodge an application for review in writing giving particulars of the decision for review. In practice, I request the applicant to provide a copy of the letter notifying the decision (and the reasons for decision) of which review is sought, so as to be satisfied that I have jurisdiction to review. I then issue letters to the decision-maker and applicant, in accordance with s.74, notifying them that the decision is to be reviewed, and also requesting, in the letter to the decision-maker, the supply of all relevant documents. It is only when the relevant documents are obtained and inspected that an assessment can be made of what other persons could be affected by the decision subject to review. Thus, it is pointless to maintain in a legislative provision the fiction that the Information Commissioner is in a position to even consider (let alone to take any practicable steps towards) giving notice to persons other than the applicant and the relevant decision-maker, before starting a review. The present s.74(1), should therefore be amended in the manner suggested in paragraph 4.12 of my first Annual Report, that is:

> *74(1) Before starting a review, the Commissioner must inform the applicant and the agency or Minister concerned that the decision is to be reviewed.*

2.22 As to notifying other persons who may be affected by the decision the subject of review, it seems to me that there are two sensible approaches. The first is that suggested in my recommended s.74(2) as set out in paragraph 4.12 of my first Annual Report, where I suggested that a separate subsection 74(2) should provide as follows:

> *(2) The Commissioner may take such steps as are practicable to inform another person who the Commissioner considers could be affected by the decision the subject of the review, that the decision is to be reviewed.*

2.23 In terms, this makes the giving of notice discretionary rather than mandatory, but the exercise of the discretion would, as a matter of law, be governed by the common law rules of natural justice/procedural

fairness. Since the legal requirements of procedural fairness will apply in any event, the other acceptable approach would be to make no specific provision at all for notice to parties other than the applicant and respondent. It is appropriate that both applicant and respondent be notified that the Information Commissioner is satisfied as to jurisdiction, and intends to conduct a review under Part 5. The notification of other parties who may be affected by the decision under review requires no express provision at all in Part 5 of the FOI Act. It can be left to the application of the legal requirements of procedural fairness to dictate what notice, and what opportunity to be heard, must be given to a party whose interests may be adversely affected by the disclosure under the FOI Act of information which is in issue in a review under Part 5. If this proposal is accepted, it would require that s.74(1) in its present form be amended in the manner suggested in paragraph 2.2 above, and the present s.74(2), s.83(5) and s.89(4) be repealed.

2.24 All that the agency which sought the 1993 amendments (referred to in paragraph 2.20) was concerned about was, in essence, a mandatory requirement for notice to be given to certain persons, in situations where common sense would dictate that it was preferable that notice not be given, unless and until it was strictly necessary to do so in order to enable those persons to have the opportunity to participate in a review under Part 5 when their interests might be adversely affected. What I am particularly concerned to avoid is to have s.74 perpetuate an onerous and unnecessary, mandatory notice obligation which in many cases will impose unnecessary expense, inconvenience, and delay for participants, and anxiety (of a kind which may not amount to undue distress, or adversely affect a person's physical or mental well-being, which are the only circumstances to which the present s.74(2) is directed) for a range of persons who in many instances need not be troubled at all.

2.25 I note that s.51 of the FOI Act does not oblige a person who may be affected by the release of certain information to be consulted where the decision-maker does not propose to release the information (i.e. where the decision-maker is satisfied that the information is clearly exempt matter under Part 3 Division 2 of the FOI Act). Why then should s.74 require the Information Commissioner automatically to notify any person who may be affected by the decision under review (thereby causing that person anxiety or at the very least causing them to assess whether they should expend time and perhaps money in seeking to participate in a review by the Information Commissioner), when investigation and review by the Information Commissioner, obtaining evidence and submissions in an informal manner from the applicant and the respondent decision-maker, may result in the Information Commissioner negotiating an informal resolution of the case, or becoming satisfied that the material in issue is clearly exempt, so that there is no necessity to trouble the person(s) who would be affected if the material were to be released. The basic principle of natural justice is that an opportunity to be heard is to be given to a person when it is proposed to make a decision adverse to that person's interests.

2.26 Allowing the Information Commissioner the discretion to notify a person who may be affected by the disclosure of information only when it is apparent that there is a real prospect that the information may be found not to be exempt (i.e. only when natural justice requires that that person be given the opportunity to be heard) would assist in eliminating or reducing unnecessary delay, expense and inconvenience for participants in a Part 5 review. This is consistent with the objects that Parliament was seeking to achieve in enacting the Information Commissioner model of review (in this regard, see chapter 2 and paragraphs 4.23 - 4.38 of my first Annual Report, 1992/93).

Section 76(2)

2.27 During the course of the reporting period I have noted a further significant flaw in a provision in Part 5 of the FOI Act, which prevents, or makes unnecessarily difficult, the process of giving to a person who has been notified of a review, a meaningful opportunity to participate by being provided with

copies of the documents in issue (assuming that such documents are not exempt *vis-à-vis* that person). The flaw is in s.76(2) of the FOI Act which has gone to unnecessarily extreme lengths to ensure the security of documents claimed to be exempt that are produced to the Information Commissioner in accordance with s.76(1). Section 76(2) of the FOI Act is in the following terms:

> *(2) The Commissioner must do all things necessary to ensure -*
>
> *(a) that a document or matter produced to the Commissioner under subsection (1) is not disclosed to a person other than a member of the staff of the Commissioner in the course of performing duties as a member of the staff; and*
>
> *(b) the return of the document or matter to the person who produced it at the end of the review.*

2.28 Take the situation of a document provided, in confidence, by person X to a government agency, which the agency claims (in response to an FOI access application by person Y) to be exempt under s.46 of the FOI Act. The Information Commissioner requires the agency to produce the document under s.76 of the FOI Act. It then becomes apparent that person X is a person whose interests may be adversely affected if it is decided that the document in issue is not exempt. Natural justice requires that person X be given an opportunity to be heard on the question of whether or not the document is exempt. If s.76(2) is interpreted literally, it not only prevents the Information Commissioner from forwarding a copy of the document in issue to person X, the person who originally supplied it to a government agency, it also prevents the Information Commissioner from even discussing the contents of the document with person X. The same difficulty would arise if applicant Y were seeking access to personal affairs information concerning person X which X had supplied to the government, or commercially valuable information about corporation XYZ which that corporation had supplied to a government agency. The literal application of s.76(2) would cause enormous practical problems for the conduct of a review under Part 5, in situations of this kind, and would run directly contrary to the aim of conducting a streamlined review process which eliminates unnecessary expense and delay. I consider that an amendment should be made by adding words to the effect of the following words, at the end of the present paragraph (a) in s.76(2) of the FOI Act:

> *...staff, or to a person to whom it is necessary to disclose the document or matter for the purposes of the conduct of a review under this Part; and*

2.29 The vast majority of persons whom the Information Commissioner contacts because they may be affected by the disclosure of a document under review, are persons who cannot afford, or do not wish to seek, legal representation to present a case to the Information Commissioner. I would wish to have my staff try to assist these people to make their views known to me on the issues which arise for determination. But if s.76(2) is applied literally, the discussion of the contents of a document in issue with such persons would be prohibited.

Section 81 - Modified Onus in "Reverse FOI" cases

2.30 Section 51(2)(e) of the FOI Act provides that where an agency or Minister, after having consulted with a third party in the circumstances prescribed by s.51(1), decides (contrary to the views of the third party) that the matter in issue is not exempt matter, the agency or Minister must nevertheless refrain from giving access to the matter in issue until the third party has exhausted the rights of review available under the FOI Act. Section 71(1)(f) of the FOI Act makes it clear that a third party is entitled to apply for review by the Information Commissioner of decisions to disclose documents contrary to the views of the third party obtained under s.51 of the FOI Act. Applications of this kind are

commonly referred to as "reverse FOI" applications. I have already referred, in paragraph 2.16 above, to the fact that the "reverse FOI" procedures in the FOI Act are capable of abuse by a third party who wishes to assert that documents are exempt merely for the purpose of delaying, for as long as possible, access by the original applicant for access. Section 81 of the FOI Act provides:

> *81. On a review by the Commissioner, the agency which or Minister who made the decision under review has the onus of establishing that the decision was justified or that the Commissioner should give a decision adverse to the applicant.*

2.31 I have referred to the potential for abuse of the "reverse FOI" procedures, but even where the applicant in a "reverse FOI" application has a legitimate case to argue, it is difficult to see any justification for imposing on an agency or Minister, which has decided in favour of giving access to documents under the FOI Act, an onus of establishing that documents in issue are not exempt. In my opinion, it is consistent with the object of the FOI Act (see s.4 of the FOI Act) that the party which asserts that documents in issue are exempt should bear the onus of establishing its case. This principle has been recognised in s.61(2) of the Commonwealth FOI Act (following amendments made in 1991) and in s.102(2) of the *Freedom of Information Act 1992* WA. I recommend that s.81 of the FOI Act be amended as follows:

> *81(1) Subject to subsection (2), on a review by the Commissioner, the agency which or Minister who made the decision under review has the onus of establishing that the decision was justified or that the Commissioner should give a decision adverse to the applicant.*
>
> *(2) On a review by the Commissioner of a decision of the kind identified in section 71(1)(f)(i) or section 71(1)(f)(ii), the applicant for review has the onus of establishing that the matter which the relevant agency or Minister has decided to disclose, is exempt matter.*

Summary of recommended amendments

2.32 I consider that the amendments to Part 5 of the FOI Act which I have raised above require prompt attention, in the interest of the more efficient conduct of reviews under Part 5 of the FOI Act. In summary, they are:

- the conferral on the Information Commissioner of powers equivalent to those conferred on the Parliamentary Commissioner by s.20 of the *Parliamentary Commissioner Act 1974.*
- the amendment of s.74(1) in the manner suggested in paragraph 2.21 above.
- the amendment of s.74(2) in the manner suggested in paragraph 2.22 above (or its repeal for the reasons suggested in paragraph 2.23 above), and the consequential repeal of s.83(5) and s.89(4).
- the amendment of s.76(2) in the manner suggested in paragraph 2.28 above.
- the amendment of s.81 (in the manner suggested in paragraph 2.31 above) so that in a "reverse FOI" application, the applicant for review bears the onus of establishing that the matter which an agency or Minister has decided to disclose, is exempt matter.

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CHAPTER

GOALS & PERFORMANCE IN 1993-1994

3.1 In terms of program management, the Office of the Information Commissioner does not operate under its own separate financial program, but as part of the program "Complaint Investigation and Resolution" of the Office of the Parliamentary Commissioner. I have nevertheless established a separate set of goals and key performance indicators for the work undertaken by the Office of the Information Commissioner.

3.2 In my first Annual Report (1992/93), the performance criteria were grouped under the headings of Quality, Timeliness, and Informality/user friendliness of procedure. Some of the performance criteria were assessed against two documents published as Appendix 3 and Appendix 4 to my first Annual Report, being respectively titled "Performance Standards - Quality and Timeliness" and "Time Standards for Case Management". They are again published as Appendix 3 and Appendix 4 to this Report, for ease of reference. Those performance standards were formulated shortly after the Office of the Information Commissioner came into being, on the assumption that the Office was likely to receive approximately 125 cases in its first year of operation. The "Performance Standards - Quality and Timeliness" remain relevant and applicable. However, paragraph 8, and to a lesser extent, paragraph 6, of the "Time Standards for Case Management" appear with the benefit of hindsight to have been overly optimistic. The "Time Standards for Case Management" are now regarded as setting standards of timeliness to which the Office of the Information Commissioner should aspire (and with appropriate resourcing should aim to meet). However, with the current imbalance between available resources and the number of cases on hand, the aim is to meet paragraphs 1 - 5 of the "Time Standards for Case Management" in all cases, paragraphs 6 and 7 in most cases, and paragraph 8 in a majority of cases. As previously explained, the case-load for each full-time member of professional staff is too high to make achievement of the standards in paragraphs 6 and 7 a realistic goal in all cases, or achievement of the standards in paragraph 8 a realistic goal in most cases. Approximately 40% of cases on hand at 30 June 1994 had not been resolved within the time frames specified in paragraph 8 of the "Time Standards for Case Management". (It should also be noted, however, that approximately 30% of those cases, i.e. 12% of all cases on hand, were unable to be satisfactorily progressed because of delays on the part of the participants in the review, rather than delays on the part of the Information Commissioner's Office.) With the benefit of experience, the "Time Standards for Case Management" have also been found to need refinement in that not only the volume of documents in issue, but also the number of issues in dispute, the number of participants involved, and the number of witnesses involved, all have significant effects on the complexity and likely duration of cases.

3.3 I have formulated a new set of goals and key performance indicators for the Office of the Information Commissioner, as follows:

Goals:

1. To conduct the investigation and review of decisions subject to review under Part 5 of the FOI

Act, with a high standard of professionalism, timeliness and efficiency, in order to establish the correct decision required by the provisions of the FOI Act (or resolve the dispute by informal means) with as much expedition as the requirements of procedural fairness, and the issues for determination in the case, will allow.

Performance Indicators

achievement in each reporting period of a target number for total cases resolved (the target to be set by the Information Commissioner by reference to actual performance in past reporting periods, expected optimum performance for each available member of professional staff, and expected efficiency/productivity improvements). An additional measure of performance to be noted will be the percentage variation in the number of resolved cases, compared with previous reporting periods.

proportion of cases completed in the reporting period which were resolved within 12 months of lodgment (and percentage variation in that proportion over previous reporting periods).

average time for finalisation of cases completed in the reporting period (and percentage variation in that average time over previous reporting periods).

2. To adopt flexible and informal procedures which ensure that each case proceeds with as little formality and technicality as the issues for determination in the case will allow, so as to-

promote informal resolution of disputes (or reduction of the number of issues in dispute requiring formal resolution) by negotiation and mediation; and

avoid or minimise unnecessary expense to participants (including government agencies).

Performance Indicators

proportion of total cases assessed for investigation and review during the reporting period in which informal dispute resolution methods (i.e. negotiation/mediation) were undertaken.

proportion of cases resolved informally compared to cases resolved by formal written determination.

3. To maximise the educative and normative role of the Information Commissioner as independent external review authority under the *Freedom of Information Act 1992* by publishing formal decisions which authoritatively interpret and explain relevant provisions of the *Freedom of Information Act 1992* and correctly illustrate the application of relevant principles in particular cases.

Performance Indicator

number of Information Commissioner's formal determinations that are overturned for

legal error by the Supreme Court in judicial review proceedings.

Performance against Goal 1

3.4 During 1993/94, the target which I set for my professional staff was to resolve a minimum of 110 cases. This target took account of the fact that, while two of the four professional staff were experienced in FOI matters, the other two were new to this very specialised jurisdiction. It also took account of the need for senior staff to expend a significant amount of time in carefully researching and writing the leading cases, intended to provide authoritative explanations of those provisions of the FOI Act identified in paragraph 2.13 of this Report. Ultimately, the Office was able to resolve 125 cases during 1993/94, which I regard as a very good result.

3.5 The proportion of cases closed in 1993/94 which were resolved within twelve months of lodgment was 92%. This will constitute the base year for comparison with subsequent years, since in the abbreviated reporting period for 1992/93, which covered only five and a half months, the proportion achieved was 100%. The percentage achieved must realistically be expected to decline over the first three reporting periods, but hopefully to stabilise at approximately 80% which I consider to be a realistic target figure for future years if workloads remain at their current high levels. The average time for finalisation of cases resolved during the reporting period was 162 days, i.e. approximately 23 weeks. Again this will form the base year for comparison with performance in subsequent years.

Performance against Goal 2

3.6 The proportion of total cases assessed for investigation and review during 1993/94 in which informal dispute resolution methods were undertaken was 92%. A total of 105 cases was resolved informally compared to 20 cases resolved by formal written determination, making a proportion of 84% resolved by informal methods. In addition, it has been the experience to date that even when mediation does not fully resolve a dispute it does, in nearly all cases, result in some significant progress towards narrowing and reducing the number of issues which must be the subject of formal determination.

Performance against Goal 3

3.7 Any judgment of the quality of the Information Commissioner's formal decisions and of their educative and normative role is necessarily subjective, and to that extent is incapable of objective measurement. In respect of the published performance indicator, the position is that, during the reporting period, none of the formal decisions of the Information Commissioner was overturned for legal error by the Supreme Court in judicial review proceedings, and indeed, no legal challenge was initiated to any decision of the Information Commissioner. I am encouraged by feedback which suggests that FOI administrators are finding valuable guidance in the formal decisions issued by the Information Commissioner, and by the fact that some of my more significant decisions have been approved and applied by other external review authorities, notably the Western Australian Information Commissioner, the South Australian Ombudsman and the Tasmanian Ombudsman.

3.8 Detailed notes of the more significant decisions issued during 1993/94 appear in Chapter 3 of the Freedom of Information Annual Report (1993/94) published by the Minister for Justice and Attorney General. It is unnecessary therefore to produce detailed summaries in this report. However, since they represent a most significant part of the work undertaken by my Office during the year, I propose to record some brief notes on what I consider to be the significant issues dealt with in each formal decision. This may

be of assistance as a check list or handy guide for FOI administrators:

Re Hudson, as agent for Fencray Pty Ltd, and the Department of the Premier, Economic and Trade Development (Decision No. 93004, 13 August 1993; (1993) 1 QAR 123)

Amendments to s.36 of the FOI Act (the Cabinet matter exemption) which took effect from 20 November 1993 (and which were apparently made in response to my decision in this case) have diminished the continuing value of my reasons for decision. Nevertheless, the reasons for decision -

contain a detailed analysis of the orthodox rationale for Cabinet secrecy, in terms of the convention of collective ministerial responsibility.
analyse the meaning of the phrase "deliberation of Cabinet" which was retained in s.36(1)(g) and s.36(2)(a) and (b) of the FOI Act, following the 1993 amendments.
analyse the wording of the proviso to the s.36(2) exception, which remained unchanged following the 1993 amendments.
analyse and illustrate the meaning of the phrase "merely factual matter", which no longer appears in s.36(2) following the 1993 amendments, but which still appears in s.41(2)(b) of the FOI Act.

Re Doelle and Legal Aid Office, Qld (Decision No. 93005, 24 November 1993; (1993) 1 QAR 207)

This is the first, and so far the only, formal decision I have given in respect of Part 4 of the FOI Act, which deals with the amendment of information relating to a person's personal affairs. The result of the case turned on the fact that the applicant was unable to point to any evidence which established that any part of the information in issue was inaccurate, incomplete, out of date or misleading. I observed that, in the particular circumstances of this case, there was a practical or evidentiary onus on the applicant to do so, even though the ultimate legal onus remained on the respondent in accordance with s.81 of the FOI Act. I also found that the words of s.55 of the FOI Act, which contemplate the making of amendments by altering information or adding an appropriate notation to information, do not comprehend or authorise the destruction or removal of documents.

Re Stewart and Department of Transport (Decision No. 93/006, 9 December 1993; (1993) 1 QAR 227)

This case includes an extensive survey of Commonwealth, Victorian and New South Wales case law on the meaning of the phrase "personal affairs of a person", which, until 1991, appeared in the Commonwealth FOI Act, and which still appears in the Victorian and New South Wales freedom of information legislation.

The decision notes that the ambit of the phrase "personal affairs of a person" (and relevant variations thereof) is important in four significant contexts in the Queensland FOI Act, namely -

i) the charging regime embodied in s.29(2) of the FOI Act and sections 6 and 7 of *Freedom of Information Regulation 1992* Qld.
ii) the s.44 exemption for "matter affecting personal affairs".
iii) the right conferred by s.53 of the FOI Act to seek amendment of information relating to a person's personal affairs, if the information is inaccurate, incomplete, out of date, or misleading.

iv) s.6 of the FOI Act, which permits a modification of the ordinary approach to the application of some exemption provisions in circumstances where an applicant is seeking access to information which relates to the applicant's personal affairs.

I decided that the phrase "personal affairs of a person" (and relevant variations thereof) should be interpreted as having a consistent meaning in the different contexts in which it appears in the FOI Act.

I decided that the phrase should be interpreted consistently with decisions of the Federal Court of Australia which had interpreted the equivalent phrase which appeared in the Commonwealth FOI Act until 1991; in my opinion, the phrase "personal affairs" means affairs of or relating to the private aspects of a person's life.

Recognising that there was still a degree of vagueness about the ambit of the phrase, I set out examples of categories of information which clearly fall within the meaning of the phrase "personal affairs of a person", and categories of information which ordinarily fall outside the meaning of that phrase. I also addressed some recurring issues in what I referred to as the "grey area" within the ambit of the phrase. I indicated that when dealing with difficult questions of characterising matter as personal affairs matter or not, i.e., when working within the grey area at the edges of the ambit of the phrase, it was appropriate to draw on principles from privacy law in the manner explained in paragraph 76 of my reasons for decision.

Re Timms and the Department of Employment, Vocational Education, Training and Industrial Relations (Decision No. 93007, 17 December 1993; (1993) 1 QAR 270)

This case illustrates a particular application of the principles set out in *Re Stewart*, the issue being whether information relating to the applicant's conduct of "a hobby farm" was information concerning the applicant's personal affairs or business affairs. In the particular circumstances of that case, I decided the information in issue concerned the applicant's business affairs.

Re "B" and Brisbane North Regional Health Authority (Decision No. 94001, 31 January 1994; (1994) 1 QAR 279)

This case includes a detailed analysis of s.46 of the FOI Act, and a survey of general law cases concerning actions for breach of confidence which may be of assistance in applying s.46(1)(a) of the FOI Act. In particular, the elements of an action in equity for breach of confidence are explained and illustrated in considerable detail.

The elements of s.46(1)(b) are also identified and explained in some detail. In particular there is a detailed explanation of the meaning of the phrase "disclosure [of the matter in issue] could reasonably be expected to [have some specified prejudicial effect]" which appears in many exemption provisions in the FOI Act.

The effect of s.46(2), which places a significant qualification on the scope of the s.46(1) exemption, is explained in paragraphs 35-36 of *Re "B"*.

There is a detailed explanation of how s.44(1), s.44(2) and s.6 of the FOI Act operate in the context of an application by a person for information which relates to the shared personal affairs of

the applicant and another person (at paragraphs 172 - 178) and an illustration of the application of the public interest balancing test contained in s.44(1) in a context of that kind (paragraphs 179-189).

Re McEniery and Medical Board of Queensland (Decision No. 94002, 28 February 1994; (1994) 1 QAR 349)

This case contains a detailed analysis of s.42(1)(b) of the FOI Act, which is one of the most frequently invoked exemption provisions in cases proceeding to review by the Information Commissioner.

I concluded that the words "a confidential source of information" in s.42(1)(b) mean a person who has supplied information in the understanding, express or implied, that his/her identity would remain confidential. I then analysed in some detail the kinds of factors which might give rise to an implied understanding of the requisite kind, when there was no express agreement.

I also explained the requirement that the information which the confidential source has supplied (or is intended to supply) be information relating to the enforcement or administration of the law, with particular focus on the meaning of the words "enforcement or administration of the law".

I also attempted to explain the rationale for the common law's policy of protecting the identity of informers, even though persons accused of wrongdoing (especially if falsely accused) may feel they have a right to know who their accuser is (see paragraphs 56 and 64).

I also noted (paragraphs 12-14 and 65-66) other possible bases on which a person's identity, or information which would enable a person to be identified, may be exempt from disclosure under the FOI Act.

Re McMahon and Department of Consumer Affairs (Decision No. 94003, 28 February 1994; (1994) 1 QAR 377)

This case illustrates principles established in *Re "B"* and *Re McEniery* in a situation where the source of a complaint of wrongdoing made to a regulatory agency could not reasonably have expected his identity, or the information he provided, to remain confidential if the complaint was to be properly dealt with by the regulatory agency.

Re "T" and Queensland Health (Decision No. 94004, 11 March 1994; (1994) 1 QAR 386)

This case contains a detailed analysis of s.42(1)(e) of the FOI Act, explaining the meaning of its key phrases "lawful method or procedure" and "contravention or possible contravention of the law". (I decided that the latter phrase is not confined to contraventions of provisions which impose criminal penalties).

The circumstances in which there might be a reasonable expectation of prejudice to the effectiveness of law enforcement methods and procedures are discussed.

The principles are illustrated in relation to methods or procedures adopted by Queensland Health's Drugs of Dependency Unit in performing its functions under the *Poisons Regulation 1973* Qld.

Re Brack and Queensland Corrective Services Commission (Decision 94005, 6 April 1994; (1994) 1 QAR 414)

This is the first of a series of cases intended to more concisely explain and illustrate the principles established in *Re "B"* in respect of the proper interpretation and application of s.46(1)(a) and s.46(1)(b) of the FOI Act.

The applicant was a prisoner who sought access to a document on his prison file which he believed contained information supplied by a relative of his victim, being information prejudicial to his chances of obtaining parole. The case illustrates the application of s.46(1)(a) and s.46(1)(b) in a situation of that kind.

The applicant also sought the removal of the document in issue from his prison file. I decided that it was not open to the applicant to do so, since it was a prerequisite to any entitlement under s.53 of the FOI Act to seek amendment of information, that the applicant must previously have obtained access to the information in question (whether under the FOI Act or otherwise). Moreover, consistently with my decision in *Re Doelle*, the removal or destruction of the document was not a method of amending information available under s.55 of the FOI Act.

Re Burton and Department of Housing, Local Government and Planning (Decision No. 94006, 18 April 1994; (1994) 1 QAR 439)

This is another case illustrating the principles set out in *Re "B"*. The applicant had complained to the respondent about a neighbour who was a residential tenant of the respondent. The information in issue had been obtained from a third party for the purposes of the respondent's investigation of the applicant's complaint about the applicant's neighbour. I had to consider whether the information in issue was exempt under s.46(1)(a) and s.46(1)(b).

I also found that part of the information in issue related to the personal affairs of persons other than the applicant, since it related to the domestic circumstances and domestic responsibilities of those persons, and considered the application of s.44(1).

Re Shepherd and Department of Housing, Local Government and Planning (Decision No. 94007, 18 April 1994, unreported)

This case sets out the principles to be applied in "sufficiency of search" cases, that is, cases where an applicant claims that a respondent agency has failed to locate and deal with all documents covered by the terms of the applicant's FOI access application (see especially paragraphs 18-19).

This case also provides a further illustration of the principles from *Re "B"* concerning the proper interpretation and application of s.46(1)(a), in circumstances where a third party had

supplied information to the respondent for the purpose of the respondent's investigation of complaints against the applicant, relating to her tenancy of a residential unit owned by the respondent.

Re Byrne and Gold Coast City Council (Decision No. 94008, 12 May 1994, unreported)

This case illustrates the application of principles set out in *Re McEniery* as to the scope of the words "enforcement or administration of the law" in s.42(1)(b) of the FOI Act. I decided that a law which does no more than empower a government agency to carry out activities for the benefit of the public, as opposed to, for instance, imposing enforceable legal obligations, will not ordinarily be a law within the meaning of the phrase "enforcement or administration of the law" in s.42(1)(b) of the FOI Act.

This case also briefly analyses s.42(1)(f) of the FOI Act highlighting the significance of the fact that s.42(1)(f) refers only to prejudice to the maintenance or enforcement of a lawful method or procedure (for protecting public safety), in contrast to s.42(1)(e) which refers to prejudice to the effectiveness of a lawful method or procedure (for dealing with contraventions of the law).

This case provides an important further illustration of principles set out in *Re Stewart* as to the scope of the phrase "information relating to the personal affairs of a person". I held that the identity of a person who had complained to the person's local alderman about an issue concerning local civic affairs, was entitled to exemption under s.44(1) of the FOI Act, even though the substance of the complaint was not exempt matter and had in fact been disclosed to the applicant for access.

Re Cannon and Australian Quality Egg Farms Ltd (Decision No. 94009, 30 May 1994, unreported)

This case contains a detailed analysis of s.45(1) and s.45(2) of the FOI Act in the light of Commonwealth, Victorian and New South Wales case law on comparable provisions in the freedom of information legislation of those jurisdictions.

There is a discussion of the meaning of "trade secrets" in s.45(1)(a).

There is also a discussion of the meaning of the key phrase "commercial value" in s.45(1)(b) and the meaning of the phrase "could reasonably be expected to destroy or diminish the commercial value of the information" in s.45(1)(b).

The case includes a detailed analysis of the constituent elements of s.45(1)(c) of the FOI Act, namely -

i) the proper characterisation of the information in issue as information concerning the business, professional, commercial or financial affairs of an agency or another person;

ii) a reasonable expectation that disclosure would have either of the two prejudicial effects stipulated in s.45(1)(c)(ii) of the FOI Act;

iii) the public interest balancing test incorporated within s.45(1)(c).

That analysis is illustrated by the application of s.45(1)(c) to the particular information in issue in the case.

This case also includes (at paragraphs 7-16) a discussion of the appropriate approach to the interpretation of the terms of an applicant's FOI access application, in light of the obligations imposed on applicants and agencies by s.25 of the FOI Act.

Re Bussey and Council of the Shire of Bowen (Decision No. 94010, 24 June 1994, unreported)

This case illustrates the principles set out in *Re McEniery* as to the proper interpretation and application of s.42(1)(b) of the FOI Act, in a situation where the applicants sought information as to the identity of a person who complained to the respondent Council alleging that the applicants had breached the Council's by-laws with respect to the keeping of dogs.

Re Young and Workers' Compensation Board of Queensland (Decision No. 94011, 24 June 1994, unreported)

This case sets out the principles which the Information Commissioner will apply when asked to exercise the discretion conferred by s.73(1)(d) of the FOI Act so as to extend the time limit for lodging an application for review under Part 5 of the FOI Act.

In briefly considering the merits of the substantive application for review, a further illustration of the application of s.42(1)(b) of the FOI Act, and the principles set out in *Re McEniery*, is given in the context of anonymous information supplied to a workers' compensation regulatory authority.

Re Hearl and Mulgrave Shire Council (Decision No. 94012, 27 June 1994, unreported)

In this case, I determined that, by virtue of s.88(1)(b) of the FOI Act, the Information Commissioner possesses power under Part 5 of the FOI Act to negotiate with an applicant to agree on more precise terms for the reframing of an FOI access application.

The respondent Council agreed to supply documents falling within the terms of the reframed FOI access application, apart from 17 pages claimed to be exempt under s.43(1) of the FOI Act (legal professional privilege).

The applicant's initial FOI access application was predominantly framed as a series of questions, seeking answers, rather than as a request for access to documents. I stated that the FOI Act confers no legal right to obtain answers to questions, but I also commented that, where appropriate, an FOI access application framed as a series of questions should probably be interpreted as a request for any information in documentary form which relates to the questions as framed.

In respect of several parts of the applicant's FOI access application, I decided to exercise the power conferred by s.77(1) of the FOI Act not to review further, because I was satisfied that the application for review was vexatious, misconceived and lacking in substance.

I also decided that the 17 documents claimed by the respondent Council to be exempt under s.43(1) were clearly subject to legal professional privilege, and exempt as claimed.

Re Norman and Mulgrave Shire Council (Decision No. 94013, 28 June 1994, unreported)

This case illustrates the application of s.43(1) of the FOI Act and general law principles relating to legal professional privilege in respect of a letter containing legal advice, a draft pleading and draft affidavits, all of which were prepared by solicitors acting for the respondent Council in respect of anticipated litigation against the applicant.

The applicant contended that, the litigation having been finalised, legal professional privilege should no longer apply to deny him access to the requested documents. After reviewing relevant authorities, I held that where it is clear that a document is subject to legal professional privilege, the privilege endures (notwithstanding, for instance, the conclusion of the litigation for the purpose of which the privileged document was created) unless the privilege is waived by the client entitled to assert the privilege, or any of the recognised exceptions to the privilege apply.

I also said that, consistently with the objects of the FOI Act, there may be sound reasons why a government agency, in appropriate circumstances, should choose to exercise its discretion under s.28(1) of the FOI Act so as not to claim exemption under s.43(1) for a document that is technically subject to legal professional privilege. In this regard, I explained the nature of the discretion conferred upon agencies by s.28(1) of the FOI Act.

I also noted, however, that in a review under Part 5 of the FOI Act, the Information Commissioner is specifically deprived (by s.88(2) of the FOI Act) of the discretionary power possessed by agencies to permit access to exempt matter.

Re Yabsley and Department of Education (Decision No. 94014, 29 June 1994, unreported)

In this case I decided that a letter from a doctor relating to a student's medical condition, and its effect upon the student's ability to undertake swimming classes, comprised information concerning the student's personal affairs for the purposes of s.44(1) of the FOI Act. This case also illustrates the application of the public interest balancing test contained within s.44(1).

Re Green and Office of the Parliamentary Commissioner for Administrative Investigations (Decision No. 94015; 30 June 1994, unreported)

This case further illustrates the application of principles set out in *Re "B"* as to the correct interpretation and application of s.46(1)(a), s.46(1)(b) and s.46(2) of the FOI Act, in circumstances where a document supplied to the respondent by Queensland Rail referred to information supplied to Queensland Rail in confidence by a third party, and that information had no relationship to the investigation which the respondent was conducting.

APPENDIX "1"

Table 6 - External Review Applications Received between 1 July 1993 and 30 June 1994, by Category (as per s.71 of the FOI Act)

STATEMENT OF AFFAIRS (PART 2)	
Refusal to publish, or to ensure compliance with Part 20	
Deemed refusal	0
ACCESS TO DOCUMENTS (PART 3)	
Refusal to grant access	103
Deletion of exempt matter	22
Combination - refusal to grant access/deletion of exempt matter	65
Deemed refusal to grant access	29
Deferred access	0
Charges	9
Combination - refusal to grant access/charges	1
Third party consulted; objects to disclosure	30
Third party not consulted; objects to disclosure	0
AMENDMENT OF RECORDS (PART 4)	
Refusal to amend	7
Deemed refusal to amend	3
ISSUANCE OF CONCLUSIVE CERTIFICATE	
Cabinet matter0	
Executive Council matter	0
Law enforcement/Public safety matter	1
MISCELLANEOUS	
Misconceived applications (i.e. bearing no relationship to a category specified in s.71)	4
TOTAL	**274**

APPENDIX 2

Table 7: Distribution of External Review applications received during 1993/94, by respondent agency or minister

NAME OF AGENCY	No.
Queensland Police Service	30
Department of Education	20
Queensland Corrective Services Commission.	18
Minister for Corrective Services	1
Department of Transport	11
Queensland Treasury	11
Department of Health	9
Brisbane North Regional Health Authority	8
Brisbane South Regional Health Authority	8
West Moreton Regional Health Authority	6
Darling Downs Regional Health Authority	6
South Coast Regional Health Authority	3
Peninsula & Torres Straight Regional Health Authority	2
Central Regional Health Authority	1
Medical Board of Queensland	2
Patient Review Tribunal	1
Health Rights Commission	1
Mater Misericordiae Hospital*	1
Dept.of Family Services & Aboriginal & Islander Affairs	8
Department of Tourism Sport & Racing	7
Department of Lands	6
Department of Primary Industries	6
Department of Consumer Affairs	5
Department of Justice & Attorney General	4
Minister for Justice & Attorney General	1
Department of Premier, Economic & Trade Development	4
Premier & Minister for Economic & Trade Development	1
Department of Administrative Services	3
Department of Emergency Services	3
Department of Housing, Local Govt. & Planning	2
Dept. of Employment, Voc. Educ. Training & Indust. Rel.	1
Department of Environment & Heritage	1
Department of Minerals & Energy	1
University of Queensland	5
University of Southern Queensland	4
Griffith University	1
Janes Cook University	1

NAME OF AGENCY	No.
Criminal Justice Commission	5
Legal Aid Office (Qld)	4
Queensland Industry Development Corporation	4
Public Trustee Qld	2
Worker's Compensation Board	2
Public Sector Management Commission	1
Parliamentary Commissioner (Ombudsman)	1
Cairns Port Authority	1
Director of Prosecutions (Qld)	1
Far North Queensland Electricity Board	1
South West Queensland Electricity Board	1
Queensland Egg Industry Management Authority	1
Queensland Fish Management Authority	1
Queensland Law Society*	1
Queensland Principal Club	1
Royal Society for the Prevention of Cruelty to Animals	1
Totalisator Agency Board - Qld	1
Local Authorities	
Brisbane City Council	17
Mulgrave Shire Council	5
Redland Shire Council	4
Gold Coast City Council	2
Bowen Shire Council	1
Caloundra Shire Council	1
Calliope Shire Council	1
Caboolture Shire Council	1
Ipswich City Council	1
Noosa Shire Council	1
Perry Shire Council	1
Pine Rivers Shire Council	1
Redcliffe City Council	1
Rockhampton City Council	1
Thuringowa Shire Council	1
Widgee Shire Council	1
Yarrabah Community Council	1
TOTAL	**274**

*In these cases, the named respondent has disputed that it is an agency subject to the FOI Act.

APPENDIX "3"

PERFORMANCE STANDARDS - QUALITY AND TIMELINESS

ACCESS

Safety, accessibility and convenience: The facilities of the Office should be safe, accessible and convenient to use for members of the public, and public sector administrators alike.

Effective participation: All who participate in proceedings before the Information Commissioner are to be given the opportunity to participate effectively without undue hardship, expense or inconvenience.

Affordable costs of access: The Information Commissioner is to ensure that proceedings are conducted with as little complexity and technicality as the issues for determination in the case will allow, and is to adopt flexible and informal procedures so to ensure that participants can, if they wish, effectively present their case without needing to incur the expense of legal representation.

EXPEDITION AND TIMELINESS

Elimination of unnecessary expense or delay: The Information Commissioner is to seek to mediate disputes whenever it is appropriate, and to adopt flexible and informal procedures tailored to achieve the most expeditious and cost-effective resolution of the issues in dispute in any particular case.

Case processing: The Information Commissioner is to ensure a timely progression of cases through the review process by monitoring the progress of all pending cases, the time taken to dispose of cases, the ratio of dispositions to new case load, and like measures.

EQUALITY, FAIRNESS AND INTEGRITY

Fair and reliable procedures: The Information Commissioner is to faithfully adhere to the procedural requirements of the *Freedom of Information Act* and the general law as to the observance of fair procedures.

Decision-making process: The Information Commissioner is to give individual attention to cases, deciding them without undue disparity among like cases and only upon legally relevant factors.

Clarity: Decisions of the Information Commissioner are to unambiguously address the issues presented for determination and clearly explain the reasons for arriving at determinations.

Production and preservation of records: Records of all relevant decisions and actions are to be accurate, and properly preserved.

Independence and impartiality: The Information Commissioner is to maintain institutional integrity, and impartiality in the determination of disputes.

Accountability and public education: The Information Commissioner is to provide written reasons explaining and justifying the determinations arrived at to resolve disputes under the FOI Act. Copies of the written reasons for decisions are to be freely available to the public. The Information Commissioner may seek to disseminate the decisions for the purpose of informing the community.

APPENDIX "4"

TIME STANDARDS FOR CASE MANAGEMENT

CASE MANAGEMENT SYSTEM TO BE MAINTAINED

1. The Office of the Information Commissioner is to maintain a case management system to monitor the timely progress of cases through the review process, by providing a monthly present position report in respect of all current cases, which also indicates the responsibility for next action and any deadlines for completion of that action.

DETAILED TIME STANDARDS

2. Each application for review received by the Information Commissioner is to be assessed for validity and a letter despatched to the applicant within 7 days advising of any patent defect which renders the application for review invalid, and explaining what further steps the applicant should take.

3.

(a) In respect of each application for review that is accepted as valid and appropriate for investigation and review, letters in accordance with s.74 of the FOI Act are to be despatched to the applicant and the respondent agency or Minister within 7 days of the receipt of the application for review.

(b) Whenever practicable, a s.74 letter to a respondent agency or Minister is to request the production to the Information Commissioner of copies of the documents in dispute and set an appropriate timeframe for production of the documents. (As a guideline only: less than 100 pages - 7 to 14 days; more than 100 pages - 21 to 28 days.)

(c) Whenever practicable, a s.74 letter to a participant is to request whatever input is clearly necessary from that participant (on the basis of the available information) to aid the timely progress of the case, and is to set an appropriate timeframe for the provision of that input.

4. Where the validity of an application for review is in doubt, the Information Commissioner must within 7 days commence preliminary inquiries to establish whether or not the application for review is valid, and when that issue has been established, must within a further 7 days, take the action contemplated in paragraph 2 or paragraph 3 as the case may be.

5. All communications to a participant in a review requesting or directing some input from the participant to the review process are to set an appropriate timeframe for provision of that input.

6. In every case, the documents in dispute are to be examined with a view to assessing the appropriateness of the case for mediation as soon as practicable, but in any event, within -
(a) for cases in CATEGORY A - 12 weeks;
(b) for cases in CATEGORY B - 15 weeks;
(c) for cases in CATEGORY C - 20 weeks;
of the date of receipt of the application for review.

7. Where a case is assessed as appropriate for mediation, the mediation process is to commence as soon as practicable, but in any event within two weeks of that assessment being made, and is to conclude as soon as it is apparent that no further progress can be made toward resolving the dispute, or toward

narrowing and defining the specific issues for determination.

8. Where a case has been assessed as unsuitable for mediation, or where mediation has been abandoned in accordance with paragraph 7, the Information Commissioner is to issue directions to the participants as to the inputs required of them to present their case on the issues for determination by the Information Commissioner, with a view to ensuring that a formal determination is given as soon as practicable, but in any event within -
   (a) for cases in CATEGORY A - 6 months;
   (b) for cases in CATEGORY B - 8 months;
   (c) for cases in CATEGORY C - 10 months;
   of the date of receipt of the application for review.

9. Nothing in paragraphs 7 and 8 is intended to fetter the Information Commissioner's discretion under s.80 of the FOI Act to open or re-open the mediation process, at any time during a review, if it is considered appropriate.

FACTORS WHICH MAY INHIBIT COMPLIANCE WITH TIME STANDARDS

10. It is recognised that the most significant factors affecting the timely progression of cases through the investigation and review process are:

   (a) the number of pages of matter in issue (which must be the subject of detailed evaluation by the Information Commissioner and may be the subject of detailed submissions by participants);

   (b) the complexity of the facts and/or technical/legal issues in dispute;

   (c) any difficulties in locating, and obtaining participation from, third parties whose interests may be affected by the decision under review, and/or relevant witnesses; and

   (d) any difficulties in obtaining co-operation of the participants in adhering to time limits set by the Information Commissioner for the provision of their required inputs to the review process.

11.
   (a) It is recognised that where significant difficulties of the type referred to in paragraph 10(c) or (d) are encountered it may constitute a reasonable excuse for failure to comply with the time standards stipulated in this document.

   (b) It is recognised that in an exceptional case, the complexity of the facts and/or technical/legal issues in dispute may constitute a reasonable excuse for failure to comply with the time standards stipulated in this document.

EXPLANATION OF CATEGORIES

12. Recognising that the factor referred to in paragraph 10(a) will be a variable present in each case received by the Information Commissioner, that will affect what constitutes a reasonable length of time for completion of various stages in the review process, all cases received will be allocated a category according to the number of pages of matter in issue, as follows:

CATEGORY A : 1 to 40 pages
CATEGORY B : 40 to 200 pages
CATEGORY C : more than 200 pages.