

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 96021
Application S 58/94

Participants:

JEREMY ALAN RYMAN
Applicant

DEPARTMENT OF MAIN ROADS
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents concerning investigation of feasibility of a western bypass road for Brisbane - whether documents prepared for briefing, or the use of, a Minister or chief executive in relation to a matter submitted to Cabinet - application of s.36(1)(c) of the *Freedom of Information Act 1992 Qld* - whether disclosure of some documents in issue would involve disclosure of any consideration of Cabinet or could otherwise prejudice the confidentiality of Cabinet considerations or operations - application of s.36(1)(e) of the *Freedom of Information Act 1992 Qld* - whether some documents in issue comprise copies of, or extracts from, drafts of matter which was prepared for briefing, or the use of, a Minister or chief executive in relation to a matter submitted to Cabinet - application of s.36(1)(g) of the *Freedom of Information Act 1992 Qld*.

Freedom of Information Act 1992 Qld s.4, s.36(1)(a), s.36(1)(b), s.36(1)(c), s.36(1)(d),
s.36(1)(e), s.36(1)(f), s.36(1)(g), s.36(4), s.81, s.110
Freedom of Information Amendment Act 1995 Qld

Beanland and Department of Justice and Attorney-General, Re (Information Commissioner Qld,
Decision No. 95026, 14 November 1995, unreported)

*Hudson as agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade
Development, Re* (1993) 1 QAR 123

Little and Department of Natural Resources, Re (Information Commissioner Qld,
Decision No. 96002, 22 March 1996, unreported)

National Crime Authority v S (1991) 100 ALR 151

DECISION

I set aside the decision under review (being the decision of Mr W J Rodiger dated 9 March 1994). In substitution for it, I decide that:

- (a) document 1 is exempt matter under s.36(1)(c) of the *Freedom of Information Act 1992* Qld; and
- (b) the other documents in issue listed in paragraph 7 of my accompanying reasons for decision do not comprise exempt matter under the *Freedom of Information Act 1992* Qld, and that the applicant therefore has a right to be given access to them under the *Freedom of Information Act 1992* Qld.

Date of decision: 19 December 1996

.....
F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant (who is a Councillor of the Pine Rivers Shire Council) seeks review of the respondent's decision to refuse him access to documents, created in or before 1992, which relate to preliminary investigations into the feasibility of developing a road that would act as a western bypass road for Brisbane. The respondent contends that the documents comprise exempt matter under s.36(1)(c), s.36(1)(e) or s.36(1)(g) of the *Freedom of Information Act 1992* Qld (the FOI Act).
2. Following the change of government in Queensland in February 1996, the Department of Main Roads became a separate entity from the Department of Transport on 26 February 1996. The facts and circumstances relied on by the Department of Main Roads to support its claims for exemption of the documents in issue all arose while its present functions were being carried out by the Department of Transport. Any reference in these reasons for decision to "the Department" will be to the Department of Transport, if the reference relates to the period prior to 26 February 1996, or otherwise will be to the Department of Main Roads.
3. In an application received by the Department on 22 November 1993, Mr Ryman applied for access under the FOI Act to "*all documents including all maps, files, and plans on the road commonly known as the Western Bypass of Brisbane.*" The initial decision in response to the application was made on behalf of the Department by Mr G Healey on 7 February 1994. Mr Healey decided to give Mr Ryman access to a number of documents, but found that 197 pages were exempt matter under various provisions of s.36(1) of the FOI Act. Mr Healey determined that the pages contained information that had either been submitted to Cabinet or was proposed to be submitted to Cabinet.
4. By application dated 24 February 1994, Mr Ryman sought internal review of Mr Healey's decision. The internal review was conducted by Mr W J Rodiger of the Department, who

notified the applicant, by letter dated 9 March 1994, of his decision that the documents in issue were exempt under s.36(1)(a), (c), (e) or (f), of the FOI Act, as then in force. (Section 36 of the FOI Act was amended in March 1995). By letter dated 29 March 1994, Mr Ryman applied to me for review, under Part 5 of the FOI Act, of Mr Rodiger's decision.

The review process

5. The documents in issue were obtained and examined. Following consultations with my staff, the Department agreed to give Mr Ryman access to a number of the documents in issue. However, the Department maintained its claims for exemption in respect of other documents. By letter dated 10 March 1995, the Deputy Information Commissioner raised a number of queries with the Department in respect of its exemption claims. As some of the Department's exemption claims involved contentions that matter had been submitted to Cabinet, the Department was requested to supply copies of relevant Cabinet submissions evidencing this (which it subsequently did). The Deputy Information Commissioner also asked for clarification of the precise provisions of s.36(1) which the Department contended were applicable to particular documents in issue. Shortly thereafter, s.36 of the FOI Act was amended by the *Freedom of Information Amendment Act 1995* Qld. By letter dated 5 April 1995, the Department replied to the Deputy Information Commissioner's request, itemising the particular provisions of the amended s.36 which were claimed to be applicable to the particular documents remaining in issue.

6. Having considered the further material provided by the Department, I wrote to it on 5 July 1995 raising a number of issues for its consideration, and inviting it to lodge a written submission and/or evidence in support of its contentions. In response, I received a 31 page submission from the Crown Solicitor (acting on behalf of the Department) together with statutory declarations by a senior officer of the Department, Mr John Gralton, dated 14 November 1995, and by a former Cabinet secretary, Dr Brian Head, dated 15 November 1995. Copies of the submission and evidence (edited to remove matter claimed by the Department to be exempt, in accordance with the specific request made in a letter to me from the Crown Solicitor dated 17 November 1995) were provided to Mr Ryman, who lodged a brief response. The submission provided by the Crown Solicitor raised exemption provisions which were in some respects different from those previously relied on by the Department. I have confirmed with the Department that it now seeks to rely on only those exemption provisions which are referred to in paragraph 8 below.

Documents in issue and relevant provisions of the FOI Act

7. The documents remaining in issue are:
 - a report titled "*Preliminary Feasibility of a Western Bypass of Brisbane: Technical Report*" (document 17B), which I will refer to as "the technical report";
 - a memorandum dated 1 July 1992 from Mr Gralton of the Department to eight addressees (document 17A), to which a copy of the technical report was attached;
 - a memorandum from Mr Gralton to the Minister for Transport dated 16 July 1992, summarising the technical report and seeking instructions (document 1); and
 - various maps, plans, charts, tables and diagrams created in the course of preliminary investigations into the feasibility of a western bypass (documents 2-5, 10-12, two maps from document 15 and plans A-U).

8. The Department contends that:

- documents 1, 17A and 17B are exempt matter under s.36(1)(c) of the FOI Act;
 - documents 3, 4, 10, 11, 12 and 15, and plans A-U are exempt matter under s.36(1)(e) of the FOI Act; and
 - documents 2 and 5 are exempt matter under s.36(1)(g) of the FOI Act.
9. Section 36 of the FOI Act was amended by the *Freedom of Information Amendment Act 1995* Qld. This amendment was expressed to apply retrospectively (see s.110 of the FOI Act and *Re Beanland and Department of Justice and Attorney-General* (Information Commissioner Qld, Decision No. 95026, 14 November 1995, unreported) at paragraphs 44 and 55-56). Accordingly, I must apply s.36, as now in force, to the documents remaining in issue. The relevant provisions of s.36 are as follows:

36.(1) *Matter is exempt matter if—*

- (a) *it has been submitted to Cabinet; or*
- (b) *it was prepared for submission to Cabinet and is proposed, or has at any time been proposed, by a Minister to be submitted to Cabinet; or*
- (c) *it was prepared for briefing, or the use of, a Minister or chief executive in relation to a matter—*
 - (i) *submitted to Cabinet; or*
 - (ii) *that is proposed, or has at any time been proposed, to be submitted to Cabinet by a Minister; or*
- (d) *it is, or forms part of, an official record of Cabinet; or*
- (e) *its disclosure would involve the disclosure of any consideration of Cabinet or could otherwise prejudice the confidentiality of Cabinet considerations or operations; or*
- (f) *it is a draft of matter mentioned in paragraphs (a) to (e); or*
- (g) *it is a copy of or extract from, or part of a copy of or extract from, matter mentioned in paragraphs (a) to (f).*

...

(4) *In this section—*

"Cabinet" *includes a Cabinet committee or subcommittee.*

"chief executive" *means a chief executive of a unit of the public sector.*

"consideration" *includes—*

- (a) *discussion, deliberation, noting (with or without discussion) or decision; and*

(b) *consideration for any purpose, including, for example, for information or to make a decision.*

"draft" includes a preliminary or working draft.

"official record", of Cabinet, includes an official record of matters submitted to Cabinet.

"submit" matter to Cabinet includes bring the matter to Cabinet, irrespective of the purpose of submitting the matter to Cabinet, the nature of the matter or the way in which Cabinet deals with the matter.

10. Whether the exemption provisions invoked by the respondent apply to the documents in issue will turn on what are essentially questions of fact - with the material facts being peculiarly within the knowledge of the respondent. Pursuant to s.81 of the FOI Act, the respondent bears the onus of proving the material facts which would attract the application of s.36(1) of the FOI Act to the documents in issue (and hence that the decision under review was justified or that I should give a decision adverse to the applicant). I will consider in turn each of the exemption provisions relied on by the Department.

Documents claimed to be exempt under s.36(1)(c)

11. The Department contends that documents 1, 17A and 17B are exempt matter under s.36(1)(c) of the FOI Act. The following extracts from the statutory declaration of Mr Gralton give his account of the process during which those documents (and other documents in issue) were created:
2. *During the period July 1990 and February 1993 I was appointed to the position of Regional Director (Metropolitan), Department of Transport.*
 3. *My duties in this position included dealing with the process of decision-making on major transport infrastructure projects. Such projects included a possible western bypass of Brisbane.*
 4. *On 2 August 1990, Mr David Hamill, the then Minister for Transport and Minister Assisting the Premier on Economic and Trade Development, announced in Parliament that in planning for the road and traffic needs of Brisbane, an investigation would begin immediately on a western route to bypass the City of Brisbane. This study would examine all options, specifically the question of how close to the city the bypass should be built.*
 5. *Subsequent to Mr Hamill's announcement I was provided with a copy of Hansard which recorded his statement. ...*
 6. *Upon receipt of the copy of Hansard containing Mr Hamill's statement of 2 August 1990, I commissioned the Transport Studies and Projects Branch, Passenger Transport Division, of the Department to prepare a report on the feasibility of a western bypass of Brisbane.*
 7. *The decision-making process on the feasibility of a western bypass of Brisbane transport infrastructure project initially required the Department to undertake a technical assessment of traffic impacts of the proposal to identify*

benefits, if any, on the existing transport network. This process involved preparation of a Technical Report.

8. *On 25 July 1991, I provided a discussion paper outlining the study on a Western Brisbane Bypass to [8 officers of the Department are listed].*

The discussion paper was provided for consideration and comment at a meeting to be arranged.

...

9. *On 16 October 1991, a meeting was convened to consider the discussion paper of 25 July 1991 and the commissioning of the Transport Studies and Projects Branch, Passenger Transport Division of the Department to prepare a report on the feasibility of a western bypass of Brisbane in response to Mr Hamill's commitment made to Parliament on 2 August 1990.*

10. *The minutes of the meeting of 16 October 1991 were reduced to writing*

...

11. *Because Mr Hamill had given a commitment to Parliament on 2 August 1990 to investigate a western route to bypass the city, it was anticipated that a submission in some form concerning the results of the investigation would proceed to Cabinet. It was anticipated that the submission would proceed to Cabinet upon consideration of the results of the investigation contained in the Technical Report by the Director-General, Department of Transport and in turn the Minister for Transport. On this basis the Technical Report on the feasibility of a western bypass of Brisbane ("the Technical Report") was prepared primarily for briefing the Director-General Department of Transport and also the Minister for Transport on the feasibility of a western bypass of the city of Brisbane and also for their use in preparing the anticipated submission to Cabinet.*

12. *On 24 June 1992, the Manager, Transport Studies and Projects Branch, Passenger Transport Division, provided me with the Technical Report.*

13. *On 1 July 1992, I prepared a memorandum which addressed the contents of the Technical Report prepared by the Transport Studies and Projects Branch [Document 17A]. Attached to the memorandum was the Technical Report [Document 17B]. This memorandum ..., although provided to a number of officers identified at the head of the memorandum, was prepared primarily for the briefing and use of the Director-General in relation to the feasibility and options for a western bypass of Brisbane as it was anticipated, subject to the view of the Minister, that a submission in some form would be made to Cabinet for consideration.*

14. *On 16 July 1992, I provided a memorandum to the then Minister for Transport, Mr David Hamill [Document 1]. This memorandum addressed and analysed the feasibility study of the western bypass of Brisbane. The memorandum particularly addressed the study of a western bypass of Brisbane, impacts on regional transport for the highest BCR alternatives and social issues. The memorandum also provided a conclusion to the study and made*

recommendations to the Minister on matters that should be addressed including the need to inform Cabinet on the feasibility of a western by-pass of Brisbane. A copy of the Technical Report was attached to the memorandum.

The memorandum was prepared to brief the Minister on the Western Bypass Study on the results of the investigation he had ordered and was prepared on the basis that the matter would be submitted to Cabinet. However, the final decision as to submission to Cabinet was one for the Minister himself. ...

12. The relevant parts of Dr Brian Head's statutory declaration are as follows:

1. *In February 1993 I held the position of Cabinet Secretary.*
2. *The Cabinet Business List for the meeting of 1 February 1993 included an Information Paper on the western Brisbane bypass to be presented to Cabinet on behalf of the Minister for Transport and Minister Assisting the Premier on Economic and Trade Development.*
3. *On 1 February 1993, Cabinet considered the Information paper. I was present during the Cabinet meeting on that day.*
4. *I am aware that Cabinet decided on that day that the contents of the Information Paper be noted, and I signed Cabinet's decisions to that effect.*

13. In paragraphs (a), (b) and (c) of s.36(1) of the FOI Act, a clear progression is evident in the categories of matter on which the legislature has conferred a 'class claim' for exemption (i.e., where exemption is conferred merely by membership of a defined class or category, irrespective of whether disclosure of the actual contents of a document falling within the defined class would have any prejudicial consequences). The first category comprises matter which has been submitted to Cabinet. The second category requires that matter must have been prepared for submission to Cabinet, and must be, or must have been, proposed by a Minister to be submitted to Cabinet. Where matter has not been submitted to Cabinet, nor prepared for that purpose, it may qualify for exemption under the third category if it was prepared for briefing, or the use of, a Minister or chief executive in relation to a matter submitted to Cabinet, or proposed by a Minister to be submitted to Cabinet.

14. The words following the verb "prepared" in s.36(1)(c) attach a purposive requirement to that word. To qualify for exemption, it must be established that the matter in issue was prepared for briefing, or the use of, a Minister or chief executive. In addition, the briefing or use must relate to a matter which has been submitted to Cabinet, or which is proposed, or has at some time been proposed, by a Minister to be submitted to Cabinet.

15. The Department's contention as to the correct approach to the interpretation of s.36(1)(c) of the FOI Act was set out at pp.7-8 of its written submission:

3.5 *It is submitted that the proper construction of s.36(1)(c) of the FOI Act in its current form is that a document is exempt matter if it can be shown that a purpose for its preparation was for:-*

- (1) *briefing; or*
- (2) *the use of;*

a chief executive or a Minister, and a matter to which that document relates has been submitted to Cabinet or it is proposed, or has at any time been proposed, that the matter to which the document relates be submitted to Cabinet by a Minister.

3.6 *Furthermore, it is submitted that in satisfaction of the test set out in s.36(1)(c) of the FOI Act, it only need be established that one of the purposes for the preparation of the matter was for the briefing or the use of a Minister or a chief executive in relation to a matter:-*

- (1) *submitted to Cabinet; or*
- (2) *that is proposed, or has at any time been proposed, to be submitted to Cabinet by a Minister;*

and it is not necessary to go as far as to show a sole purpose, or a primary purpose, for the preparation of the matter, to satisfy this test.

3.7 *Should Parliament have intended to limit the scope of the word "prepared", so that it would be confined to matter prepared solely or primarily for the use of or briefing the Minister or chief executive, it is our submission that Parliament would have included the adverb solely or primarily in the provision.*

16. I do not accept the Department's contention in this regard. This issue arose for my consideration in another case (decided after receipt of the Department's above-quoted submission) in which the respondent agency relied on s.36(1)(c), and also s.37(1)(c), of the FOI Act: *Re Little and Department of Natural Resources* (Information Commissioner Qld, Decision No. 96002, 22 March 1996, unreported). The Department's above-quoted submission raises no issue of substance that would prompt me to revise the views I stated in *Re Little* (in particular, at paragraphs 30-34). The argument put forward by the Department, that Parliament would have inserted the words "solely" or "primarily" if that is what it intended, is hardly a compelling one. It is equally open to assert that, if it was Parliament's intention that matter be exempt under s.36(1)(c) (no matter that the specific and direct purpose for its preparation was not a qualifying purpose under the terms of s.36(1)(c)) so long as one of the contemplated purposes for its preparation (no matter how remote or contingent) was a qualifying purpose under the terms of s.36(1)(c), then Parliament would have employed a clearer form of words to express that intention.
17. The fact is that the words employed by the legislature in s.36(1)(c) of the FOI Act are ambiguous as to their intended application in circumstances where the matter in issue has been prepared for more than one purpose, and one of the purposes for its preparation is not a qualifying purpose under the terms of s.36(1)(c). I remain convinced that the correct approach to the interpretation of s.36(1)(c) (and s.37(1)(c)) of the FOI Act in such circumstances is that which I stated in *Re Little* at paragraphs 32-34:
32. *I consider that the applicants are correct in asserting that the words of s.36(1)(c) and s.37(1)(c) are ambiguous in their application to a situation where the matter in issue has been prepared for more than one purpose, including one or more which is not a qualifying purpose according to the terms of s.36(1)(c) or s.37(1)(c). (I note that precisely the same difficulty may arise in the interpretation of s.36(1)(b) and s.37(1)(b).) I also accept that it is correct in the context of freedom of*

information legislation to resolve any such ambiguity in favour of an interpretation which would further, rather than hinder, free access to information: Victorian Public Service Board v Wright (1986) 160 CLR 145 at p.153; Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor (1992) 36 FCR 111 at p.115. (I note that these cases were not referred to by the Victorian Administrative Appeals Tribunal (M T McNamara, Presiding Member) when coming to the opposite conclusion on an essentially identical issue in Re Mildenhall and Department of Premier and Cabinet (No. 1) (1995) 8 VAR 284 at p.290. I do not think the Tribunal's reliance on Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR 282, a case where the context was far removed from the interpretation of ambiguous words in a statutory provision contained in remedial/beneficial legislation, can be logically preferred to the principles I have stated in this paragraph.)

33. *I have a significant reservation, however, as to whether the ambiguity should be resolved in favour of the narrowest possible interpretation (i.e. a 'sole purpose' test) or whether a less extreme interpretation would be more appropriate given the nature of the exemption provisions in question. The application of a strict 'sole purpose' test may produce unintended consequences: for example, a document that was prepared for the purpose of briefing a Minister, a chief executive, and a number of senior officials of a Department (on a matter submitted, or proposed by a Minister to be submitted, to Cabinet or Executive Council) may not qualify for exemption under s.36(1)(c) or s.37(1)(c) if a 'sole purpose' test were applied, because the purpose of briefing senior officials other than the chief executive would not be a qualifying purpose.*

34. *I consider that the test which is most appropriate to the nature of these exemption provisions, one which places a sensible limit on the breadth of the class of documents eligible for exemption while remaining consistent with the natural sense of the words chosen by the legislature, is a 'dominant purpose' test. I use the adjective "dominant" in its primary sense (according to the Australian Concise Oxford Dictionary) of "ruling, prevailing, most influential", such that there can be only one of two or more purposes for the preparation of a document which is the dominant of those purposes. In circumstances where there were multiple purposes for the preparation of the matter in issue, not all of which are qualifying purposes under s.36(1)(c) or s.37(1)(c), the application of those provisions would require a finding on an ultimate question of fact, to be determined by an objective examination of the relevant primary facts and circumstances, as to whether or not the dominant purpose for the preparation of the matter in issue was one of the qualifying purposes for exemption under s.36(1)(c) or s.37(1)(c).*

Where a specific and direct purpose for the preparation of the matter in issue can be identified from the relevant primary facts and circumstances, that will ordinarily be the most reliable indicator of the dominant purpose for which the matter in issue was prepared.

18. I will deal with the documents claimed to be exempt under s.36(1)(c) in the same order as they are dealt with in the respondent's written submission.

Technical report (document 17B)

19. Notwithstanding the submission quoted at paragraph 15 above, the Department has put its case on the basis that the documents claimed to be exempt under s.36(1)(c) were prepared primarily for purposes which are qualifying purposes under the terms of s.36(1)(c). In respect of document 17B, the Department submits:

4.3 *The Statutory Declaration of John Gralton dated 14 November 1995 and attachments thereto, it is submitted, establishes the following facts:-*

- (a) *Mr. David Hamill, the then Minister for Transport and Minister Assisting the Premier on Economic and Trade Development gave a commitment to Parliament on 2 August 1990 that an investigation would commence immediately on a western route to bypass the City of Brisbane;*
- (b) *subsequent to Mr. Hamill's announcement the Transport Studies and Projects Branch, Passenger Transport Division was commissioned to prepare a report on the feasibility of a western bypass of Brisbane ("the technical report");*
- (c) *the technical report was prepared primarily for the briefing and use of the Director-General, Department of Transport and also Mr. Hamill, the then Minister for Transport and Minister Assisting the Premier on Economic and Trade Development;*
- (d) *at the time of the preparation of the technical report it was anticipated that a submission in some form concerning a western bypass of Brisbane would proceed to Cabinet.*

4.4 *The Statutory Declaration of Brian William Head dated 15 November 1995, it is submitted, establishes the following facts:-*

- (1) *that the Information Paper - Western Brisbane Bypass was submitted to Cabinet on 1 February 1993; and*
- (2) *the Information Paper was considered by Cabinet on that day and the contents were noted.*

4.5 *It is therefore submitted that the above-mentioned combined evidence of Mr Gralton and Mr Head, provided by the Department establishes that the Technical Report ... was prepared in anticipation that the matter of a Western Bypass of Brisbane would proceed to Cabinet in reliance on Mr. Hamill's commitment to Parliament that an investigation would begin immediately on the feasibility of a western route to bypass the City of Brisbane. (See paragraph 11 of Mr. John Gralton's Statutory Declaration).*

4.6 *It is further submitted that prior to any submission to Cabinet, it was considered necessary that the Director-General and the Honourable The Minister be provided with the Technical Report so as to brief them on the results of the investigation into the feasibility of a Western Bypass of Brisbane and to enable them to consider the options set out in the*

Technical Report. It is submitted that this consideration was based on the then Minister for Transport's indication to Parliament that a study of a western bypass of Brisbane was to examine all options, specifically the question of how close to the city the bypass should be built, (see subparagraph 2 of paragraph 4 of the Ministerial Statement marked exhibit "A" in John Gralton's Statutory Declaration).

4.7 *Consequently, it is submitted that the Technical Report was prepared by the Transport Studies & Projects Branch primarily for the briefing of the Director General, Department of Transport and also Mr. Hamill, the then Minister for Transport and Minister Assisting the Premier on Economic and Trade Development as to the results of the investigation undertaken by the Department and also for their use in preparing the anticipated submission to Cabinet on the matter which consequently was submitted to Cabinet on 1 February 1993. (See paragraph 11 of Mr. John Gralton's Statutory Declaration). It is further submitted that at all times subsequent to the commitment made to Parliament by Mr. Hamill it was intended to:-*

- (i) brief the Minister; and*
- (ii) it was anticipated that submissions would be made to Cabinet;*

concerning a western bypass of Brisbane. (See paragraphs 6 and 7 on page 3 of the minutes of the meeting of 16 October 1991 being exhibit "C" attached to the Statutory Declaration of John Gralton).

20. Document 17B is a report of approximately 100 pages in length, titled "Preliminary Feasibility of a Western Bypass of Brisbane-Technical Report". There is nothing on the face of the technical report to indicate that it is a draft, although document 17A describes it as such and the respondent has treated it as such in its submissions. It is probably best described as an advanced draft, presented in a form for final consideration by senior officers of the Department.
21. Notwithstanding the assertion in the last sentence of paragraph 11 of Mr Gralton's statutory declaration, I am not satisfied that the dominant purpose for the preparation of document 17B was for briefing, or the use of, the Director-General of the Department, or the then Minister for Transport, in relation to a matter which, based on the evidence in Dr Head's statutory declaration and my own examination of the relevant Cabinet submission, I accept was subsequently submitted to Cabinet. The history of the preparation of document 17B is apparent from a number of other documents of the Department, to which the applicant has mostly now been granted access, but many of which were before me for examination and assessment, as documents that were initially in issue at the commencement of this review. That history is not consistent with Mr Gralton's assertions as to the primary purpose for the preparation of document 17B.
22. Mr Gralton refers (in paragraph 8 of his statutory declaration) to having provided a discussion paper dated 25 July 1991, outlining a proposed study on a Western Brisbane bypass, to a number of senior officers of the Department, only one of whom (the Executive Director, Infrastructure Development) was a member of the Board of Management of the Department. Mr Gralton also refers (in paragraphs 9-10 of his statutory declaration) to the minutes of a meeting of senior officers of the Department (the Executive Director, Infrastructure Development, was the only member of the Board of Management of the Department who attended) on 16 October 1991 to consider Mr Gralton's discussion paper. Although the minutes of that meeting (annexure "C" to Mr Gralton's statutory declaration) state that the purpose of the meeting was to consider

Mr Gralton's discussion paper and "to develop from that a document to form the basis of a Board [of Management] Submission", Mr Gralton has omitted any reference in his statutory declaration to the Board of Management Submission dated 24 October 1991 (Submission No. 423) and the Board of Management Minute dated 4 November 1991 setting out its decision in response to that submission (Decision No. 448). Those documents were initially claimed by the Department to be exempt, but during the course of this review the Department agreed to disclose them to the applicant.

23. Mr Gralton was not, at that time, a member of the Board of Management of the Department. Mr Gralton held the position of Regional Director (Metropolitan). The Board of Management of the Department comprised -

- the Director-General;
- the Executive Director, Policy, Planning and Finance;
- the Executive Director, Transport Services;
- the Executive Director, Infrastructure Development;
- the Executive Director, Corporate Management and Development; and
- the Chief Executive, Queensland Rail (the Department's annual reports from this period contain footnotes to the effect that the Chief Executive, Queensland Rail, was a member of the Board of Management to assist in addressing the total transport needs of Queensland).

24. The Board of Management Submission dated 24 October 1991 sought approval to commit human and financial resources of the Department to a Western Brisbane Bypass Preliminary Assessment Study. The following parts of the Board of Management Submission are relevant for present purposes:

...

This submission seeks approval to conduct an assessment which will endeavour to:

- *identify the possible indication of a long term need and likely usage of a possible transportation corridor in the west of Brisbane;*
- *identify in a preliminary way, impact on the existing road network, local street systems and other modes of transport under the alternative scenarios of Western Brisbane Bypass and its notional links being/not being provided;*
- *undertake a broad preliminary analysis of possible alternative corridors, constraints and likely costs.*

...

PROPOSAL

It is intended to address the necessary investigations in two stages:

- (i) *an in-house examination of expected traffic volumes, including effect on Route 20, identification of alternative route alignments, and listing of impacts and benefits;*
- (ii) *subject to determination of justification for more detailed consideration of a western bypass from Stage 1, a comprehensive study of the alternative*

alignments and their relative merits in full consultation with authorities and the community.

It is envisaged that Stage I would be completed within six (6) months of Board approval. Should this work indicate that the need for a western bypass is justified, a brief for the Stage II investigations and consultations would be preferred as part of the Stage I recommended actions.

PROJECT CONTROL

The work will be undertaken by internal resources in the initial stage and will be guided by a steering group consisting of:

*Regional Advisor (Strategy Development) Chair and Coordinator
Regional Director (Metropolitan)
District Engineer (Metropolitan North)
District Engineer (Metropolitan South)*

Representatives of Transport Technology, Roads, Policy and Planning would be invited as appropriate.

Principal Manager (Major Projects) would act as specialist advisor to the project.

...

An estimate of cost for Stage II will be provided (if necessary) as part of the outcome of Stage I.

RECOMMENDATIONS

1. *The Western Brisbane Bypass Preliminary Assessment Study be approved in principle.*
 2. *The assessment brief be monitored by the steering committee.*
 3. *Should the preliminary assessment so indicate, a further submission will seek approval, prior to May 1992, to progress the planning of a Western Brisbane Bypass.*
25. The language and tone of this submission indicates that any further action in respect of a western bypass was understood to be contingent on an assessment of the outcome of the Stage 1 preliminary study. This tone is reflected in the Board of Management Minute dated 4 November 1991 (Decision No. 448) which states that the Board of Management decided:
1. *That the Western Brisbane Bypass Preliminary Assessment Study be approved in principle.*
 2. *That the assessment brief be monitored by the steering committee.*
 3. *Should the preliminary assessment so indicate, a further submission will seek approval, prior to May 1992, to progress the planning of a Western Brisbane Bypass.*

4. *That the Principal Manager, Office of the Director-General provide a copy of the submission to the Office of the Minister for information.*

The minute also indicates that the Board of Management allocated implementation responsibility for its decision to Mr Gralton.

26. Document 17B is the document that was prepared in accordance with the decision by the Department's Board of Management set out above. Applying the principles set out in *Re Little* at paragraphs 32-34 (which are reproduced at paragraph 17 above), I am satisfied, on the material before me, that the dominant purpose for the preparation of document 17B was to provide senior officers of the Department with technical information affording a preliminary assessment of the feasibility of a western bypass of Brisbane so that the steering committee could decide whether to recommend (and the Board of Management of the Department could, in turn, decide whether to pursue) a comprehensive feasibility study of a western bypass of Brisbane, including a comprehensive study of alternative alignments and their relative merits, environmental investigations and public consultation.
27. It is also clear on the material before me that Mr Gralton (and no doubt other senior officers) contemplated, from the initial stages, that a submission would go to Cabinet in the event that it was decided to proceed with a comprehensive feasibility study, and that the Minister for Transport would be briefed in respect of whatever recommendation was formulated in the light of the preliminary feasibility assessment. However, I do not consider that the test for exemption under s.36(1)(c) is satisfied merely because it was contemplated, in the preparation of the matter in issue, that it might, or even that it probably would, at some stage be briefed to, or used by, a Minister or chief executive in relation to a matter submitted to Cabinet or proposed by a Minister to be submitted to Cabinet. In this instance, the specific and direct purpose (and, in my opinion, clearly the dominant purpose) for the preparation of document 17B was not a qualifying purpose under the terms of s.36(1)(c) of the FOI Act, but rather was that which I have stated in the preceding paragraph.
28. On the material before me, the respondent has not discharged the onus imposed on it by s.81 of the FOI Act, in that I am not satisfied that document 17B was prepared for the dominant purpose of briefing, or the use of, a Minister or chief executive in relation to a matter submitted to Cabinet, or that is proposed, or has at any time been proposed, to be submitted to Cabinet by a Minister. I find that document 17B is not exempt matter under s.36(1)(c) of the FOI Act.

Memorandum dated 1 July 1992 (document 17A)

29. Document 17A is a memorandum dated 1 July 1992 signed by Mr Gralton who was at that time acting in the position of Executive Director (Policy, Planning and Finance). It is not clear whether Mr Gralton was the signatory to the memorandum because it was a responsibility of the position in which he was relieving, or because of his role on the steering committee and/or his continued responsibility for implementation of the Board of Management decisions set out at paragraph 25 above. The memorandum is, in its heading, jointly addressed to eight officers: three of them (the Acting Director-General, the Executive Director, Infrastructure Development, and the Executive Director, Transport Services) were members of the Board of Management of the Department, four others were senior officers of the Department, and one was an officer of the Department of the Premier, Economic and Trade Development. The fact that the memorandum is jointly addressed to eight officers has significance in terms of the application of s.36(1)(c) to the memorandum. It is not the case, for instance, that the memorandum was addressed to the Acting Director-General of the Department, with copies forwarded to other officers "for information" (in which case, depending on any other relevant indicators, it might have been easier to draw the inference that the dominant purpose for the preparation of the memorandum was for briefing a chief executive).

30. Document 17A contains a summary briefing, for the benefit of its addressees, on the findings set out in the technical report (and also forwards a copy of the technical report for reference), and makes recommendations for further action.
31. Mr Gralton's evidence in respect of document 17A is, in my view, unsatisfactorily brief. Mr Gralton says, at paragraph 15 of his statutory declaration:

This memorandum [document 17A], although provided to a number of officers identified at the head of the memorandum, was prepared primarily for the briefing and use of the Director-General in relation to the feasibility and options for a western bypass of Brisbane as it was anticipated, subject to the view of the Minister, that a submission in some form would be made to Cabinet for consideration.

32. It is clear that one of the purposes for the preparation of document 17A was for briefing, or the use of, a chief executive in a relation to a matter which, on the basis of Dr Head's statutory declaration and my own examination of the relevant Cabinet submission, I accept was subsequently submitted to Cabinet. Thus, one of the purposes for the preparation of document 17A was a qualifying purpose under the terms of s.36(1)(c) of the FOI Act. However, it is equally clear that there were multiple purposes for the preparation of document 17A, for example, briefing the other seven officers to whom the memorandum was jointly addressed (and, possibly, the purpose discussed in paragraph 35 below) and that the other purposes were not qualifying purposes under the terms of s.36(1)(c) of the FOI Act.
33. The critical issue is whether the dominant purpose for the preparation of document 17A was that of briefing the chief executive. In this regard, I have Mr Gralton's statement that document 17A was prepared primarily for the briefing and use of the Director-General of the Department, and, since document 17A bears his signature as author, Mr Gralton's statement must be accorded some weight (although it is not necessarily in itself determinative: *cf.* the comments of Lockhart J in *National Crime Authority v S* (1991) 100 ALR 151, in the paragraph which spans pp.159-160). However, Mr Gralton has not satisfactorily explained why briefing the Director-General of the Department was the dominant purpose, as compared to other identifiable purposes, namely those of briefing the other seven joint addressees of the memorandum, or of collectively briefing all eight joint addressees of the memorandum, or, perhaps, of collectively briefing those of the joint addressees who were members of the Board of Management of the Department (see paragraph 35 below). The only reason suggested in Mr Gralton's evidence for his assertion that document 17A was prepared primarily for the briefing and use of the Director-General rather than other identifiable purposes, was that it was anticipated that a submission in some form would be made to Cabinet for consideration - a factor that to my mind is not at all logically probative (especially given the context explored at paragraphs 24-26 above) of Mr Gralton's assertion on the issue which now concerns me.
34. I note that on the last page of document 17A there is a recommendation that four proposed actions be endorsed. If, for example, there was evidence before me that the endorsement was being sought specifically from the Director-General of the Department, who was the only appropriate person to give it, and that the other addressees had been provided with the information so that they could convey their views on it if consulted by the Director-General, such evidence would probably weigh in favour of a finding that the dominant purpose for the preparation of document 17A was that of briefing the Director-General. However, there is nothing in the evidence before me that tends to negate the natural inference to be drawn from the language of document 17A itself, i.e., that endorsement of the four proposed actions was being sought from all of the joint addressees of the memorandum. I consider that it is most

likely that the dominant purpose for the preparation of document 17A was that of collectively briefing all eight joint addressees of the memorandum, and obtaining their endorsement of the four proposed actions.

35. There is a further possible dominant purpose for the preparation of document 17A. I note that document 17A was forwarded by a person who was relieving in a position at Board of Management level, to three other members of the Board of Management of the Department. Document 17A, although it is in the form of a Departmental memorandum rather than a formal Board of Management submission, is otherwise a document that would answer the description of a further submission seeking approval to progress the planning of a western Brisbane bypass (although it does not appear to be a submission seeking approval of the Stage II investigations and consultations foreshadowed in the submission quoted at paragraph 24 above): see point 3 of the Board of Management decision set out at paragraph 25 above, which specifically contemplated the possible receipt of a further submission seeking Board of Management approval to progress the planning of a western Brisbane bypass, depending on the outcome of the preliminary feasibility study. If the purpose for the preparation of document 17A was to seek the endorsement of members of the Department's Board of Management to the four actions proposed in the document, then it would not, in my opinion, be possible to find that the purpose of briefing the Director-General was dominant over the purpose of briefing members of the Board of Management (which is not a qualifying purpose under the terms of s.36(1)(c) of the FOI Act).
36. Having regard to the unsatisfactory state of the evidence, I find that the Department has not discharged the onus imposed on it by s.81 of the FOI Act, in that it has not satisfied me that it is more probable than not that the dominant purpose for the preparation of document 17A was for briefing, or the use of, a chief executive (notwithstanding that one of several purposes for the preparation of document 17A was that of briefing a chief executive in relation to a matter subsequently submitted to Cabinet). I therefore find that document 17A is not exempt matter under s.36(1)(c) of the FOI Act.

Memorandum to Minister dated 16 July 1992 (document 1)

37. Document 1 is a memorandum dated 16 July 1992 addressed to the Minister for Transport, summarising the contents of document 17B, and making certain recommendations. Mr Gralton has given evidence in respect of this document at paragraph 14 of his statutory declaration. Having examined document 1, I am satisfied that it was prepared for the sole purpose of briefing a Minister in relation to a matter which, on the basis of Dr Head's statutory declaration and my own examination of the relevant Cabinet submission, I accept was subsequently submitted to Cabinet. I am satisfied that there was a sufficient relationship or connection between document 1 and the matter subsequently submitted to Cabinet so as to meet the requirement imposed by s.36(1)(c) that the relevant briefing or use must relate to a matter submitted to Cabinet (or a matter falling within the terms of s.36(1)(c)(ii) of the FOI Act). Thus the sole purpose for the preparation of document 1 was a qualifying purpose under the terms of s.36(1)(c) of the FOI Act. I find that document 1 is exempt matter under s.36(1)(c) of the FOI Act.

Documents claimed to be exempt under s.36(1)(e)

38. The Department contends that documents 3, 4, 10, 11, 12 and parts of document 15 (all of which are maps or diagrams of possible routes for a western bypass road and/or possible road links to it), and plans A-U, are exempt matter under s.36(1)(e) of the FOI Act. However, the only documents in respect of which detailed submissions or evidence have been lodged by the Department are documents 3, 4, 10, 11 and 12.

39. Prior to the amendments to s.36 of the FOI Act effected by the *Freedom of Information Amendment Act 1995* Qld, the provision which corresponded to the present s.36(1)(e) provided that matter was exempt if "*its disclosure would involve the disclosure of any deliberation or decision of Cabinet, other than matter that has been officially published by decision of Cabinet.*" I discussed the meaning of the phrase "deliberation ... of Cabinet" in *Re Hudson as agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123 at pp.140-143 (paragraphs 36-47). At p.141 (paragraph 39), I said:

... A document whose creation preceded "active discussion and debate" in Cabinet (even though it was created and submitted to provide information to assist Cabinet debate or indeed to contribute the opinions and recommendations on policy matters of an individual Minister) cannot logically constitute a record of what was actively discussed and debated in Cabinet on the occasion of that document's consideration by Cabinet. Such material could be incorporated by reference into the active discussion and debate, for example "I agree with the recommendations set out in the Cabinet submission", but that cannot equate the material prepared to assist Cabinet deliberation with the Cabinet deliberation itself. It cannot in my opinion be said that disclosure of the former would involve disclosure of any of the active discussion and debate within Cabinet. It is only documents created contemporaneously with, or subsequent to, active discussion and debate within Cabinet, that in my opinion are capable of disclosing any deliberation of Cabinet so as to fall within s.36(1)(e).

40. Section 36(1)(e) in its present form refers to "any consideration of Cabinet". Consideration is defined in s.36(4) to include "*discussion, deliberation, noting (with or without discussion) or decision*". The present s.36(1)(e) was clearly intended to be more extensive in its coverage than its predecessor, which I analysed in *Re Hudson*. Nevertheless, I consider that, like its predecessor, the new provision will not ordinarily apply to any document the creation of which preceded discussion, deliberation or noting in Cabinet.
41. The approach adopted by the Department in respect of the documents it has claimed to be exempt under s.36(1)(e) of the FOI Act (at paragraphs 15-17 of Mr Galton's statutory declaration, and pp.20-25 of the Department's written submission) is innovative but untenable. In essence, it has selectively disclosed to Mr Ryman, through its own evidence and submissions in this review, information to the effect that the Cabinet submission dated 1 February 1993 referred to in Dr Head's statutory declaration (a document which I note was purely an information paper - it sought no decision from the Cabinet) included one map showing possible routes for a western bypass road. Then, in respect of certain maps and plans produced in the Department (in the course of its preliminary feasibility studies), which predate the Cabinet submission and which are not identical to the map which accompanied the Cabinet submission, Mr Galton has declared that he has compared them to the map which accompanied the Cabinet submission and that they contain possible routes for a western bypass road that are identical to the possible routes disclosed on the map which accompanied the Cabinet submission. The Department has, in essence, sought to make a case for exemption through its own selective disclosure of information which is extraneous to the matter in issue, since it is only the connection of that extraneous information to the matter in issue that could involve the disclosure of any consideration of Cabinet or prejudice the confidentiality of Cabinet considerations or operations.

42. There was enough information already in the public domain, by the time Mr Ryman lodged his FOI access application, for any interested citizen to be aware that the Department was conducting preliminary feasibility studies in respect of a western bypass road. Any interested citizen would apprehend that that process necessarily involved the identification of possible routes and an assessment of their respective merits against a number of criteria. An interested citizen seeking access under the FOI Act to information on the Department's preliminary feasibility studies would reasonably expect the Department to possess maps or diagrams showing possible alternative routes. Disclosure of such maps or diagrams could not in themselves disclose anything about the considerations of Cabinet, or otherwise prejudice the confidentiality of Cabinet considerations or operations. Their disclosure could not in itself involve the disclosure of, say, the fact that Cabinet had noted a similar map displaying similar (or identical) possible alternative routes.
43. Section 36(1)(e) relevantly provides that "matter is exempt matter if its disclosure would involve the disclosure of any consideration of Cabinet or could otherwise prejudice the confidentiality of Cabinet considerations or operations" (my underlining). If the documents now claimed to be exempt under s.36(1)(e) had simply been disclosed to Mr Ryman without any comment on behalf of the Department, there is no possible basis on which their disclosure could have involved the disclosure of any consideration of Cabinet or could have otherwise prejudiced the confidentiality of Cabinet considerations or operations. I am not prepared to find that the test for exemption under s.36(1)(e) is established because the Department, through its own disclosures of information extraneous to the matter in issue, claims that disclosure of the matter in issue, in connection with that extraneous information, would involve the disclosure of information noted by Cabinet or would otherwise prejudice the confidentiality of Cabinet considerations or operations.
44. The test for exemption under s.36(1)(e) is to be evaluated by reference to the effects of disclosure of the matter in issue itself, and on that basis the Department's case for exemption fails. Disclosure of documents 3, 4, 10, 11 and 12 would not involve the disclosure of any consideration of Cabinet, nor could it otherwise prejudice the confidentiality of Cabinet considerations or operations. I find that documents 3, 4, 10, 11 and 12 are not exempt matter under s.36(1)(e) of the FOI Act.
45. No detailed submissions have been made in relation to the matter remaining in issue in document 15, or plans A-U. These documents are maps and charts. I cannot see any basis for the application of s.36(1)(e) in the case of these documents. They all appear to have been created in 1992 or earlier, well before any Cabinet involvement in the matter. I note that plan A and plans L-U bear the notation "*Confidential, For Advice to Cabinet Only, Not Approved Planning*". However, no argument or evidence was offered by the Department to support a claim that these documents had in fact been prepared for submission to Cabinet. In any event, on the material before me, there is nothing to establish that any of them were ever proposed by a Minister to be submitted to Cabinet, or to establish that they were ever submitted to Cabinet. The Department has failed to discharge its onus under s.81 of the FOI Act in that it has failed to produce any material capable of satisfying me that the matter in issue in document 15, or that plans A-U, comprise exempt matter under s.36(1)(e) of the FOI Act. I find that neither the matter deleted from document 15, nor plans A-U, comprise exempt matter under s.36(1)(e) of the FOI Act.

Section 36(1)(g)

46. The Department contends that documents 2 and 5 are exempt matter under s.36(1)(g), on the basis that they are extracts from a draft of the technical report (document 17B) which it contends is exempt matter under s.36(1)(c) of the FOI Act.

47. Section 36(1)(g) may be described as an adjunct exemption. One of the requirements for its fulfilment is to establish that matter exists which is exempt matter under s.36(1)(a), (b), (c), (d), (e) or (f) of the FOI Act. It must then be established that the matter claimed to be exempt under s.36(1)(g) is a copy of or extract from, or part of a copy of or extract from, the matter which has been established to be exempt matter under s.36(1)(a), (b), (c), (d), (e) or (f). Obviously, to be a copy of, or extract from, that exempt matter, the matter claimed to be exempt under s.36(1)(g) must have come into existence after that exempt matter: see *Re Hudson* at p.135 (paragraph 29).
48. My finding that the technical report (document 17B) is not exempt matter under s.36(1)(c) of the FOI Act means that the Department's case that documents 2 and 5 qualify for exemption under s.36(1)(g) must fail. Any earlier draft of the technical report, or a part of the technical report, will not be exempt under s.36(1)(f) and so any copy or extract from such an earlier working draft will not be exempt matter under s.36(1)(g) of the FOI Act.

Conclusion

49. For the foregoing reasons, I set aside the decision under review. In substitution for it I find that:
- (a) document 1 is exempt matter under s.36(1)(c) of the FOI Act; and
 - (b) the other documents in issue in this external review (identified in paragraph 7 above) do not comprise exempt matter under the FOI Act, and the applicant accordingly has a right to be given access to them under the FOI Act.

.....
 F N ALBIETZ
INFORMATION COMMISSIONER