



THIRD ANNUAL REPORT

OFFICE

of the

**QUEENSLAND
INFORMATION COMMISSIONER**

1 JULY 1994 TO 30 JUNE 1995

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 third Annual Report of the Office of the Information Commissioner.

Yours faithfully

F N ALBIETZ
INFORMATION COMMISSIONER

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EXECUTIVE SUMMARY



Fred Albietz, Commissioner

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 (the categories are listed in paragraphs 1.1-1.3 of this Report).

1994/95 has been a year of consolidation on the achievements made during 1993/94. With an increase from four to six full-time professional staff, the Office of the Information Commissioner managed (by comparison with the results achieved in the previous year) to double the number of formal decisions issued,

and increase by 43% the total number of applications for review resolved. In 1994/95 a total of 179 applications for review under Part 5 of the FOI Act were resolved: 43 by formal decision, and 136 by informal methods of dispute resolution. (One further case, an application to the Supreme Court for judicial review of one of my formal decisions, was also resolved during the reporting period, when the application for judicial review was withdrawn shortly before the scheduled hearing date). This result compares favourably with results achieved by the comparable external review authorities under the Commonwealth, Victorian and Western Australian freedom of information statutes in the early years of operation of those statutes (see paragraphs 2.7, 2.9, and table 4 of this Report). The formal decisions issued during the year have, I believe, contributed significantly to the educative and normative (i.e. standard setting) role expected of an independent external review authority by providing guidance for FOI administrators and the general public on the interpretation and application of key provisions in the FOI Act. Notes on the significance of the formal decisions issued during 1994/95 appear in Appendix 3 to this Report.

Table 1 - Applications for Review under Part 5 of the FOI Act - 1994/95

Pending from previous reporting period (1.7.93 to 30.6.94)	242
Opened during the reporting period	223
Completed during the reporting period	179
Pending at end of reporting period	286

Note 1: a table showing the distribution of the 223 applications for review received during 1994/95, across the categories of decision subject to investigation and review by the Information Commissioner (as specified in s.71 of the FOI Act), appears at Appendix 1.

Note 2: a table showing the distribution of the 223 new applications for review, according to the identity of the respondent agency, appears at Appendix 2.

In my past two Annual Reports, I have commented on the fact that the extent of the demand for the services of the Information Commissioner significantly exceeded all expectations, and markedly exceeded the capacity of the Office of the Information Commissioner to deal, in a timely fashion, with all of the applications for review received by it, given the level of resources allocated to the Office. Unfortunately, that has remained the position during 1994/95. The relevant statistics do show, however, that there has been a marked deceleration in the rate of growth of the accumulated backlog of unresolved appeals, due to (by comparison with 1993/94) a decrease in the total number of new applications for review received, and a substantial increase in the total number of applications for review resolved. That backlog, which was zero as at 18 January 1993, had grown to 93 by 30 June 1993, and to 242 by 30 June 1994. In the year to 30 June 1995, the accumulated backlog grew to 286. (Over that period of slightly less than 2½ years, my Office has received a total of 617 applications for review, and resolved 331).

A backlog of this magnitude unfortunately means that an unacceptably high proportion of applicants for review will not have their cases dealt with in the timely manner that my Office had hoped to be able to achieve. This has been the cause of some dissatisfaction on the part of applicants for whom the value in obtaining particular information lies in obtaining it quickly for some particular purpose.

My Office endeavours, in all cases, to undertake a preliminary assessment of the documents in issue as quickly as possible, and to negotiate with the participants in the review with a view to achieving settlement, or at least narrowing the range of issues in dispute which must proceed to a formal determination. This approach is intended to serve the aims of the FOI Act by procuring as quickly as possible the disclosure of as much information as possible. But when the point is reached that an agency and other participants are not prepared to make any further concessions, the case must proceed on a more formal basis with opportunities given to each participant to lodge evidence and submissions in support of their respective cases. Lacking adequate staff resources to process all such applications for review in a timely fashion, I have continued to assess cases deserving of priority treatment according to the factors which I outlined in paragraphs 2.15-2.16 of my second Annual Report.

While, in a substantial proportion of cases received, my Office cannot claim to have managed to achieve the goal of speedy resolution of disputes, it has achieved all other goals expected of it, as is explained in more detail in Chapter 2 of this Report. In particular, the emphasis on informal methods of dispute resolution, and on tailoring procedures to suit the circumstances of each individual case, has been successful in keeping down the costs of participation in the external review process, not only for applicants but also for agencies (and hence for the public purse). The Office of the Information Commissioner consciously tries to reduce or eliminate unnecessary expense and formality for participants, at 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 136 of the 179 cases resolved during 1994/95 were resolved without the need for a formal determination. This represents a proportion of 76% of cases resolved by informal means.

Table 2 - Outcome of External Reviews completed during 1994/95

No jurisdiction	6
Decision not to review/review further under s.77 of the FOI Act	1
Agency granted further time to deal with application	3
Withdrawn/Resolved following mediation	130
Decision issued - affirming decision under review	25
Decision issued - varying decision under review	10
Decision issued - setting aside decision under review; making decision in substitution therefore	4
TOTAL	179

Of the 130 cases withdrawn or resolved following mediation, 70 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. Ten of the remaining 60 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. Eight of those 10 cases were resolved in a manner that allowed the initial applicant to have access to the information in issue, or at least part of it. In the remaining 50 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, and an assessment of performance against established performance criteria, can be found in Chapter 2.

Table 3 - Time for Resolution of Cases Completed during 1994/95.

Under 1 month	10	12 - 15 months	17
1 - 3 months	30	15 - 18 months	20
3 - 6 months	32	18 - 21 months	11
6 - 9 months	21	21 - 24 months	9
9 - 12 months	25	over 24 months	4
		TOTAL	179

Unfortunately, the year 1994/95 has witnessed a significant retreat from the principles of openness, accountability and responsibility which the FOI Act was intended to enshrine. A series of, in my opinion, ill-considered and unnecessarily wide exemptions or exclusions from the right of access to documents of agencies and Ministers conferred by s.21 of the FOI Act, were introduced by amendments to the FOI Act and the *Freedom of Information Regulation 1992* Qld. This is a trend that must cause concern to those who welcomed the FOI Act as one means, but an important means, of redressing the imbalance between the governors and the governed in our community, with respect to access to information pertaining to the operations of government which affect the community at large. The amendments, in my opinion, pay insufficient regard to deeper principles of democratic accountability. I have commented further on these matters in Chapter 3 of this Report.

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(2));
 - 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 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.

1.6 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. I have made arrangements with the Law Book Company for my formal decisions to be published in the looseleaf service by Professor Chris Gilbert and Mr William Lane, Queensland Administrative Law. The decisions will eventually be published in a bound series of reports to be known as the Queensland Administrative Reports (QAR). The Human Rights and Administrative Law Division of the Department of Justice and Attorney-General arranges for distribution to FOI Co-ordinators in government agencies of copies of my formal decisions, shortly after they are given. Access to the decisions on computer disc is also available from that source, on request by a government agency. Copies of any of my formal decisions which have not been reported are made available to members of the public, on request to my Office.

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

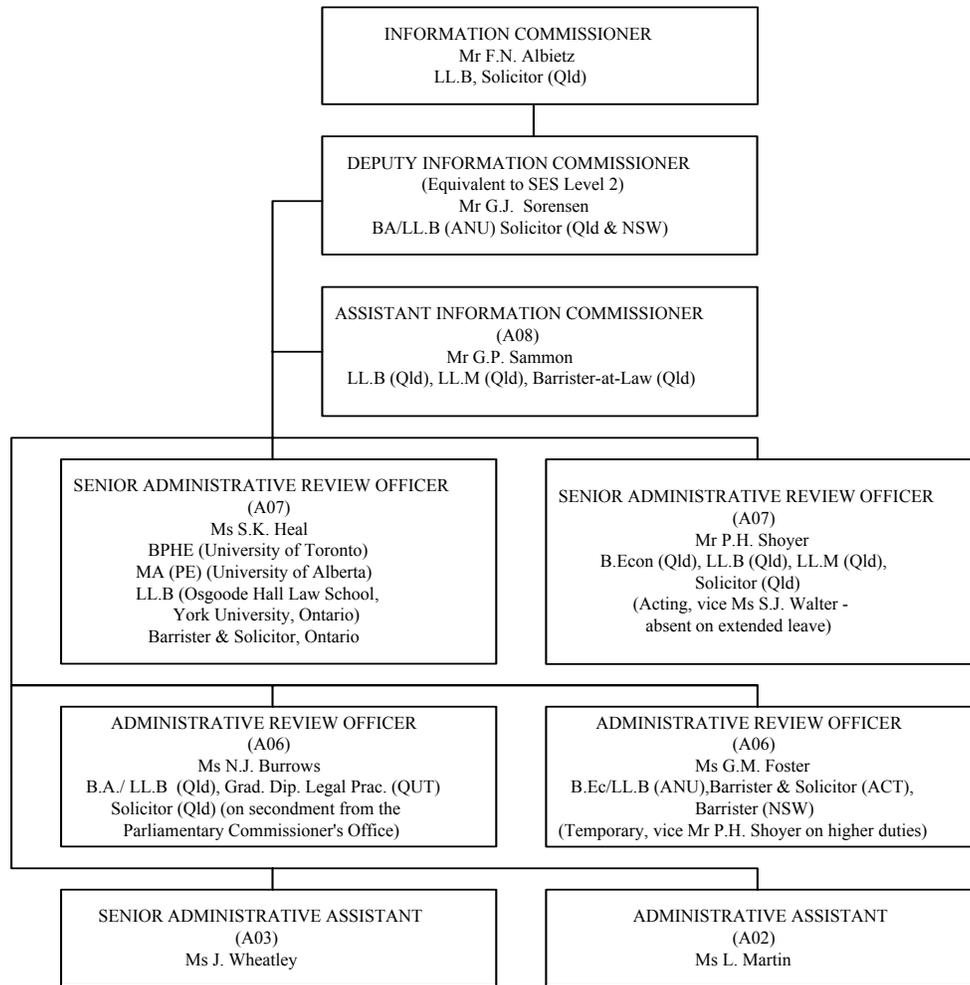
- (b) an office with 20 years accumulated experience in pursuing cheap, flexible, informal and non-confrontational methods of dispute resolution, making it best suited to adapt those methods to the task of resolving disputes under the FOI Act.

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 audited financial statements for 1994/95 in respect of that program have been certified and will be published in the 21st Annual Report of the Parliamentary Commissioner. An amount of \$483,000 was allowed for the Office of the Information Commissioner for 1994/95. \$450,000 was paid in salaries and related costs, with other costs, including administration costs, totaling \$33,000. The additional operating costs of \$69,000 were met from the budget of the Office of the Parliamentary Commissioner.
- 1.11 The program goal for the program "Complaint Investigation and Resolution" is to ensure responsive, independent and impartial investigation and resolution of complaints 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 reviewing decisions of specified kinds made 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 2 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) 3246 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 term. 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 1995, 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.

OVERVIEW OF OPERATIONS DURING THE REPORTING YEAR

- 2.1 During 1994/95, 223 new applications for review were received (which represents an average rate of receipt of approximately 4.5 per week), compared to 274 in 1993/94. There was a significant increase (from 29 in 1993/94 to 55 in 1994/95) in the number of applications for review made on the basis of a deemed refusal of access by an agency to requested documents (this occurs when an agency fails to respond to an FOI access application within the relevant statutory time limit: see s.27(4), s.57 and s.79 of the FOI Act). This tends to indicate that some agencies (chiefly the Queensland Police Service and the Queensland Corrective Services Commission) which receive large volumes of FOI access applications have not allocated sufficient staff resources to enable them to comply with their statutory obligations, having regard to the extent of the demand for access to information from those agencies. Those cases aside, the fall in the number of new applications for review seems to have been counterbalanced by an overall increase in the complexity of the issues raised in the new applications for review. Whereas, in previous reporting periods, up to 20% of applications for review raised issues which involved a fairly straightforward misunderstanding of the interpretation or application of the FOI Act (whether by an applicant for access, or by an agency), there have been very few cases of that kind received in 1994/95. This reflects the increased experience and expertise of the full-time FOI administrators in agencies which receive substantial numbers of FOI applications, and the extent to which some basic principles in the administration of the FOI Act have been settled through acceptance (by agencies and most applicants for access) of some of my earlier formal decisions.
- 2.2 On the other hand, it seems from the profile of new cases received in 1994/95 that complex cases, which test the margins of the exemption provisions in the FOI Act, continue to arise across a broad range of agencies. In Chapter 2 of my second Annual Report, I referred (at paragraphs 2.2-2.6) to the complex nature of some of the legal issues that arise under the FOI Act, and the compounding effect which can occur when there is a large volume of information in issue. Decisions which proceed through to the stage of external review 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, while affording the opportunity (which, due to statutory time constraints, is not ordinarily available at primary, and internal review, decision-making levels) 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. 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, including the duty to accord procedural fairness. 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) 1 Australian Journal of Administrative Law, p.33.

2.3 My first two Annual Reports have documented the difficulties which the Office of the Information Commissioner has encountered in coping with an unforeseen flood of work (more than double the amount which had been anticipated), with resourcing that was never going to be adequate to cope with that level of demand, and still achieve the standards of timeliness that the Information Commissioner model aspires to deliver. In brief, in the 2½ years from 1 January 1993 to 30 June 1995, this Office has resolved 331 applications for review under Part 5 of the FOI Act - which I consider to be a commendable performance, given the complexity of some of the workload and the level of resourcing available to the Office. The number of applications for review received in that period, however, was 617 - a figure which exceeds the number of appeals under the Commonwealth FOI Act received by the Commonwealth AAT, Australia-wide, in the first 2½ years after the commencement of the Commonwealth FOI Act, and which far exceeds the number of appeals received in any comparable period by any of the external review authorities under the freedom of information statutes of other Australian states. In the Executive Summary to my second Annual Report, I suggested explanations as to why the demand for the services of the Information Commissioner should be so high in Queensland. Firstly, the rate of usage of the FOI Act by Queenslanders far exceeds that experienced in other state jurisdictions, including the more populous states. Secondly, the informal and inexpensive methods of review used by my Office tend to make the prospect of pursuing external review less intimidating to applicants who are dissatisfied with agency decisions under the FOI Act, and hence encourage resort to the external review authority (see paragraph 2.10 and tables 5A, 5B and 5C below).

2.4 The history of the performance of the Office has been as follows:

- from 18 January 1993 to 30 June 1993,
with two full-time professional staff: received 120 appeals, completed 27 (pending: 93)
- from 1 July 1993 to 30 June 1994,
with four full-time professional staff: received 274 appeals, completed 125 (pending: 242)
- from 1 July 1994 to 30 June 1995,
with six full-time professional staff: received 223 appeals, completed 179 (pending: 286).

2.5 The work undertaken by this Office is labour-intensive, requiring the professional staff to apply their skills to:

- careful consideration of the documents in issue in the light of relevant legal principles
- co-ordinating inputs from participants in the review
- attempting to mediate settlements wherever possible, or to reduce the issues in dispute requiring formal determination as far as possible
- evaluating evidence and submissions provided by the participants, and researching and writing formal reasons for decision when cases must proceed to formal determination.

As demonstrated by the figures above, increased staff resources readily equate to increased outputs, and a quicker turnaround time in the resolution of appeals.

- 2.6 The performance achieved in 1994/95 saw a marked deceleration in the rate of growth of the backlog of unresolved applications for review, which nevertheless increased from 242 at 30 June 1994 to 286 at 30 June 1995. Inevitably, and regrettably, many applicants for review have been left dissatisfied with the fact that their cases have not been speedily resolved. Again, I have had to choose cases deserving of priority treatment according to the factors identified in paragraphs 2.15-2.16 of my second Annual Report.
- 2.7 At no stage since this Office commenced operations has it been adequately resourced to deal in a timely fashion with the unforeseen extent of demand for the services of the Information Commissioner. By contrast, the “review and complaint resolution” branch in the Office of the Western Australian Information Commissioner, with the same number of professional staff as my Office, has achieved excellent standards of timeliness in the resolution of cases, having received approximately half of the number of appeals that I have received. (In its first 30 weeks of operation, the Office of the Western Australian Information Commissioner received 61 appeals, and resolved 26; and in 1994/95 received 123 formal appeals and resolved 105: see the first and second Annual Reports of the Western Australian Information Commissioner).
- 2.8 In my first and second Annual Reports, I have expressed my views on the effectiveness of the Information Commissioner model for independent, external review of decisions made under freedom of information legislation. (For a considered assessment of the advantages of the Information Commissioner model, see P. Bayne, “External Review of FOI decisions by the Information Commissioners” (1995) 3 Australian Journal of Administrative Law, p.53). To my mind, the performance achieved by the Western Australian Information Commissioner confirms that when a reasonable balance is achieved between the resources available to an Information Commissioner, and the extent of the demand for an Information Commissioner’s dispute resolution service, the Information Commissioner model is the most efficient and cost-effective for the interests of all concerned. When the resources available to the Information Commissioner do not match the extent of the demand for the Information Commissioner’s dispute resolution service, then the Information Commissioner model of dispute resolution still works efficiently and cost-effectively for those whose cases are given priority, but standards of timeliness inevitably suffer for the participants in other cases.
- 2.9 In my second Annual Report (at paragraphs 2.9-2.10 and table 4), I included information comparing the performance of the Office of the Information Commissioner with the performance of the Commonwealth AAT and the Victorian AAT in the first years following the commencement of FOI legislation in the respective jurisdictions. Those figures are updated in table 4 below. Comparisons have been made with the Commonwealth and Victoria because 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 2.7 above).

**Table 4: Comparison of Performance of External Review Authorities
- Queensland, Commonwealth and Victoria**

	Queensland	Commonwealth	Victoria
	Period: 19.11.92 - 30.6.93	Period: 1.12.82 - 30.6.83	Period: 5.7.83 - 30.6.84
Applications to external review authority	120	69	59
Resolved by formal decision	7	3	Not available
Resolved without formal decision	20	16	Not available
Total resolved	27	19	Not available
Pending at end of reporting period	93	50	Not available
	Period: 1.7.93 - 30.6.94	Period: 1.7.83 - 30.6.84	Period: 1.7.84 - 30.6.85
Applications to external review authority	274	203	112
Resolved by formal decision	20	16	40
Resolved without formal decision	105	125	20
Total resolved	125	141	60
Pending at end of reporting period	242	112	58
	Period: 1.7.94 - 30.6.95	Period: 1.7.84 - 30.6.85	Period: 1.7.85 - 30.6.86
Applications to external review authority	223	334	119
Resolved by formal decision	43	46	29
Resolved without formal decision	136	213	59
Total resolved	179	259	88
Pending at end of reporting period	286	187	89

NOTE: The source for the statistical information on the Commonwealth and Victoria is Annual Reports on the Freedom of Information Acts of each jurisdiction. Minor discrepancies between relevant figures appear in different Annual Reports.

- 2.10 One other interesting comparison with the Commonwealth and Victoria (illustrated in tables 5A, 5B and 5C below) is that the percentage of total FOI 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 Applications

Period	No. of Appeals to Commonwealth AAT	Total No. of FOI Applications	As a %
01/12/82 to 30/06/83	69	5,702	1.21%
1983/84	203	19,390	1.05%
1984/85	310	33,213	0.93%
1985/86	267	36,727	0.73%

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

Period	No. of Appeals to Victorian County Court or AAT	Total No. of FOI Access Applications	As a %
1983/84	59	4,285	1.38%
1984/85	112	4,702	2.38%
1985/86	119	9,062	1.31%

Source: Annual Reports on the Freedom of Information Act of each jurisdiction. Minor discrepancies between relevant figures appear in different Annual Reports.

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

Period	No. of Applications for Review by Information Commissioner	Total No. of FOI Applications	As a %
19.11.92 - 30.6.93	120	4,988	2.41%
1.7.93 - 30.6.94	274	8,275	3.3%
1.7.94 - 30.6.95	223	7,495	2.98%

- 2.11 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. This is done not only through the publication 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 considers that an agency may have misunderstood or misapplied the FOI Act in a particular case. The quality of formal decisions is, of course, of prime importance in discharging the educative and normative (i.e. standard-setting) role expected of an external review authority. Notes on the significant issues dealt with in each formal decision given in 1994/95 are set out in Appendix 3 to this report.
- 2.12 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 1994/95. 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. The procedures adopted are intended to keep the costs for participants (including government agencies) as low as possible.

GOALS & PERFORMANCE IN 1994/1995

- 2.13 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, 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 lodgement (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

- 2.14 During 1994/95, the target which I set for my professional staff was to resolve a minimum of 160 cases. This target took account of the effect of disruptions caused by turnover of staff during the year, and the amount of time taken by new staff to become proficient in what is a highly specialised field. The target also took account of the large amount of staff time expended on preparations for the hearing of a Supreme Court judicial review application, challenging one of my formal decisions (the application was withdrawn only days prior to a scheduled hearing, after detailed written submissions had been lodged by all parties). Ultimately, the Office was able to resolve 179 applications for review, which I regard as a good result. This represented an increase of 43% on the number of applications for review resolved in 1993/94. The number of cases resolved by formal decision increased from 20 in 1993/94 to 43 in 1994/95. Those 43 formal decisions (which represent the most complex and time-consuming part of the work done by this Office) involved the preparation and publication of some 555 pages of reasons for decision.
- 2.15 The proportion of cases closed in 1994/95 which were resolved within 12 months of lodgment was 66%. This is a significant decline from the proportion of 92% achieved in 1993/94, but, as I explained in paragraph 3.5 of my second Annual Report, this figure was expected to decline due to the aging of the large number of cases (394) received in the first 18 months of operations, a substantial proportion of which it has proved impractical to resolve quickly. The same factor accounts for the significant rise in the average time for finalisation of cases resolved during the reporting period, which rose from 162 days (i.e. approximately 23 weeks) in 1993/94 to 286 days (i.e. approximately 41 weeks) in 1994/95. There may be a further small decline in performance against these two performance criteria in 1995/96, following which the position should stabilise and begin to improve.

Performance against Goal 2

- 2.16 The proportion of total cases assessed for investigation and review during 1994/95 in which informal dispute resolution methods were undertaken was 91%. A total of 136 cases was resolved informally compared to 43 cases resolved by formal written determination, making a proportion of 76% resolved by informal methods. Given that the number of formal decisions more than doubled (from 20 to 43) this is comparable to the proportion of 84% reported in the previous financial year. Again, I can report that it has been my experience that even if mediation and/or negotiation does not fully resolve a dispute it has, in nearly all cases, resulted in some significant progress towards narrowing and reducing the number of issues which must be the subject of formal determination.

Performance against Goal 3

- 2.17 From my examination of agency decisions at primary and internal review level (in those cases which progress to the stage of external review), it is clear that most agencies are obtaining

assistance from my formal decisions, and referring to them to explain and justify to applicants the stance which an agency has taken in a particular case.

- 2.18 In relation to the performance indicator for this goal, 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. Although one of my decisions (*Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663) was the subject of an application to the Supreme Court for judicial review, the application was withdrawn by the Cairns Ports Authority shortly before the scheduled hearing.
- 2.19 Since they represent a most significant part of the work undertaken by my Office during the reporting period, I have recorded, in Appendix 3 to this Report, some notes on what I consider to be the significant issues dealt with in each formal decision issued in 1994/95. This may be of assistance as a check list or handy guide for FOI administrators.

NEED FOR AMENDMENTS TO THE FOI ACT - ADDRESSING THE EROSION OF THE RIGHT OF ACCESS

- 3.1 1994/95 marked the second anniversary of the application of the FOI Act to Queensland government agencies and Ministers (19 November 1994) and to local authorities (19 May 1995). The Parliamentary Committee for Electoral and Administrative Review, in its April 1991 Report on Freedom of Information, had recommended that there be a full review of the operation of the FOI Act two years after its commencement. It had been widely understood amongst FOI administrators that a 'two year review' would take place. Certainly, on a number of occasions when I sought to raise with the Department of Justice and Attorney-General the need for amendments to the FOI Act, I was informed that these were matters that could wait until the 'two year review' of the FOI Act.
- 3.2 Cabinet has decided that a review of the FOI Act should be undertaken by an Inter-departmental Working Group comprising representatives of the Department of Justice and Attorney-General, the Office of the Cabinet, Queensland Treasury, Queensland Health and a local authority (Redcliffe City Council). I understand that the Inter-departmental Working Group is required to report to Cabinet on the results of its review by the end of February 1996. The terms of reference developed for the review are fairly broad. Apparently, however, it is not proposed to invite the general public and users of the FOI Act to participate in the review by making submissions, although government agencies (including my office) and local authorities were formally invited to lodge written submissions for consideration by the Inter-departmental Working Group. I have taken the opportunity to forward a detailed submission, drawing attention to a number of respects in which I consider that the FOI Act should be amended to improve its effective and efficient administration, and to improve its prospects of realising its professed objects. They include recommendations for amendment of the FOI Act which I have raised in formal decisions (see the notes in Chapter 2 of this report on *Re "JM" and Queensland Police Service*, and *Re "EST" and Department of Family Services and Aboriginal and Islander Affairs*) and in previous Annual Reports. It is not possible to detail here all the issues raised in my submission to the Inter-departmental Working Group. I have chosen to highlight in this chapter three issues exemplifying a trend towards erosion of the right of access to government information conferred by the FOI Act—a trend which gives cause for concern.
- 3.3 I preface my remarks by acknowledging that Parliament is entitled to enact legislation which it considers necessary or desirable. Nevertheless, I believe it is appropriate that, as Information Commissioner, I express to Parliament any concerns I have with respect to the propriety of the legislative changes, and ask the Parliament to consider the views I express.

The Cabinet matter/Executive Council matter exemptions of the FOI Act - s.36 and s.37

3.4 When the FOI Act commenced in November 1992, it contained a Cabinet exemption provision which, in my opinion, struck an appropriate balance between the degree of secrecy necessary in the Cabinet process to protect the convention of collective Ministerial responsibility and, on the other hand, the public interests in openness, accountability and informed public participation in the processes of government, which the FOI Act was intended to promote.

3.5 Section 36, as originally enacted in 1992, was in the following form:

36.(1) *Matter is exempt matter if -*

(a) *it has been submitted, or is proposed by a Minister to be submitted, to Cabinet for its consideration and was brought into existence for the purpose of submission for consideration by Cabinet; or*

(b) *it forms part of an official record of Cabinet; or*

(c) *it is a draft of matter mentioned in paragraph (a) or (b); or*

(d) *it is a copy of, or contains an extract from, matter or a draft of matter mentioned in paragraph (a) or (b); or*

(e) *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.*

(2) *Matter is not exempt under subsection (1) if it is merely factual or statistical matter unless -*

(a) *the disclosure of the matter under this Act would involve the disclosure of any deliberation or decision of Cabinet; and*

(b) *the fact of the deliberation or decision has not been officially published by decision of Cabinet.*

(3) *For the purposes of this Act, a certificate signed by the Minister certifying that matter is of a kind mentioned in subsection (1), but not of a kind mentioned in subsection (2), establishes, subject to Part 5, that it is exempt matter.*

(4) *In this section -*

“Cabinet” includes a Cabinet committee.

3.6 Section 36 as originally enacted was a provision which accorded very closely with recommendations, as to the proper scope of a Cabinet exemption provision, in two highly regarded reports prepared by committees comprised of parliamentarians, able to bring the insight and perspective of the political "insider" to their work: the first was the 1979 report by the Senate Standing Committee on Constitutional and Legal Affairs on the Commonwealth Freedom of Information Bill 1978 (Commonwealth Parliamentary Paper No. 272/1979); and the second was the 1989 report by the Legal and Constitutional Committee of the Parliament of Victoria titled "Report upon Freedom of Information in Victoria".

3.7 I referred to those reports, and explained the correct interpretation and application of s.36 of the Queensland FOI Act, as originally enacted, in my reasons for decision in *Re Hudson as agent for*

Fencray Pty Ltd and Department of the Premier, Economic and Trade Development (1993) 1 QAR 123, published in August 1993. The document in issue in that case was a Cabinet submission, which had already been considered by Cabinet. The respondent Department had made a decision that the Cabinet submission was exempt under s.36(1)(a) of the FOI Act, except for any merely factual matter contained in the submission, which by virtue of s.36(2) was not eligible for exemption under s.36(1). The respondent Department had in fact disclosed to the applicant some information from the Cabinet submission, which it accepted was merely factual matter within the terms of s.36(2). In my reasons for decision, I found (applying principles as to the characterisation of information as merely (or purely) factual which had been stated in a previous decision of a Full Court of the Federal Court of Australia) that there was additional information in the Cabinet submission which was merely factual matter, and not eligible for exemption under s.36(1) by virtue of s.36(2). It is clear from my reasons for decision (at p.148) that I approached the issue on the basis that matter expressing the opinions and recommendations of individual Ministers on policy issues and policy options requiring Cabinet determination, was entitled to, and deserving of, exemption under s.36(1) of the FOI Act.

- 3.8 Nevertheless, some three months later, the *Freedom of Information Amendment Act 1993* Qld introduced amendments to s.36 which considerably broadened the scope of the exemption, with the second reading speech by the then Minister for Justice and Attorney-General claiming that the amendments were made necessary by my reasons for decision in the aforementioned case. That in itself was surprising since the views I expressed in *Re Hudson/Fencray*, as to the proper interpretation and application of s.36 of the FOI Act, happened to accord with the guidelines published to FOI administrators in the "Freedom of Information Policy and Procedures Manual" (in particular at p.110-115 thereof) issued by the Department of Justice and Attorney-General. The Minister had submitted that manual to Cabinet for approval prior to its publication. The November 1993 amendments to s.36 of the FOI Act corresponded fairly closely to amendments made in mid-1993 to the Cabinet exemption provision (s.28) in the *Freedom of Information Act 1982* Vic: see the *Freedom of Information (Amendment) Act 1993* Vic. No other Australian jurisdictions have considered it necessary to give their Cabinet exemptions in FOI legislation such an extended reach as was contained in the 1993 amendments made in Victoria and Queensland.
- 3.9 On the first occasion I had to revisit s.36 in a published decision, *Re Woodyatt and Minister for Corrective Services* (Information Commissioner Qld, Decision No. 95001, 13 February 1995, unreported), I made comments that were critical of the extremely wide coverage of the amended s.36 exemption which (rather than focussing on protection of secrecy for proceedings within Cabinet and for the contribution of individual Ministers to Cabinet deliberations and decision-making) seemed designed to extend unqualified protection to the contributions of those who brief Ministers on issues that are to come or may come before Cabinet (amended s.36(1)(c)), any document submitted to Cabinet for its consideration, whether or not the document was initially prepared for submission to Cabinet (amended s.36(1)(a)), and any document which a Minister has at some time proposed for submission to Cabinet, irrespective of whether that proposal was subsequently abandoned (amended s.36(1)(b)). Documents of this kind would formerly have fallen under the deliberative process exemption (s.41) and would have been exempt only if the disclosure of their contents would be contrary to the public interest.
- 3.10 In *Re Woodyatt*, at paragraph 12, I expressed the view that the requirement under s.36(1)(a), as originally enacted, that to qualify for exemption information must have been brought into existence for the purpose of submission for consideration by Cabinet, placed sensible limits on the scope of the exemption. I gave examples of unwarranted consequences of dispensing with that requirement, viz:
- ❑ documents submitted to Cabinet merely to provide background information relevant to a proposal contained in a Cabinet submission, and which do not reflect the views of a Minister on the proposal (but which could be valuable for informing the general public, or any interested member thereof) would be exempt, even though not initially prepared for the purpose of submission to Cabinet.

- ❑ documents submitted to Cabinet which had previously been prepared and used for another purpose, or even released into the public domain, such as a Green paper, would be exempt.
 - ❑ an avenue for potential abuse of the accountability objects of the FOI Act was permitted, by enabling an agency or Minister to prevent disclosure of an embarrassing or damaging document, merely by ensuring that it was submitted to Cabinet for its consideration (even though the document was not initially prepared for the purpose of submission to Cabinet).
- 3.11 I expressed the hope that guidelines would be issued to FOI decision-makers encouraging the appropriate exercise of the discretion conferred by s.28(1) of the FOI Act in respect of documents technically exempt under the extremely wide coverage of the amended s.36(1), but the disclosure of which could do no harm to the effective working of the Cabinet process.
- 3.12 That has not, to my knowledge, occurred. Rather, in March 1995, the *Freedom of Information Amendment Act 1995* Qld introduced amendments to s.36 and s.37 of the FOI Act which expanded the coverage of these exemption provisions even further. Both the 1993 and 1995 amendments were justified by the then Minister for Justice and Attorney-General as being necessary to prevent the undermining of the convention of collective Ministerial responsibility, and to safeguard the confidentiality of the Cabinet and Executive Council process. Those amendments, however, appear to be based on a conception of the extent of the Cabinet/Executive Council process which far exceeds that which has been understood in other Australian jurisdictions, with the notable exception of Victoria since 1993.
- 3.13 In fact, so wide is the reach of s.36 and 37, following the 1993 and 1995 amendments, that they can no longer, in my opinion, be said to represent an appropriate balance between competing public interests favouring disclosure and non-disclosure of government information. They exceed the bounds of what is necessary to protect traditional conceptions of collective Ministerial responsibility (and its corresponding need for Cabinet secrecy) to such an extent that they are antithetical to the achievement of the professed objects of the FOI Act in promoting openness, accountability and informed public participation, in the processes of government.
- 3.14 I consider that it is time for the Queensland Parliament to reconsider the rationale for inclusion of a Cabinet exemption and an Executive Council exemption in the FOI Act and to ask whether s.36 and s.37 of the FOI Act, in their present form, sit comfortably with the professed objects of the FOI Act.
- 3.15 When first enacted in 1992, s.36 of the Queensland FOI Act contained all the features of a balanced Cabinet exemption provision which had been recommended by the Senate Standing Committee on Constitutional and Legal Affairs in its 1979 report on the Commonwealth Freedom of Information Bill 1978. The Senate Committee made it clear that it was concerned to preserve the effectiveness of the Cabinet system and to preserve the secrecy surrounding Cabinet discussions. Paragraph 4.21 of its report, said: "*...our recommendations, if adopted, would clearly protect the confidentiality of all Cabinet deliberations; they will preserve the necessary degree of secrecy for advice tendered to Cabinet and would in no way expose the individual views or opinions of ministers in a way which could adversely affect the doctrine of collective responsibility*".
- 3.16 The Senate Committee referred (at paragraph 18.2) to the kinds of documents that would be protected from disclosure by its recommended Cabinet exemption provision:

Cabinet submissions (and documents prepared in support); Cabinet business lists; departmental notes containing details of proposals in Cabinet submissions and decisions; correspondence between ministers, between ministers and departments and between departments, which disclose Cabinet deliberations and

decisions; and drafts of legislation being prepared in accordance with Cabinet decisions.

- 3.17 Clause 24(1)(a) of the Bill approved by the Senate Committee would have extended exemption from disclosure to a document that had been submitted to Cabinet for its consideration, or was proposed by a Minister to be so submitted, but (by virtue of clause 24(4)) only if it was brought into existence for the purpose of submission for consideration by Cabinet. (That clause would, in effect, have corresponded precisely with the effect of s.36(1)(a) of the Queensland FOI Act, as originally enacted in 1992.)
- 3.18 The Senate Committee expressed the view (at paragraph 18.6) that:

Notwithstanding this limitation many documents will possibly be included as Cabinet documents that should not be. For instance, it is possible that a minister may order the compilation of a broad category of important statistics on Australian social or economic life, for consideration by Cabinet, in relation to a proposed policy. Again, Cabinet may require a major study, primarily of a factual nature, on the feasibility of a new policy or on the implications for Australia of a projected proposal. Reference can also be made to important reports prepared by such bodies as the Administrative Review Council on new or proposed legislation, which we understand are often submitted to a minister for consideration by the Cabinet. Of a comparable nature are the reports of consultants. Quite often these are prepared, at considerable cost to the public, to evaluate the efficiency of existing government programs. Each of these examples refers to a document that has been brought into existence for the purpose of submission to Cabinet. In each case the document, which is an important one of public interest, could be treated as conclusively exempt as a Cabinet document.

... Essentially, the clause is designed to protect the Cabinet decision-making process. Yet, in protecting anything that is submitted or proposed to be submitted to Cabinet, it goes far beyond what is reasonably necessary for this purpose. To disclose documents of the type to which we referred in the previous paragraph is to disclose only the raw material on which the Cabinet process operates; it is not necessarily to disclose anything about Cabinet process itself.
(my emphasis)

- 3.19 The 1989 "Report upon Freedom of Information in Victoria" by the Legal and Constitutional Committee of the Victorian Parliament (the Victorian Report) discussed (at pp.70-72) both the virtues and vices of Cabinet secrecy:

The convention [of collective ministerial responsibility] serves several important constitutional purposes. It secures the responsibility of Cabinet to the Parliament and, through the Parliament, to the electorate. The coherence of government exercises pressure on the opposition to unite in the presentation of alternative policies and ministries. The convention assists in the maintenance of government control of legislation and public expenditure. It acts as a strong incentive towards the co-ordination of departmental policies and actions. More practically, Cabinet unanimity conforms with the expectations of the electorate which, in general, disapproves of divisiveness in its government

However, some of the political purposes facilitated by the convention have been the subject of substantial criticism It is argued that the accretion of power at the centre of government has been at the cost of effective accountability to both Parliament and people

Similarly, there has been criticism of the degree to which collective Ministerial responsibility has been productive of secrecy throughout government. Excessive secrecy can be seen as counter-productive to effective government since it conceals and distorts the process of decision-making ... Secrecy, like the ripples of a pond, can radiate from its centre in Cabinet to encircle the entirety of governmental administration. ... [Reproduced here was part of the passage from the Fitzgerald Report which is set out below.]

It is partly in response to such criticism that freedom of information legislation has been introduced in many nations with Westminster type governments.

It is a central question for this inquiry to determine what degree of secrecy should attach to Cabinet and other documents in order to effectively preserve the convention of collective ministerial responsibility. In examining this question, the Committee must weigh carefully two competing public interests. There is first, the public's interest in preserving the proper and efficient conduct of affairs of state. Secondly, there is the public interest in ensuring that, in the conduct of those affairs, the government is fully accountable to the people it exists to serve.

- 3.20 After an extensive analysis of constitutional convention, the recommendations of national and international commissions of inquiry, similar legislative provisions, relevant case-law and the evidence presented to it, the Victorian Legal and Constitutional Committee (with four of the six ALP members voting with the conservative majority) concluded that it was only documents which disclosed the individual submissions or opinions of Ministers, and the nature and content of their collective deliberations, that should be protected as Cabinet documents. For example, the Committee said (at paragraphs 7.53-7.54):

7.53 ... The Committee has been consistent in its view that only documents which, if disclosed, would undermine the unanimity of Cabinet should be protected as Cabinet documents. Therefore, documents which canvass or disclose the individual views or votes of Cabinet members should be exempt. Further, for the reasons already given, the decisions of Cabinet should not be disclosed unless and until the government determines that this is appropriate. However, factual documentation provided to assist Cabinet in its deliberations pre-dates decisions based upon it and in consequence will not disclose these decisions. Therefore, in the Committee's opinion, the disclosure of background material will not prejudice the maintenance of the convention of collective ministerial responsibility.

7.54 The availability of Cabinet's raw material will provide the community with a means of assessing the appropriateness of Cabinet decision making. Moreover, it will also assist the Parliament in exercising its legislative and supervisory functions. The Committee believes that these are important factors militating in favour of disclosure.

- 3.21 In an article titled "Freedom of Information and Cabinet Government: Are They Compatible in Every Dissimilar Respect?" (1994) 1 Australian Journal of Administrative Law 208, Mr Spencer Zifcak, a legal academic who assisted the Victorian Legal and Constitutional Committee in the preparation of the report referred to above, argues that:

...the key principles which should govern the disclosure of Cabinet documents are these:

- (1) The convention of collective Ministerial responsibility should be preserved. Cabinet documents should, therefore, remain secret until their disclosure will no longer prejudice Cabinet's effectiveness.*

- (2) *Consistent with the convention's protection, however, only those documents whose disclosure is likely to undermine the unity of Cabinet should be protected. So, any document which reveals an individual Minister's submission to Cabinet, the deliberations of Cabinet or the Cabinet's decisions should remain confidential.*
- (3) *It follows, therefore, that documents which will not disclose the individual views or votes of Ministers in Cabinet need not be protected as Cabinet documents. Thus, any document not prepared for the purpose of consideration by Cabinet need not be accorded protection as a Cabinet document since, by definition, it cannot disclose Cabinet's deliberations or decisions. Similarly, any documents which form the raw material of Cabinet discussion such as factual, statistical, technical and scientific documents should be capable of release.*
- (4) *To avoid undue pressure on the Cabinet to respond to matters raised in this latter class of documents, however, they should be withheld from disclosure until after the decision to which they relate has been made.*

Legislation based on these principles would strike an appropriate balance between the public's interest in effective Cabinet discussion and its interest in drawing the Cabinet to account for its actions. The views and votes of Ministers in Cabinet would remain confidential but external and factual material on which the Cabinet relied in making its decisions could eventually be disclosed providing a benchmark against which the appropriateness and propriety of its decisions might be judged.

If one accepts this analysis, it becomes apparent that it is quite incorrect for politicians to claim that, in order to prevent the very foundations of the Westminster system from crumbling, every document considered by or relevant to Cabinet's deliberations must remain off-limits to the public. On the contrary, it is only those documents whose disclosure would have the effect of fracturing Cabinet's unity and hence Cabinet's collective responsibility that require protection.

- 3.22 I endorse the arguments made in the above-quoted passage and urge the Queensland Parliament to consider carefully whether s.36 and s.37 of the FOI Act should be amended so as to accord with them.
- 3.23 I note that in his second reading speeches introducing the 1993 and 1995 amendments to s.36 and s.37 of the FOI Act, the then Minister for Justice and Attorney-General placed reliance on the decision of the High Court of Australia in *Commonwealth of Australia v Northern Land Council* (1993) 67 ALJR 405. It is true that in the *Northern Land Council* case the High Court held that the interest of a government in the maintenance of the secrecy of deliberations within Cabinet constitutes a public interest that will be accorded protection by the courts in all but exceptional cases. However, the High Court was careful to confine this statement of principle to documents of the kind in issue before it, i.e. documents recording the actual deliberations of Cabinet. The six majority judges saw fit to point out (at p.406) that the documents in issue in the case were "documents which record the actual deliberations of Cabinet or a Committee of Cabinet", and not "documents prepared outside Cabinet, such as reports or submissions, for the assistance of Cabinet."
- 3.24 In his second reading speech introducing the Freedom of Information Amendment Bill 1995, the then Minister for Justice and Attorney-General stated that the High Court had, in the *Northern Land Council* case "recognised the public interest in maintaining the confidentiality of the

Cabinet process”. With respect, there is nothing in the *Northern Land Council* case which supports the proposition that the High Court has recognised a public interest in maintaining the confidentiality of anything so amorphous and ill-defined as “the Cabinet process”. The High Court limited its remarks to the protection of the public interest in preserving the confidentiality of the actual deliberations of Cabinet or a Cabinet Committee. There was abundant protection from disclosure of deliberations of Cabinet or a Cabinet committee, and of the contributions of individual Ministers, in s.36 of the FOI Act, as originally enacted in 1992. The *Northern Land Council* case affords no support in principle for the extensions of the scope of s.36 and s.37 made by the 1993 and 1995 amendments.

- 3.25 The Fitzgerald Report had in 1989 warned Queenslanders of the dangers of excessive Cabinet secrecy (at pp.126-127):

Although "leaks" are commonplace, it is claimed that communications and advice to Ministers and Cabinet discussions must be confidential so that they can be candid and not inhibited by fear of ill-informed or captious public or political criticism. The secrecy of Cabinet discussions is seen as being consistent with the doctrines of Cabinet solidarity and collective responsibility under which all Ministers, irrespective of their individual views, are required to support Cabinet decisions in Parliament.

It is obvious, however, that confidentiality also provides a ready means by which a Government can withhold information which it is reluctant to disclose.

A Government can deliberately obscure the processes of public administration and hide or disguise its motives. If not discovered there are no constraints on the exercise of political power.

The rejection of constraints is likely to add to the power of the Government and its leader, and perhaps lead to an increased tendency to misuse power.

The risk that the institutional culture of public administration will degenerate will be aggravated if, for any reason, including the misuse of power, a Government's legislative or executive activity ceases to be moderated by concern for public opinion and the possibility of a period in Opposition. ...

The ultimate check on public maladministration is public opinion, which can only be truly effective if there are structures and systems designed to ensure that it is properly informed. A Government can use its control of Parliament and public administration to manipulate, exploit and misinform the community, or to hide matters from it. Structures and systems designed for the purpose of keeping the public informed must therefore be allowed to operate as intended.

Secrecy and propaganda are major impediments to accountability, which is a prerequisite for the proper functioning of the political process. Worse, they are the hallmarks of a diversion of power from the Parliament.

Information is the lynch-pin of the political process. Knowledge is, quite literally, power. If the public is not informed, it cannot take part in the political process with any real effect.

The involvement of Cabinet in an extended range of detailed decisions in the course of public administration gives principles intended to apply in different circumstances an operation that cannot have been contemplated or intended. Excessive Cabinet secrecy has led to the intrusion of personal and political considerations into the decision-making process by bureaucrats and politicians.

3.26 Thus, the maintenance of an appropriately balanced Cabinet exemption in FOI legislation is consistent with the Fitzgerald reform agenda in Queensland. In my opinion, the 1993 and 1995 amendments to s.36 and s.37 of the FOI Act have resulted in exemption provisions of unwarranted breadth, which have re-opened the potential for abuse of Cabinet secrecy warned of in the passage from the Fitzgerald Report quoted above.

3.27 Section 36, in its current form, provides:

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 party of a copy of or extract from, matter mentioned in paragraphs (a) to (f).*
- (2) *Subsection (1) does not apply to matter officially published by decision of Cabinet.*
- (3) *A certificate signed by the Minister stating that specified matter would, if it existed, be exempt matter mentioned in subsection (1), but not matter mentioned in subsection (2), establishes, subject to part 5, that, if the matter exists, it is exempt matter under this section.*

(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.*

- 3.28 Under s.36(1)(a) in its present form, any document (even a bundle of thousands of documents) can be made exempt by placing it before Cabinet. A Minister, or official with sufficient influence to have a document placed before Cabinet, now holds the power, in practical terms, to veto access to any document under the FOI Act by adopting this mechanism. It does not matter that the document was not created for the purpose of submission to Cabinet, or that the disclosure of the document would not compromise or reveal anything about the Cabinet process. It is not even necessary that the document be in any way relevant to any issue considered by Cabinet. At any time, even at a time after an FOI access application has been made for that specific document, a document may be made exempt by placing it before Cabinet.
- 3.29 Moreover, under s.36(1)(c) in its present form, the same result can be achieved without even arranging for a sensitive document to be submitted to Cabinet. For example:
- Under s.36(1)(c), any document prepared for the use or briefing of a Minister can now be rendered exempt merely by the Minister proposing (to whom is not specified, arguably any member of staff would suffice) that a matter to which it relates should go to Cabinet. Neither the document in question nor the related matter need ever reach the Cabinet room. The Minister therefore has it within his or her power to transform a document created without any intention that it or its subject matter would ever be dealt with by Cabinet, into exempt matter under s.36(1)(c).
 - A similar possibility arises under s.36(1)(c) in relation to documents prepared for a chief executive, if a Minister can be persuaded to propose to take a matter dealt with in the documents before Cabinet. From a practical point of view, this leaves open the possibility that an enormous number of documents dealing with the everyday activities of an agency can be made exempt under s.36(1)(c), on the basis of a decision of a Minister. In earlier times it would, of course, have been open to agencies to argue that documents of this type were exempt under s.41(1) of the FOI Act, on the basis that disclosure would not be in the public interest. Now there is an option available to a Minister to avoid having to deal with public interest considerations.
 - The general words, "in relation to a matter", appearing in s. 36(1)(c), leave much ground for FOI decision-makers to conclude that a document relates to some item that has gone to Cabinet at some stage in history. Since its inception, Cabinet has no doubt dealt with most subject matters that are administered by Departments and agencies subject to the FOI Act. An FOI decision-maker need only draw a link between a document prepared for a chief executive or Minister and some matter which once went, or was proposed to go, to Cabinet.
- 3.30 It is also difficult to see any justification for the words "or has at any time been proposed [to be submitted to Cabinet by a Minister]" in s.36(1)(b) and s.36(1)(c)(ii). Given that documents actually submitted to Cabinet, or subject to a current proposal for submission to Cabinet, are covered elsewhere in the section, these words extend protection to matter never submitted to Cabinet, and in respect of which a proposal by a Minister to submit the matter to Cabinet has been abandoned. There is no logical justification for giving matter of this kind the benefit of the cloak of Cabinet secrecy.
- 3.31 Citizens are entitled to feel cynical about the achievement of the accountability objects of the FOI Act in the face of these provisions. Much of the benefit of the FOI Act is prophylactic - the prospect of public scrutiny should deter officials from impropriety and encourage the best possible performance of their functions. However, the intended prophylactic effect of accountability measures of this kind is negated if there exists a certain method for evading scrutiny in the event of problems arising, by preventing the disclosure of embarrassing or damaging information. Moreover, the prospect of concerned citizens obtaining documents which would permit informed participation in the policy development phase of some issue which is

ultimately intended to go before Cabinet or Executive Council is also reduced, by these exemption provisions, to something which is entirely at the discretion of Ministers, or officials with sufficient influence to create circumstances which attract the application of these exemption provisions in the manner noted above.

3.32 The other disquieting factor in this context is the all-pervasive nature of Cabinet government. It is not just that every decision of importance is routed through Cabinet, but that an enormous number of minor decisions, of significance only to small segments of the public or to individuals, are routed through Cabinet and/or Executive Council. An extraordinary number of routine administrative decision-making powers are, by long convention, vested by statute in the Governor in Council. Therefore, the potential negative impact on access to information posed by s.36 and s.37 in their present form is enormous.

3.33 The beneficial objects of FOI legislation, which include -

- keeping the community informed of government's operations,
- promoting open discussion of public affairs,
- promoting informed public participation in the processes of government, and
- enhancing the accountability of government, and government officials,

were intended to be secured by the conferral (in s.21 of the FOI Act) of a legally enforceable right of access to documents of agencies and official documents of Ministers, subject only to limited exceptions designed to protect the private and business affairs of members of the community, and *essential* public interests (see s.5(2) of the FOI Act).

3.34 It is an unavoidable weakness in the scheme of the FOI Act that officials in the executive branch of government must necessarily be made judges in their own cause (subject to the right to seek independent external review) on whether exceptions to the s.21 right of access (which is designed to promote accountability of the executive branch of government) apply in respect of particular documents or parts of documents. But the right of access conferred by s.21 of the FOI Act is rendered illusory, when it is within the power of Ministers or influential officials to defeat the right of access by making use (in the manner described above) of excessively broad exemption provisions, which go much further than is needed to protect *essential* public interests. It becomes, in effect, a right of access subject to Ministerial veto.

3.35 The concerns which I have expressed about the potential for abuse of s.36 and s.37 following the 1993 and 1995 amendments are not merely fanciful. An effective 'Ministerial veto' has already been employed to ensure exemption of documents prepared by all Departments in 1994 for the purpose of briefing Ministers in preparation for their appearances before Budget Estimates Committees of the Parliament. A number of shadow ministers, and one journalist, requested access under the FOI Act to briefing documents of this kind. These documents had not been prepared for the purpose of submission to Cabinet (indeed the purpose for which they were prepared had been spent), yet within the 45 days allowed for processing after the first such FOI access application was lodged, the documents had been placed before Cabinet, and each applicant for access was met with the assertion that the documents were exempt under s.36 of the FOI Act: see *Re Beanland and Department of Justice and Attorney-General* (Information Commissioner Qld, Decision No. 95026, 14 November 1995, unreported).

3.36 Another significant consequence of the broad reach of these amendments is the extension of unqualified protection (from disclosure and public scrutiny) to the contributions of those officials who brief Ministers and chief executives on issues that are to come or may come before Cabinet. When first enacted, the FOI Act recognised a distinction between two types of deliberative process matter. The first type was matter which might disclose the views of a Minister on matter taken to Cabinet, and the deliberations and decisions of Cabinet. This type of matter was to be afforded protection under s.36(1), regardless of any countervailing public interest which might favour disclosure. The second type of matter was the opinion and advice of public servants (not

prepared specifically for the purpose of submission to Cabinet) which the Minister and the Cabinet might or might not choose to accept. Provision was made under s.41(1) for this matter also to be made exempt, but only if it could be shown that disclosure of the particular information would be contrary to the public interest.

- 3.37 The rationale for this distinction can be drawn from Chapter 4 of the 1979 Report of the Senate Standing Committee on Constitutional and Legal Affairs, which discusses the interplay between FOI legislation and the Westminster system of government, and Chapters 18 and 19 of that report, which deal specifically with the two exemption provisions. In essence, the distinction was made because it was considered that a blanket exemption for matter expressing the views of Ministers on matters taken to Cabinet was justified on public interest grounds but that, in the case of the advice and opinions of public servants, each case should be considered on its merits, with non-disclosure being called for only when the public interest, on balance, weighed against disclosure.
- 3.38 The recent amendments are very much contrary to this approach. They allow a great deal of opinion and advice, given by public servants to a Minister or a chief executive, to be characterised as exempt matter under s.36(1)(c), regardless of whether release of the documents would be in the public interest. My major concern in this regard is the potential to undermine the achievement of one of the major objects of the FOI Act, i.e. fostering informed public participation in the processes of government, by stifling access to information about proposed policy developments, because the issue is ultimately proposed to go before Cabinet. In this regard, I draw attention to remarks I made in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 (at pp.113-115, paragraphs 158, 160-163):

158. There are sound reasons why the class of documents entitled to strict protection under s.36 of the FOI Act should be narrowly confined. To do so will permit full scope to the object of fostering informed public participation in the processes of developing policy proposals, and this in turn will benefit the Cabinet process itself and through it, the public interest. I do not suggest that elected governments do not have the legitimacy and authority to make decisions without public consultation. In circumstances requiring urgent government action, there may be no practical alternative, and some government decision-making and policy-forming processes may be quite inappropriate for public consultation. There can be no doubt, however, that public consultation is a natural expression of the democratic process, and most governments are aware that to ignore it would be to their own peril. The mobilisation of majority public opinion against the announcement of a new government policy proposal tends to signal a government in difficulty.

...[an extract from the Cabinet Handbook, at pp32-35, was quoted here]

- 160. In the pursuit of open and accountable government, the Queensland Government has placed a high value on the importance of consultation in the development of Government policy proposals. This is in sympathetic accord with the public participation objects of the FOI Act discussed at paragraphs 58 to 75 above. Interestingly, the only embargo which the Cabinet Handbook (see the fourth paragraph of the extract quoted) places on the disclosure of information to persons and organisations external to government (to allow for meaningful consultation) is that no Cabinet document, or previous or proposed discussions or deliberations by Cabinet, are to be disclosed. This roughly accords with the scope of the protection afforded by s.36 of the FOI Act.*
- 161. The extracts from the Cabinet Handbook quoted above seem to contemplate a managed process of consultation, where the agency developing a proposal for consideration by Cabinet selects the persons or organisations who will be*

accorded the opportunity of consultation. (Pages 27-28 of the Cabinet Handbook discuss the use of Green papers and White papers in a consultation process for policy development, which is aimed at achieving a high level of information dissemination, public discussion and comment, and which is open to all; but the Cabinet Handbook contains no guidelines which indicate when that process should be adopted, leaving it to the choice of individual Ministers and Chief Executives).

162. *The right of access to government-held information conferred by the FOI Act may assist interested persons or organisations who are not selected for participation in a consultative process, first, to discover that an agency is developing a policy proposal, and second, to obtain the information which would permit meaningful participation; for instance by seeking to make their views known to the agency or the responsible Minister.*
163. *The general tenor of the Cabinet handbook on the subject of consultation is quite consistent with the notion that if an interested person or organisation has views to contribute to a policy formulation process, they should be taken into account with all other relevant views, so that the deliberation and decision-making processes within Cabinet itself can take account of all facets of public opinion, and all views which for instance question the factual or technical bases of a proposal under consideration. Not all relevant information is in the possession of government. The process of public consultation is generally a learning process, both for the government officials and the members of the public who engage in it. Not even our elite bureaucratic policy makers have a monopoly on wisdom. In the processes of Cabinet deliberation and decision, the relative strengths and weaknesses of all relevant options will be canvassed, so that Cabinet can make an informed choice according to its judgement of what the public interest requires. The Cabinet process is likely to produce better outcomes, in the public interest, when the legitimate concerns of all persons and groups have been taken into account, and the factual and technical data and assumptions on which a proposal is based have been exposed to the scrutiny of interested persons and groups.*

- 3.39 I do not see any logical justification for extending the cloak of Cabinet secrecy to policy advice rendered by public servants, without regard to a public interest balancing test of the kind provided for in s.41(1) of the FOI Act. I consider that the public in general, and certainly that segment of it which takes a keen interest in political matters, is aware that conflicting interests have to be reconciled in most of the difficult policy areas in which governments have to make decisions, and that there would be something severely deficient with the processes of government if alternate views and different policy options were not being put, and on occasions put strongly, in advice received by the government. I consider that the Queensland community is, and must be treated as, quite capable of distinguishing between policy advice given to a Minister by his or her officials, any view which the Minister then forms to take to Cabinet (which ordinarily should be clothed with the secrecy which properly applies to deliberations of Cabinet), and a government decision arrived at after consideration of all relevant advice.
- 3.40 The FOI Act was, after all, introduced with the aim of making democracy work in a better fashion by allowing a well-informed public and Opposition to make governments and individual officials more accountable and responsive to the public they are elected, or appointed, to serve. This includes a government having to be prepared to defend its policy choices against more informed scrutiny and questioning than had been the case in times when governments had an almost unfettered discretion to control the dissemination of government-held information. This may be inconvenient to a government in power, but there is no doubt that it is for the greater benefit of our system of government and the community as a whole.

- 3.41 Finally, I wish to draw the Queensland Parliament's attention to interim recommendations made by the joint Australian Law Reform Commission/Administrative Review Council review of the Commonwealth FOI Act ("the ALRC/ARC review") in its Discussion Paper 59 (DP 59) published in May 1995. The ALRC/ARC review made these observations on the Cabinet exemption in the Commonwealth FOI Act:

6.5 Nature of exemption. The exemption for Cabinet documents has always been controversial. It is a class exemption that can be claimed without consideration of the public interest or whether disclosure of the particular document will cause harm. It seems to contradict the principle of open government. Cabinet is the 'peak body' for government decision making yet its processes are secret. The Review's general view on exemptions is that they should focus on a clearly identified harm or a weighing of the public interest. Cabinet documents, however, deserve special consideration. Absolute confidentiality is essential to the effective functioning of the collective decision making process that characterises the Cabinet model of government. To breach that 'Cabinet oyster' would be to alter our system of government fundamentally. Amending the FOI Act is not the appropriate way to effect such a radical change. Section 34 is one of the few cases in which an exception to the general rule that the harm or public interest consideration that justifies an exemption must be identified within the provision itself, is appropriate. In this case, the harm is the invasion of Cabinet secrecy. The Act should, however, urge agencies not to claim the exemption where it is clear that no harm would befall the system of Cabinet decision making. Provision for a conclusive certificate should continue.

...

6.6 Definition of Cabinet document. A document currently falls within the exemption for Cabinet documents if it has been submitted to and was prepared specifically for consideration by Cabinet, if it is an official record of the Cabinet or it is a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published. Despite the apparently clear wording to the contrary, documents that have been submitted to Cabinet but that were not created for that purpose have been held to be exempt. This is not acceptable. Section 34 (1)(a) should be amended to clarify that the exemption only applies to documents prepared for Cabinet to ensure that agencies do not abuse the exemption by having documents taken to Cabinet merely to avoid disclosure under the FOI Act. [my emphasis]

- 3.42 This affords further endorsement of my view that s.36 of the FOI Act, as originally enacted in 1992, struck the appropriate balance for a Cabinet exemption provision in FOI legislation. In my opinion, the 1993 and 1995 amendments represent a giant leap backwards in terms of achievement of the objects of the FOI Act. The ultimate losers are the public of Queensland who are denied the benefits of an FOI Act that functions in a manner conducive to the achievement of the beneficial objects identified in paragraph 3.33 above. I recommend that s.36 of the FOI Act be amended to restore it to the form in which it was first enacted in 1992.
- 3.43 Thus far, I have frequently referred to s.37 in tandem with s.36. I will give some further examples, specific to s.37, of the enormous negative impact which the unwarranted breadth of this provision has for the FOI Act.
- 3.44 Section 37, in its current form, provides:

37.(1) *Matter is exempt matter if -*

- (a) *it has been submitted to Executive Council; or*
 - (b) *it was prepared for submission to Executive Council and is proposed, or has at any time been proposed, by a Minister to be submitted to Executive Council; or*
 - (c) *it was prepared for briefing, or the use of, the Governor, a Minister or a chief executive in relation to a matter -*
 - (i) *submitted to Executive Council; or*
 - (ii) *that is proposed, or has at any time been proposed, to be submitted to Executive Council by a Minister; or*
 - (d) *it is, or forms part of, an official record of Executive Council; or*
 - (e) *its disclosure would involve the disclosure of any consideration of Executive Council or could otherwise prejudice the confidentiality of Executive Council 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).*
- (2) *Subsection (1) does not apply to matter officially published by decision of the Governor in Council.*
- (3) *A certificate signed by the Minister stating that specified matter would, if it existed, be exempt matter mentioned in subsection (1), but not matter mentioned in subsection (2), establishes, subject to part 5, that, if the matter exists, it is exempt matter under this section.*
- (4) *In this section -*

“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 Executive Council, includes an official record of matters submitted to Executive Council.*

“submit” *matter to Executive Council includes bring the matter to Executive Council, irrespective of the purpose of submitting the matter to Executive Council, the nature of the matter or the way in which Executive Council deals with the matter.*

3.45 A vast number of statutory approvals (for all manner of activities) and routine administrative decisions affecting the rights and interests of citizens, are required by statute to be made by the Governor in Council. This is evident from an inspection of any issue of the *Government Gazette*. It is arguable that any matter relating to such approvals or routine administrative decisions (if prepared for the use, or briefing, of a chief executive or Minister who formulates, or formally tenders, a recommendation or advice to the Governor in Council) is exempt matter under

s.37(1)(c). For example, all documents put before a Minister in relation to a proposed rezoning could be argued to relate to the application placed before the Governor in Council and therefore to be exempt. In another case, job applications sent to the chief executive of an agency might be said to relate to the approval by the Governor in Council of appointment of the successful applicant and so be rendered exempt. Moreover, matter which is required to accompany the advice/recommendation submitted to the Governor in Council, or anything which the Minister or his officials choose to submit with it, even though not strictly required (hence my concern at the potential for abuse), may become exempt matter under s.37(1)(a).

- 3.46 So far as s.37 is concerned, the potential for abuse is similar, or greater, in extent to that presented by s.36, but the answer may well be that, rather than returning s.37 to its original form (as I have recommended for s.36) the whole section should simply be repealed. Any matter of perceived importance or political sensitivity which must be submitted to the Governor in Council will invariably be considered by Cabinet or a Cabinet committee or sub-committee beforehand, so that exemption under s.36 will be available when necessary. Nothing would be lost in terms of necessary protection, and much would be gained in terms of opening up access to documents which shed light on the workings of government, if s.37 were to be repealed. Documents submitted to Executive Council would ordinarily fall within s.41(1)(a) of the FOI Act, so that any which are not exempt under s.36 by reason of their prior consideration by Cabinet, will qualify for exemption under s.41(1) if their disclosure would be contrary to the public interest.
- 3.47 The repeal of the Executive Council exemption in the Commonwealth FOI Act has been recommended by the ALRC/ARC review. Paragraph 6.10 of DP 59 states:

Section 35 exempts Executive Council documents. Experience in the 13 years since the FOI Act came into operation suggests the exemption was included unnecessarily. Executive Council documents tend to be a formal record of matters contained in other documents available from agencies. Sensitive Executive Council documents would be protected by specific exemptions such as those for national security and personal information. In the interest of having as few exemptions as possible and simplifying the Act, the Review proposes that s. 35 be repealed. It has been suggested that Executive Council documents should not be available until they have been considered by the Council. The Review is of the opinion that requests for draft Executive Council documents would be rare and that, even if one was made, genuinely sensitive material would be protected by one of the other specific exemptions.

- 3.48 Nothing in my experience of Queensland government, or of the operation of the Queensland FOI Act, suggests that there is any greater need for a specific exemption provision dealing with Executive Council matter in this jurisdiction than in the Commonwealth jurisdiction. Rather, the reverse is true. In Queensland (by long convention), far more routine decision-making which directly affects individual citizens, and about which they should be entitled to information, is vested in the Governor in Council, than is the case with respect to the Governor-General in Council (the usual Commonwealth practice being to vest administrative decision-making powers in individual Ministers or statutory office-holders).
- 3.49 I recommend that s.37 of the FOI Act be repealed. If that is not acceptable, I recommend as an alternative that s.37 be amended to restore it to the form in which it was first enacted in 1992.

Exclusion of Government-owned corporations from the FOI Act

- 3.50 1994/95 saw the commencement of a program of exclusions of Government-owned corporations (GOCs) from the FOI Act. A new s.11A and Schedule 2 were inserted in the FOI Act by the *Queensland Investment Corporation Amendment Act 1994* Qld, and further exclusions of individual GOCs have been made by other complementary legislation.

- 3.51 I have two concerns with these developments. Firstly, I consider the policy itself to be inappropriate, for reasons explained at paragraphs 3.63-3.71 below. Secondly, the implementation of the policy has miscarried through an apparent lack of understanding of how the FOI Act operates. In this regard, I propose to address s.11 and s.11A of the FOI Act, and the unsatisfactory position which has been reached with respect to exclusions from the FOI Act for GOCs and other bodies performing commercial functions.
- 3.52 Confusion is evident in the Minister's second reading speech on the introduction of the Queensland Investment Corporation Amendment Bill 1994 where it is said (at Hansard, 30 August 1994, p.9011):
- “Secondly, the Bill provides for the exemption of the QIC and GOCs generally, from the administrative law regime of freedom of information and judicial review in respect of their commercial activities. This will place GOCs on an equal footing with their private sector competitors.*
- This amendment corrects an existing anomaly in the FOI legislation which enables an exempt document to lose its exempt status in the hands of a non-exempt body. It is expected that this amendment will greatly facilitate the performance monitoring process under corporatisation which requires GOCs to provide commercially sensitive information to Treasury, which is a non-exempt body for the purposes of the FOI Act...”*
- 3.53 With respect, the amendments to the FOI Act effected by the *Queensland Investment Corporation Amendment Act 1994* Qld, and complementary legislation in respect of other GOCs, have achieved a state of affairs where (relying on the catch-cry of creating a level playing field for GOCs to operate, free of impediments which do not affect private sector corporations) GOCs have actually been accorded, under the terms of s.11A of the FOI Act, a more privileged position in respect of the application of the FOI Act than all private sector corporations and business entities.
- 3.54 There never was, with respect, an anomaly in the FOI Act which enabled an exempt document to lose its exempt status in the hands of a non-exempt body. A document which satisfies the test for exemption under any of the exemption provisions in Part 3, Division 2 of the FOI Act is an exempt document no matter who has possession of it. Of course, one can only apply for access under the FOI Act to a Minister or an agency which is subject to the FOI Act. What I think the Minister was meaning to convey was that a document which is not subject to the FOI Act while it is in the possession of a body which is excluded from the application of the FOI Act (either generally or in respect of documents relating to particular functions) becomes subject to the FOI Act when it comes into the possession of a Minister or an agency subject to the FOI Act. If it is truly an exempt document, however, it will be an exempt document in the hands of the Minister or agency subject to the FOI Act.
- 3.55 This cannot accurately be described as an anomaly. The position is precisely the same in respect of documents created by, or about, the commercial affairs of a private sector business corporation, or the personal affairs of a citizen (neither of whom are bodies subject to the FOI Act): such documents are subject to the FOI Act when they come into the possession of a Minister or an agency subject to the FOI Act, and the general exemption provisions in Part 3, Division 2 of the FOI Act are considered sufficient to protect sensitive information from disclosure.
- 3.56 In terms of creating a level playing field, then, the only measure necessary to equate GOCs with private sector business corporations is to make them (under s.11(1)) bodies which are not subject to the FOI Act. To go any further is to confer special advantages on GOCs; however, this is precisely what s.11A of the FOI Act has done (see paragraphs 3.59-3.63 below). In my view, it is appropriate that Parliament consider legislative amendments to rectify this situation, and bring some sense of order to the making of exclusions from the FOI Act. It is necessary that I first explain the effect of s.11(1) and s.11A of the FOI Act.

- 3.57 Section 11(1) of the FOI Act lists bodies to which the FOI Act does not apply, either generally, or in respect of particular functions of those bodies. (Section 11(1)(j) is somewhat anomalous in this list, since it applies to every agency subject to the FOI Act in respect of a defined class of documents, i.e. documents received from Commonwealth agencies whose functions concern national security. *Quaere* whether it should more appropriately have been dealt with as an exemption provision - perhaps in an additional subsection of s.38). The inclusion of a body in s.11(1) means, in effect, that the body is not subject to the obligations imposed on agencies by the FOI Act (i.e. under Part 2, to publish certain documents and information; under Part 3 to deal with applications for access to documents made in accordance with s.25; under Part 4, to deal with applications for amendment of personal affairs information) either generally, or in respect of specified functions. It does not mean that documents created by, or concerning, the bodies (or the bodies in respect of specified functions) mentioned in s.11(1) can never be subject to the FOI Act. Copies of any such documents which are in the possession or control of an agency which is subject to the FOI Act will be capable of being accessed under the FOI Act (subject to the application of the exemption provisions), as is the case with documents created by, or concerning, any private sector corporation or private citizen, which find their way into the possession or control of an agency which is subject to the FOI Act.
- 3.58 Section 11(1)(q) provides for an agency, part of an agency or function of an agency, to be excluded, by regulation, from the application of the FOI Act.
- 3.59 Section 11A provides that the FOI Act does not apply to documents received, or brought into existence, in carrying out activities of a GOC mentioned in Schedule 2, to the extent provided under the particular application provisions mentioned for the GOC in the Schedule.
- 3.60 Section 11A operates in a way that is materially different from s.11. In effect, it erects a class of documents to which the FOI Act does not apply, whether they are in the possession of a GOC, or, for example, a Minister exercising a supervisory function over the GOC, or even a law enforcement or regulatory body exercising law enforcement or regulatory functions which affect the GOC. (The operation of s.11A is also materially different from exemption provisions which apply by reference to whether a document falls within a defined class of documents, e.g. s.36. A person may apply for access to Cabinet documents and, pursuant to s.28(1), an agency or Minister may decide to grant access even though they are exempt documents. By contrast, no valid application for access under the FOI Act may be made in respect of documents falling within the class defined by s.11A.)
- 3.61 The FOI Act does not apply to private sector business corporations like, for instance, Mt Isa Mines Ltd (MIM). But if documents brought into existence by MIM come into the possession of, say, the Department of Minerals and Energy (DME), through exercise of its regulatory functions, any person has a right to apply to the DME for access to those documents, and to be given access to them under the FOI Act, unless they fall within the terms of an exemption provision. Precisely the same position would apply to Suncorp Insurance and Finance (Suncorp) in respect of any documents created by Suncorp which come into the possession of, say, Queensland Treasury, notwithstanding that the FOI Act does not apply to Suncorp by virtue of s.11(1)(o).
- 3.62 The effect of s.11A is to give GOCs a more privileged position with respect to the application of the FOI Act, not only as compared to all private sector business operators, but even as compared to government-owned commercial bodies which are mentioned in s.11(1), or in regulations made under s.11(1)(q). What possible justification is there, in principle, for this state of affairs? If there is sufficient protection from competitive harm for MIM and Suncorp in s.45, and other exemption provisions, of the FOI Act (which I believe there is), why should GOCs be given any more privileged treatment?
- 3.63 My primary concern is that the FOI Act is in danger of dying the death of a thousand cuts unless the recent trend towards more and more exclusions of particular bodies, or particular functions or

classes of documents in respect of particular bodies, is arrested and, preferably, reversed. The Queensland Parliament should, in my opinion, adopt the same approach to the application of the FOI Act to GOCs as has been recommended (see the extracts below) by the ALRC/ARC review of the Commonwealth FOI Act in respect of the application of the Commonwealth FOI Act to Government Business Enterprises (GBEs).

- 3.64 Failing that, the present anomalies in the Queensland FOI Act in the treatment of these bodies should at least be removed. There would actually be a net benefit, in terms of the general accountability objects of the FOI Act, if s.11A were repealed, and the GOCs which presently have the benefit of it were instead named in additional paragraphs of s.11(1). There should be a standardisation of approach, with the GOCs included in s.11(1) according to this formula: "(name of GOC) in respect of documents in relation to its competitive commercial activities", or "its commercial activities" if the GOC has no competitor (but in that case, one has to ask what is the justification in principle for the GOC to obtain special treatment at all).
- 3.65 The ALRC/ARC review's DP 59 notes that there is no general rule governing the application of the Commonwealth FOI Act to GBEs. Some GBEs are entirely exempt; others are exempt only for specific categories of documents. There appears to be no logical basis for these differences (see paragraph 10.6 of DP 59).
- 3.66 DP 59 summarises the arguments against extending the Commonwealth FOI Act to GBEs as follows:
- the objectives of the Commonwealth FOI Act (which focus on the accountability of executive government which has a duty to act in the interest of the whole community) are irrelevant to GBEs (which operate in a commercially competitive environment) and that GBEs should not be directly accountable to the public through FOI.
 - regulatory mechanisms which apply generally to the private sector or to the particular industry within which the GBE operates provide sufficient accountability. Further in a genuinely competitive market, market mechanisms ensure a high quality of administration thus removing the need for the accountability provided by FOI.
 - being subject to the Commonwealth FOI Act would disadvantage GBEs in relation to their private sector competitors, place additional administrative and financial burdens on GBEs, and reduce their competitiveness.
- 3.67 Arguments in favour of extending the Commonwealth FOI Act to GBEs were:
- the need to protect commercial interests, and the existence of private sector accountability mechanisms and market forces, do not displace the need for public accountability of GBEs, because:
 - GBEs represent the expenditure of much public money, and should be publicly accessible and accountable for the use of that money;
 - GBEs are accountable to Ministers financially and strategically and the public has a democratic interest in their workings;
 - traditional private sector corporate reporting, accounting and audit requirements do not provide public accountability or individual justice. FOI and other administrative law mechanisms have the potential to provide such results and other benefits generally; and
 - the competitive environment does not facilitate a fair and just provision of goods and/or services. Private remedies might assist, but the cost of justice may take these outside the

reach of most individuals. By contrast, administrative law remedies are by and large cheaper and more accessible and likely to lead to public accountability and better decision making, possibly even in the commercial sphere.

- because of their nexus with government, GBEs enjoy advantages over their private sector competitors. It is important that information relating to the real rate of return targets, public authority dividend requirements, community service obligations and a host of other requirements be as transparent as possible, bearing in mind all the privileges that GBEs have over private sector organisations such as access to capital, cost of capital, immunity from threat of takeover by corporate raiders, and taxation and other regulatory privileges.
- Information relating to regulatory functions, as well as public functions or the delivery of services, should be subject to FOI, particularly where those functions are carried out in a less competitive or monopoly market.

3.68 Other factors taken into consideration by the ALRC/ARC Review were the relevance of FOI objectives to GBEs - democratic objectives (public scrutiny and accountability) and privacy objectives (individuals' right to obtain information about themselves in possession of government, including employees of these bodies). Finally, DP 59 argues that private sector accountability mechanisms do not displace the role of FOI. The nature of accountability produced by market forces is of limited benefit to the individual consumer and the recent emergence of industry-based dispute resolution schemes (e.g. industry 'Ombudsmen') evidences the deficiencies of market forces and traditional private sector methods of addressing consumer dissatisfaction.

3.69 The recommendations of DP 59 are that, due to the connection between GBEs and government, the need for some degree of accountability leads to the conclusion that the Commonwealth FOI Act should apply to GBEs. DP 59 recognised the need to protect commercial activities of a GBE that are undertaken in a market environment where there is real competition. An amendment to make it clear that the s.43 exemption in the Commonwealth FOI Act was able to be invoked by GBEs was considered to be all that was necessary in this regard. (The equivalent exemption provision in the Queensland FOI Act, s.45, already clearly applies to Queensland GOCs.) DP 59 argued that it is unnecessary for any GBE to be exempted by way of exclusion in a schedule to the Act.

3.70 Finally, the ALRC/ARC review recognised that subjecting GBEs to the Commonwealth FOI Act could impede some of the policy objectives behind creating GBEs, for example, increasing competition in various industries. Also, as a practical matter, determining whether a particular document of a GBE should be exempt because it concerns its competitive commercial activities could be problematic. Nevertheless, it was stated that the review would need further evidence to be persuaded that those difficulties outweighed the benefits to the community of extending the Commonwealth FOI Act to GBEs.

3.71 I entirely endorse the position reached by the ALRC/ARC review in Chapter 10 of DP 59. The considerations raised apply equally to Queensland GOCs, which should, in my opinion, be subject to the FOI Act.

3.72 To give effect to that position, s.11A and Schedule 2 of the FOI Act would need to be repealed (and any necessary consequential amendments made to complementary legislation). Section 11(1)(n) and all provisions of the *Freedom of Information Regulation 1992* which, pursuant to s.11(1)(q) of the FOI Act, exclude a body from the FOI Act in respect of the body's competitive commercial activities, should also be repealed. All bodies covered by these provisions should be subject to the FOI Act. Section 45 and other exemption provisions afford them sufficient protection from competitive harm.

- 3.73 However, if it is desired, as a matter of policy, to equate the position of GOCs operating in a competitive commercial environment with that of private sector corporations, then s.11A and Schedule 2 of the FOI Act should be repealed (and any necessary consequential amendments made to complementary legislation) and the GOCs should be named in separate paragraphs of s.11(1), just as Suncorp Insurance and Finance is now dealt with in s.11(1)(o). If exclusion of all of a GOCs activities is not considered necessary, then GOCs which operate in a competitive commercial market should be named in separate paragraphs of s.11(1) according to the following verbal formula: "(name of GOC) in respect of documents in relation to its competitive commercial activities".

The Freedom of Information Amendment Regulation (No.2) 1995 Qld

- 3.74 A disturbing exclusion from the right of access conferred by s.21 of the FOI Act was made by the *Freedom of Information Amendment Regulation (No.2) 1995 Qld*. This regulation amends s.5(1) of the *Freedom of Information Regulation 1992 Qld* with the effect that the FOI Act does not apply to:

- (g) *the agency within which the Education (General Provisions) Act 1989 is administered in relation to individual and aggregate student data about core skills tests, junior and senior certificates, tertiary entrance statements (including an equivalent substituted test, certificate or statement) or any of the following student assessment programs conducted by or for it -*
 - (i) *year 2 assessment;*
 - (ii) *year 6 assessment;*
 - (iii) *student performance standards assessment;*
- (h) *the Board of Senior Secondary School Studies established under the Education (Senior Secondary School Studies) Act 1988 in relation to individual and aggregate student data about core skills tests, junior and senior certificates and tertiary entrance statements (including an equivalent substituted test, certificate or statement);*
- (i) *the Tertiary Entrance Procedures Authority established under the Education (Tertiary Entrance Procedures Authority) Act 1990 in relation to individual and aggregate student data about core skills tests, junior and senior certificates and tertiary entrance statements (including an equivalent substituted test, certificate or statement).*

- 3.75 I describe this as a disturbing exclusion for two reasons. Firstly, it effects the blanket exclusion of a class of documents from the FOI Act (which is akin to, but more extreme than, the addition of a new exemption provision to the FOI Act, *cf.* the analysis of s.11A of the FOI Act at paragraph 3.60 above) not by an amendment to the FOI Act (which would allow the community notice of the amending Bill, and guarantee an opportunity for debate in Parliament) but by the making of a regulation.

- 3.76 The second reason is the justification advanced for making this exclusion from the FOI Act. I quote from *Education Views*, Vol.4, No.15, August 25, 1995:

“Educators across Queensland have welcomed a move by the Department of Education to stop media organisations ranking schools through the publication of Overall Position (OP) league tables.

The move will ensure a wide range of student assessment results remain confidential.

A new regulation under the Freedom of Information Act will exempt all individual and school-based assessment data from being accessed under Freedom of Information (FOI).

The move was announced by Education Minister David Hamill this week.

Such information would include tertiary entrance ranks (Overall Positions and Field positions) as well as Year 2 Net and Year 6 Test results.

Mr Hamill said he was meeting a commitment to ensure students' assessments remained confidential that he made to State Parliament when he became Education Minister earlier this year.

Assessment results will be available only to students, parents and teachers.

Mr Hamill said information that had been released had previously been misused by some media outlets by purporting to assess schools, rather than students.

"The information from assessments in no way measures school performance and should never have been used this way," Mr Hamill said.

The Queensland Council of Parents' and Citizens' Associations executive officer Bruce Kimball said the QCPCA supported the decision.

Mr Kimball said the QCPCA sent a letter to Mr Hamill last week supporting the move to make students' results confidential.

He said a recent national conference attended by QCPCA representatives moved that: "Results of assessment of individual students are confidential to the student, his/her parents and the teacher and may be provided to other professionals in the interests of the child only with the permission of the child's parents."

Board of Senior Secondary School Studies Director John Pitman said they were happy with the change to the FOI regulations.

Mr Pitman said as the body which made the results available, the Board was often caught in the middle.

"All in all, it's a good thing," he said.

Queensland Teachers' Union president Ian Mackie also welcomed the announcement.

"The QTU believes that the results of one test are not an indication of how well a school serves its community." Mr Mackie said.

"In the past, league tables of schools were produced and the public read far too much into them".

- 3.77 The concerns expressed on behalf of the Queensland Parents' and Citizens' Association about confidentiality for assessments of the performance of individual students are readily understandable. However, information of that kind about an identifiable person is certainly information concerning that person's personal affairs for the purposes of s.44(1) of the FOI Act, and in my opinion there was already abundant protection from disclosure of such information in the scheme of the FOI Act.

- 3.78 The major concern appears, rather, to have been directed to the use made of anonymous student performance assessments (the “aggregate student data” referred to in the provisions quoted above) grouped to indicate the performance of students at particular schools. The apparent philosophy behind the exclusion of aggregate, or school-based, student data is quite disturbing. In essence, it seems to amount to this: we do not like the way media organisations interpret this kind of information, or the way they present it to the public so that it suggests interpretations which we think are inappropriate, therefore we will stifle any access to this kind of information.
- 3.79 Rather than accept that the free flow of information and ideas, and public debate on aspects of education policy and performance, is a good thing in a democratic society, the proponents of this amendment are no longer prepared to engage in public debate about the appropriate interpretation of information which media organisations have (since long before the advent of the FOI Act) perceived to be of interest to the public, but have decided instead to block access to information of that kind. One wonders what other areas of government might be subjected to an information embargo because government officials do not like the way in which media organisations interpret the available information.
- 3.80 It does not befit officials in a democratic government to deal with concerns about misuse or misinterpretation of information relating to performance in some area or aspect of government, by suppressing information and stifling public debate. It is particularly disturbing that the proponents of this amendment, who apparently include some of our leading educators and education administrators, should fail to acknowledge the deeper issues raised by the stance they have adopted. In my opinion, s.5(1)(g), (h) and (i) of the *Freedom of Information Regulation 1992* Qld should be repealed forthwith, as a matter of principle.
- 3.81 It is apposite to quote from the judgment of Mason CJ of the High Court of Australia in *Australian Capital Television Pty Ltd v The Commonwealth (No.2)* (1992) 66 ALJR 695 (at p.706) in which the High Court found in the Australian Constitution an implied guarantee of freedom of communication with respect to public and political affairs:
- Experience has demonstrated on so many occasions in the past that, although freedom of communication may have some detrimental consequences for society, the manifest benefits it brings to an open society, generally outweigh the detriments. All too often, attempts to restrict the freedom in the name of some imagined necessity have tended to stifle public discussion and criticism of government. The Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about corruption and distortion in the political process.*
- 3.82 This is a suitable general postscript to the issues I have endeavoured to raise in this chapter. Those issues are indicative of a trend which must cause concern to those who welcomed the FOI Act as one means, but an important means, of redressing the imbalance between the governors and the governed in our community, with respect to access to information pertaining to the operations of government which affect the community at large.

APPENDIX 1

Applications for External Review received between 1 July 1994 and 30 June 1995, by category (as per s.71 of the FOI Act)

STATEMENT OF AFFAIRS (PART 2)	
<input type="checkbox"/> Refusal to publish, or to ensure compliance with Part 2	0
<input type="checkbox"/> Deemed refusal	0
ACCESS TO DOCUMENTS (PART 3)	
<input type="checkbox"/> Refusal to grant access	83
<input type="checkbox"/> Deletion of exempt matter	16
<input type="checkbox"/> Combination - refusal to grant access/deletion of exempt matter	26
<input type="checkbox"/> Deemed refusal to grant access	55
<input type="checkbox"/> Deferred access	0
<input type="checkbox"/> Charges	5
<input type="checkbox"/> Combination - refusal to grant access/charges	2
<input type="checkbox"/> Third party consulted; objects to disclosure	26
<input type="checkbox"/> Third party not consulted; objects to disclosure	0
AMENDMENT OF RECORDS (PART 4)	
<input type="checkbox"/> Refusal to amend	8
<input type="checkbox"/> Deemed refusal to amend	2
ISSUANCE OF CONCLUSIVE CERTIFICATE	
<input type="checkbox"/> Cabinet matter	0
<input type="checkbox"/> Executive Council matter	0
<input type="checkbox"/> Law enforcement/Public safety matter	0
MISCELLANEOUS	
<input type="checkbox"/> Misconceived applications (i.e. bearing no relationship to a category specified in s.71)	0
TOTAL	223

APPENDIX 2
Distribution of External Review applications received during 1994/95,
by respondent agency or Minister

NAME OF AGENCY	No.	NAME OF AGENCY	No.
Queensland Police Service	43	Cairns Port Authority	1
Department of Education	17	Department of Environment & Heritage.....	1
Department of Family Services and Aboriginal & Islander Affairs	17	Department of Housing, Local Government & Planning	1
Queensland Corrective Services Commission	15	Department of Employ., Voc. Educ. Training & Indust. Rel.	1
Department of Primary Industries	7	Gold Coast Motor Events Co.	1
Department of Transport	7	Robertson Consolidated Group (not a govt. agency)*	1
Criminal Justice Commission	6	Port of Brisbane Corporation	1
Department of Lands	6	Queensland Harness Racing Board	1
Queensland Treasury	6	Queensland Industry Development Corporation	1
Public Trustee Queensland	4	Queensland Law Society Inc	1
Department of Consumer Affairs	4	Queensland Rail	1
Department of Justice & Attorney-General	4	South East Queensland Electricity Board	1
Department of Minerals & Energy	4		
Queensland Health	4	<u>Local Authorities</u>	
Brisbane North Regional Health Authority	4	Brisbane City Council	7
Medical Board of Queensland	3	Cairns City Council	2
Psychologists Board of Queensland	3	Gatton Shire Council	2
Health Rights Commission	2	Mulgrave Shire Council	2
South Coast Regional Health Authority	2	Redland Shire Council	2
Darling Downs Regional Health Authority	1	Rockhampton City Council	2
Peninsula & Torres Strait Regional Health Authority	1	Cooloola Shire Council	1
South West Regional Health Authority	1	Isis Shire Council	1
West Moreton Regional Health Authority	1	Maryborough City Council	1
Queensland Emergency Services	3	Thuringowa City Council	1
Austa Electric (formerly, QEC)	2	Toowoomba City Council	1
Department of Premier, Economic & Trade Development	2	Townsville City Council	1
Director of Public Prosecutions (Queensland)	2	Warwick Shire Council	1
Greyhound Racing Control Board of Queensland	2		
Legal Aid Office (Queensland)	2	<u>Aboriginal Councils</u>	
Parliamentary Commissioner (Ombudsman)	2	Woorabinda Aboriginal Council	1
Workers' Compensation Board (Queensland)	2	Yorke Island Council	1
Board of Professional Engineers of Queensland	2		
Central Queensland University	2	TOTAL:	223
University of Southern Queensland	2		
University of Queensland	1		

*In this case, the applicant asserted (unsuccessfully) that the Robertson Consolidated Group was subject to the FOI Act because of its close business association with the Gold Coast Motor Events Co.

APPENDIX 3

NOTES ON SIGNIFICANT ISSUES DEALT WITH IN FORMAL DECISIONS PUBLISHED BY THE INFORMATION COMMISSIONER IN 1994/95

Re Pope and Queensland Health (Decision No. 94016, 18 July 1994, (1994) 1 QAR 616)

- ❑ This was a ‘reverse-FOI’ application by Dr Pope who opposed the release of a report (the “Seawright Report”) summarising the findings of an investigation which cleared him of allegations that, when employed as a Research Fellow at the Queensland Institute of Medical Research (QIMR), he had engaged in scientific fraud. One of the persons who had applied for access to the report was a journalist for *The Courier-Mail*, and the other, Dr Robbins, was a former colleague of Dr Pope who had made the allegations of scientific fraud. Dr Pope asserted that the Seawright Report was exempt under s.45(1)(c) of the FOI Act because its disclosure could reasonably be expected to have an adverse effect on his professional affairs, and its disclosure would not, on balance, be in the public interest. Dr Pope also argued that the Seawright Report was exempt under s.44(1) of the FOI Act, because it would disclose information concerning Dr Pope’s personal affairs and its disclosure would not, on balance, be in the public interest. Ultimately, I affirmed the respondent’s decision that the Seawright Report was not exempt from disclosure under the FOI Act.
- ❑ At paragraph 17, I explained that, even though in a ‘reverse-FOI’ case a respondent agency still carries the onus under s.81 of the FOI Act of justifying the decision under review, it can discharge that onus by demonstrating that any one of the elements which must be established to found the application of a particular exemption provision cannot be made out. Thus, the applicant in a ‘reverse-FOI’ case, while carrying no formal legal onus, must nevertheless in practical terms be careful to ensure that there is material before the Information Commissioner sufficient to demonstrate that all elements of the exemption provisions relied upon are established, with respect to the information in issue.
- ❑ In the interpretation of s.45(1)(c) of the FOI Act, I held that the word “professional” takes its colour from the surrounding words “business”, “commercial” and “financial”, and the common link among the words is to activities carried on for the purpose of generating income or profits. The words “professional affairs” are intended to cover the work activities of persons who are admitted to a recognised profession, and who ordinarily offer their professional services to the community at large for a fee, i.e., to the running of a professional practice for the purpose of generating income. Thus, persons who practise their profession as salaried employees of a government agency do not ordinarily have “professional affairs” for the purposes of s.45(1)(c). The information contained in the Seawright Report related to Dr Pope’s activities as a salaried employee of the QIMR, and thus was not information concerning his “professional affairs” for the purposes of s.45(1)(c).
- ❑ At paragraphs 52-74, there is extensive discussion of the kinds of vocation which may qualify as professions for the purposes of s.45(1)(c), with a list of “indicators” given at paragraph 62.
- ❑ At paragraph 79, I expressed the view that, because the allegations against Dr Pope had been put in the public domain, I could not see how disclosure of those parts of the Seawright Report which cleared Dr Pope of scientific fraud or misconduct could reasonably be expected to have an adverse effect on Dr Pope’s reputation as a research scientist.
- ❑ At paragraphs 83-101, there is extensive discussion of public interest considerations favouring disclosure or non-disclosure of the Seawright Report. At paragraph 96, I acknowledged that the

public interest in fair treatment of individuals might be a consideration favouring non-disclosure of matter comprising allegations of improper conduct against an individual where the allegations are clearly unfounded and damaging, and indeed might even tell against the premature disclosure of matter comprising allegations of improper conduct against an individual which appear to have some reasonable basis, but which are still to be investigated and tested by a proper authority. However, I found that in this case other public interest considerations overwhelmingly favoured disclosure, principally, accountability of government employees for the conduct of research projects designed to benefit the public, and carried on with public funding, and accountability for the process and outcome of an investigation into alleged breaches of acceptable standards of research.

- ❑ In respect of Dr Pope's reliance on s.44(1) of the FOI Act (the "personal affairs" exemption), I held that the contents of the Seawright Report were properly to be characterised as information concerning the performance by Dr Pope of his duties and functions as an employee of a government agency, rather than as information concerning his personal affairs. After reviewing relevant authorities, I held (at paragraph 116) that it should be accepted in Queensland that information which merely concerns the performance by a government employee of his or her employment duties (i.e. which does not stray into the realm of personal affairs in the manner contemplated in *Department of Social Security v Dyrenfurth* (1988) 80 ALR 533) is ordinarily incapable of being properly characterised as information concerning the employee's "personal affairs" for the purposes of the FOI Act.

Re Cairns Port Authority and Department of Lands and Cairns Shelf Co No.16 Pty Ltd (Decision No. 94017, 11 August 1994, (1994) 1 QAR 663)

- ❑ This was a 'reverse-FOI' application by the Cairns Port Authority (the CPA) seeking to restrain the Department of Lands from disclosing valuation reports (and drafts thereof) prepared by the Valuer-General in respect of a parcel of land owned by the CPA and leased for commercial purposes to the applicant for access. The documents in issue contained factual information about the subject land, and expert opinion and analysis by valuers, which supported valuation figures determined by the Valuer-General. The valuation figures were used as a basis for calculating the rent payable under the lease in respect of the subject land.
- ❑ Some of the matter contained in the documents in issue was not matter of a kind mentioned in s.41(1)(a) of the FOI Act because it did not answer the statutory description of "opinion", "advice", "recommendation", "consultation" or "deliberation", but the balance was matter of a kind mentioned in s.41(1)(a). The latter was not eligible for exemption under s.46(1) of the Act because if any duty of confidence was owed to the CPA (which was an agency of the kind mentioned in s.46(2)(b)), the application of s.46(1) was excluded by the terms of s.46(2). The former was not exempt under s.46(1)(a) because it comprised information which was not confidential in nature: it was known to the applicant for access, and was readily accessible by any member of the public, either from publicly available sources or by physical inspection of the subject land and observation of its physical layout.
- ❑ The matter in issue which fell within the terms of s.41(1)(a) of the FOI Act because it was opinion, advice or recommendation prepared in the course of and for the purposes of the deliberative processes involved in the functions of the Valuer-General, did not, however, qualify for exemption under s.41(1) of the FOI Act. Because it comprised expert opinion or analysis by expert valuers employed in the Office of the Valuer-General, it was excluded from exemption under s.41(1) by the terms of s.41(2)(c) of the FOI Act. I expressed the view that one indicator of when a person will qualify as an expert in a particular field of knowledge, for the purposes of s.41(2)(c), is whether the person would be accepted by a court as qualified to give expert opinion evidence. Senior valuers on the staff of the Valuer-General qualified on that count as experts on issues relating to the valuation of real property. I also considered it likely that the final (as distinct from draft) valuation reports issued by the Valuer-General under s.27 of the *Valuation of*

Land Act 1994 Qld were excluded from eligibility for exemption under s.41(1) by the terms of s.41(3)(b) because they answered the description of a “record of, as a formal statement of the reasons for, a final decision ... given in the exercise of ... a power or ... a statutory function”.

- ❑ While the matter in issue concerned the business or commercial affairs of the CPA, I held that it was not exempt matter under s.45(1)(c) of the FOI Act. The first expected adverse effect of disclosure of the matter in issue, as claimed by the CPA, was that the lessee would commence litigation challenging the valuations (and hence the amount of rent payable under the lease), and that the CPA would incur substantial, unrecoverable solicitor-client legal costs, even if successful in that litigation. I expressed reservations (at paragraphs 103-104) about whether a claimed adverse effect of this kind should be recognised on public policy grounds, i.e. whether an exemption provision could have been intended to operate so as to prevent disclosure of information which would assist a person to air a grievance (or to seek to vindicate an asserted legal right) in the courts. In any event, after reviewing the evidence, I was not satisfied that disclosure of the matter in issue could reasonably be expected to result in the lessee commencing a legal challenge to the valuations (for reasons explained at paragraphs 105-129).
- ❑ The CPA also claimed that if it was compelled to disclose to prospective tenants valuation material relative to its harbour lands, this would put it at a commercial disadvantage in respect of its capacity to negotiate the most favourable terms for its commercial leases. I considered this submission to be misconceived, because the circumstances of the case were very different to a situation where disclosure might prejudice a landowner’s negotiating position with respect to ongoing negotiations (a situation in which different considerations might well apply).
- ❑ At paragraphs 136-144, I considered the public interest considerations weighing for and against disclosure of the matter in issue. I expressed the view that the public interest in the fair treatment of the lessee according to law, in the accountability of the Valuer-General for the performance of his functions, and in accountability for the adoption of fair commercial practices by State Government authorities which operate on a commercial basis, would tell decisively in favour of disclosure of the matter in issue.
- ❑ The same two adverse effects claimed by the CPA were relied upon as “substantial adverse effects” to the financial or property interests of the CPA, for the purposes of s.49 of the FOI Act. For the same reasons given when considering s.45(1)(c), I held that disclosure of the matter in issue could not reasonably be expected to have the adverse effects (substantial or otherwise) claimed by the CPA. After reviewing relevant authorities, I expressed the view that the adjective “substantial” in the phrase “substantial adverse effect” is used in the sense of grave, weighty, significant or serious.
- ❑ At paragraphs 153-182, I considered the interpretation and application of s.48 of the FOI Act in its original form, i.e., before it was amended by the *Freedom of Information (Review of Secrecy Provision Exemption) Amendment Act 1994*. That analysis has no continuing significance in light of the amendments made to s.48.
- ❑ The CPA applied to the Supreme Court for judicial review of my decision, but withdrew its application a few days prior to a scheduled hearing. There was a hearing on a contested issue as to payment of legal costs, resulting in a judgment given by Thomas J on 16 December 1994. Thomas J expressed views on the extent to which participation by the Information Commissioner is appropriate in proceedings in which one of the Information Commissioner’s own decisions is subject to judicial review, notwithstanding the provision made by the legislature in s.99 of the FOI Act (*Cairns Port Authority v F N Albiets, Information Commissioner (Queensland) and Ors*, Sup. Ct of Qld, No.575 of 1994, 16 December 1994, unreported).

Re Potter and Brisbane City Council (Decision No. 94018, 19 August 1994, unreported)

- ❑ This case explains and illustrates principles relevant to determining whether legal advice given to a government agency by its own employee legal advisers attracts legal professional privilege, and hence exemption from disclosure under the FOI Act by virtue of s.43(1). I considered whether the City Solicitor, an employee of the Brisbane City Council, had the necessary quality of “independence” so that his advice had an independent character notwithstanding the employment.
- ❑ I also considered (at paragraph 28) the applicant’s contention that legal professional privilege could not apply because the documents in issue were responsible for a deliberate abuse of statutory power, but found there was nothing before me to suggest that there had been an abuse of statutory power.

Re Robbins and Brisbane North Regional Health Authority (Decision No. 94019, 19 August, unreported)

This case commenced on the basis of a deemed refusal of access, but during the course of the review, the respondent agency agreed to give access to documents falling within the terms of the FOI access application.

The applicant, however, asserted an entitlement to additional documents. I held that those documents did not fall within the terms of the FOI access application, and that it is not possible for an applicant to unilaterally extend the terms of an FOI access application at the external review stage (although there would be no impediment to the terms of the FOI access application being extended by agreement with the respondent agency, and there is nothing to prevent an applicant from making a fresh application for access to matter which falls outside the scope of an earlier FOI access application).

Re GSA Industries (Aust) Pty Ltd and Brisbane City Council (respondent) and GS Technology Pty Ltd (third party) (Decision No. 94020, 25 August 1994, unreported)

- ❑ In this case, the applicant sought access to letters written to the Brisbane City Council by the third party’s solicitors, concerning alleged infringement of certain patent rights and copyrights to which the third party claimed entitlement, and other documents related to that issue.
- ❑ This case explains and illustrates principles relevant to whether legal professional privilege attaches to third party communications, i.e. documents which are not lawyer-client communications, but communications between the client, or the client’s solicitor or barrister, and a third party who is not an agent of the client, or the client’s solicitor or barrister. Such third party communications may attract legal professional privilege if they are confidential and made for the sole purpose of obtaining advice or evidence for use in existing or anticipated litigation. I held that none of the letters from the third party’s solicitors to the Council satisfied these requirements.
- ❑ I also held that, at common law, legal professional privilege does not attach to communications between a patent attorney and his or her client. Since s.43(1) of the FOI Act refers only to legal professional privilege, it does not extend to the statutory privilege conferred on communications between a patent attorney and his or her client by s.200(2) of the *Patents Act 1990* Cth, even though the scope of that statutory privilege is to be assessed by reference to the scope of legal professional privilege.
- ❑ Although the documents in issue contained some information relating to innovative aspects of the third party’s water meter assemblies, I was not satisfied that the information was exempt under s.45(1)(a), s.45(1)(b) or s.45(1)(c), because of the extent of information that was readily available

to the public or the third party's competitors, through patent specifications lodged by the third party, or "reverse - engineering" of the third party's products.

Re Hamilton and Queensland Police Service (Decision No. 94021, 26 August 1994, unreported)

This case involved the application of s.46(1)(a) of the FOI Act (which provides that matter is exempt if its disclosure would found an action for breach of confidence) and principles explained in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279. The applicant sought access to documents recording adverse reports from members of the public, obtained in the course of processing an application by him to become a police recruit. I examined the potential clash between express assurances of confidentiality given to members of the public who supply adverse information about a potential recruit, and the explicit statutory duty imposed on the QPS to afford procedural fairness to a potential recruit. I examined the effect of that clash on the extent of any equitable obligation of confidence which, in all the relevant circumstances, a court would recognise and enforce in relation to information supplied by members of the public who received express assurances of confidentiality. In the circumstances, I found that equity would impose an enforceable obligation to respect the express assurances of confidentiality, except to the extent that it was necessary to disclose to the applicant the bare substance of the adverse allegations, in order to satisfy the statutory duty to accord procedural fairness to the applicant. I therefore found the matter in issue to be exempt under s.46(1)(a) of the FOI Act, except for a small portion which set out the substance of the information which was adverse to the applicant.

Re Negus and Queensland Police Service (Decision No. 94022, 9 September 1994, unreported)

This case affords a further illustration of the application of s.46(1)(a) and principles set out in *Re "B"*, in circumstances where third parties had written to the police objecting to the applicant's application for a standing stall licence for a roadside stall under the *Traffic Regulation 1962*. I found the documents comprising the objection were exempt.

Re Ryder and Department of Employment, Vocational Education, Training & Industrial Relations (Decision No. 94023, 9 September 1994, unreported)

In this case I determined that the applicant was required to pay \$30 application fees in respect of two FOI access applications for documents concerning unsuccessful job applications made by him. At paragraph 19, I said that if a document contains matter which concerns the applicant's personal affairs, s.6(1) of the *Freedom of Information Regulation 1992* Qld does not apply so as to require the payment of a \$30 application fee in respect of it. It is only when a document, on its proper characterisation, does not concern the applicant's personal affairs, that a \$30 application fee is payable. According to the terms of s.29(2) of the FOI Act and s.6(1) of the *Freedom of Information Regulation*, if even one document falling within the terms of an FOI access application is found not to concern the applicant's personal affairs, an application fee will be payable. I relied on my analysis of the meaning of "personal affairs" in *Re Stewart and Department of Transport* (1993) 1 QAR 227, in finding that general documents such as *Information for Applicants* and *Questions for Interview*, which were not created specifically for the applicant, could not be said to concern the applicant's personal affairs. I indicated that the fact that an individual is called on to respond to general guidelines or questions does not, by itself, transform the general document into one which concerns the individual's personal affairs.

Re "P" and Brisbane South Regional Health Authority (Decision No. 94024, 9 September 1994, unreported)

- ❑ This case involved the application of s.46(1)(a) and (b), and principles set out in *Re “B”*, in circumstances where third parties supplied information to medical staff to assist with the care of the applicant, a person regulated under the *Mental Health Act 1974* Qld, and to assist with consideration of whether the applicant should be further regulated. I found that the information provided by the third parties was exempt under both s.46(1)(a) and s.46(1)(b).
- ❑ In respect of the third element of s.46(1)(b), I held that there were real and substantial grounds for the expectation that disclosure of the matter in issue would prejudice the future supply of like information. It is frequently of assistance, and in some cases essential, for those involved in the care and treatment of a psychiatric patient to have access to a broad range of information, both clinical and non-clinical, concerning the patient. If those who are in a position to disclose such information become aware that the patient may obtain access under the FOI Act to the information they provide, it is reasonable to expect that many (whether motivated by concern for the patient’s well-being, concern to maintain a continuing relationship with the patient, or concern for their own welfare) would either refuse to give information, or give guarded or misleading information which would be of little use to health authorities in the care and treatment of patients.
- ❑ With respect to the public interest balancing test which qualifies s.46(1)(b), I held that s.6 of the FOI Act applied to assist the applicant because the matter in issue concerned the applicant’s personal affairs. There is a public interest in patients obtaining access to information concerning their medical treatment, but it is certainly not an unqualified one (see s.44(3) of the FOI Act which expressly recognises that there may be instances where disclosure to an applicant of information of a medical or psychiatric nature concerning the applicant would be prejudicial to the applicant’s physical or mental health or wellbeing). I held that disclosure of the matter in issue would not have any beneficial or positive consequences for the applicant, and certainly none that would outweigh the detriment that would be occasioned to the third parties, nor the potential detriment to the future supply of like information. Accordingly, the public interest considerations favouring disclosure of the information in issue were not of sufficient weight to displace the public interest favouring non-disclosure which was inherent in the satisfaction of the test for *prima facie* exemption under s.46(1)(b).

Re “F” and West Moreton Regional Health Authority (Decision No. 94025, 26 September 1994, unreported)

This case illustrates principles set out in *Re Stewart and Department of Transport* (1993) 1 QAR 227 regarding the meaning of the phrase “personal affairs of a person”. The applicant, a psychiatric patient, sought access to the names of other patients mentioned in the applicant’s medical records. A person’s health or ill-health falls within the core meaning of the term “personal affairs”. As disclosure of the names of the other patients would reveal that they had received treatment for psychiatric illness, their names were *prima facie* exempt from disclosure to the applicant by virtue of s.44(1) of the FOI Act. The public interest balancing test in s.44(1) did not assist the applicant, there being no public interest considerations in favour of the disclosure to the applicant of the names of other psychiatric patients. In that regard, the applicant was not able to obtain assistance from s.6 of the FOI Act because the names of the other patients did not concern his personal affairs.

Re Jennings and Department of Justice and Attorney-General (Decision No. 94026, 26 September 1994, unreported)

In this case, I invoked s.77(1) of the FOI Act, by deciding not to deal further with the applicant’s application for review because it was misconceived and lacking in substance. It was inherently unlikely that the respondent agency would hold any documents containing the particular statistics which the applicant sought (“statistics re perjury cases in Family Law that have been prosecuted last 7

years”) since they relate to matters which are the responsibility of Commonwealth government agencies. Having been informed of this, the applicant failed to put forward any evidence to suggest that the information he sought was in the possession or control of the respondent agency, or otherwise to cast doubt on the correctness of the decision under review. In these circumstances, I exercised the power conferred by s.77 of the FOI Act.

Re Queensland Gridiron Football League Incorporated and Department of Tourism, Sport and Racing (Decision No. 94027, 11 October 1994, unreported)

- ❑ This was a ‘reverse-FOI’ application by the Queensland Gridiron Football League Incorporated (the QGFL). The case illustrates the application of principles set out in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, as to the correct interpretation and application of s.45(1)(b) and s.45(1)(c) of the FOI Act (including the public interest balancing test contained within s.45(1)(c)) in circumstances where the documents in issue comprised an audit report in respect of the applicant (an organisation which received government funding under the Queensland Sports Development Scheme) and associated documents.

I was not satisfied that information in the documents in issue concerning the financial management practices in place at the QGFL, and the QGFL’s relationship with the Department, had any intrinsic commercial value to the QGFL (or any other person) for the purposes of s.45(1)(b) of the FOI Act.

- ❑ With respect to s.45(1)(c), the QGFL claimed that disclosure could reasonably be expected to have an adverse effect on its ability to obtain funding from sponsorship agreements and marketing opportunities. I was not prepared to accept that disclosure under the FOI Act could reasonably be expected to have an adverse effect on the QGFL’s business, commercial or financial affairs when the substance of the documents in issue had previously been discussed in the Queensland Parliament and had become a matter of public record. Nor was I prepared to accept that disclosure of the matter in issue could reasonably be expected to prejudice the future supply to government of like information. It was a condition of obtaining government funding under the relevant scheme that sporting organisations allow access to their books of account and other relevant documents for audit purposes. Failure to provide information of the kind in issue would result in withdrawal of funding, and thus there was no reasonable basis for expecting that disclosure would prejudice the future supply to government of like information.
- ❑ At paragraphs 36-41, I referred to the public interest considerations which clearly favoured disclosure of the matter in issue, including the public interest in ensuring that taxpayer’s funds expended on subsidies for the administration and coaching expenses of organisations like the QGFL are properly accounted for.
- ❑ This case also illustrates the application of principles set out in *Re “B”* as to the correct interpretation and application of s.46(1)(a) and s.46(1)(b). I was satisfied that none of the information in issue was communicated in such circumstances as to fix the respondent agency with an equitable obligation of confidence. The respondent in effect acts as an agent of the public in ensuring that public funds advanced to a private sector organisation, to further purposes considered to be in the public interest, are expended in a proper manner and properly accounted for. In my opinion, such circumstances tell against the imposition of enforceable equitable obligations of confidence.

Re “S” and The Medical Board of Queensland (Decision No. 94028, 12 October 1994, unreported)

The applicant sought direct access to a letter to the respondent from the applicant's former psychiatrist. The President of the Medical Board of Queensland had decided, pursuant to s.44(3) of the FOI Act, that access should not be given to the applicant but should be given instead to a qualified medical practitioner nominated by the applicant and approved by the respondent. This case contains an analysis of s.44(3) of the FOI Act and endorses (at paragraphs 12-13) principles which should guide the exercise of the discretion conferred by s.44(3). The case required the balancing of opinion from the applicant's most recent treating psychiatrist against the opinions of another psychiatrist and Dr Lange, the President of the Medical Board of Queensland. I was persuaded by the information provided by Dr Lange that there was a real and tangible possibility, as distinct from a fanciful, remote or far-fetched possibility, of prejudice to the applicant's physical or mental health or wellbeing if the applicant were to be given direct access to the document in issue. I therefore considered that it was preferable that the discretion conferred by s.44(3) of the FOI Act be exercised, and that access to the document in issue not be given to the applicant but given instead to a qualified medical practitioner nominated by the applicant and approved by Dr Lange.

Re "M" and Brisbane South Regional Health Authority (Decision No. 94029, 18 November 1994, unreported)

This case raised issues and circumstances which were for practical purposes, identical to those raised by *Re "P"*, and *Re "F"*, above, and which led to identical outcomes.

Re Nelson and Department of Education (Decision No. 94030, 18 November 1994, unreported)

- This was a 'reverse-FOI' application in which the applicant opposed release by the Department of Education of certain letters concerning the affairs of a State School Parents' and Citizens' Association.
- The applicant claimed that the information in issue concerned his personal affairs and was exempt under s.44(1), however, I found that (with the exception of two small segments of information) the matter in issue could only properly be characterised as information concerning the affairs of the relevant Parents' and Citizens' Association. Two small segments of information which concerned the shared personal affairs of the applicant and other persons were found to be exempt, applying principles set out in *Re "B"* at paragraphs 172-178.
- The applicant also claimed the documents to be exempt under s.46(1)(a) and (b) of the FOI Act, however, I found that the information in issue was not confidential in nature (it described events which took place in public meetings, and the applicant had canvassed in his local community for supporting signatories, in the manner of a petition) and was not communicated in such circumstances that the respondent understood or ought to have understood that it was communicated in confidence.

Re "H" and Legal Aid Office (Queensland) (Decision No. 94031, 5 December 1994, unreported)

This case also illustrates the application of principles set out in *Re Stewart and Department of Transport* (1993) 1 QAR 227. The applicant sought information relating to an assessment of the merits of the legal aid application made by his opponent (the mother of his ex-nuptial son) in a custody and access dispute. Part of the matter in issue comprised information concerning his opponent's family relationships. Other matter in issue comprised part of a merit assessment report by a social worker which recorded the social worker's assessment of the mother's personality and demeanour, and her ability as a parent. The mother's residential address was also in issue. I decided that the matter in issue could only properly be categorised as information concerning the personal affairs of the mother and I was satisfied that there were no public interest considerations favouring

disclosure which outweighed the public interest in non-disclosure inherent in the satisfaction of the test for *prima facie* exemption under s.44(1).

Re Pemberton and the University of Queensland (Decision No. 94032, 5 December 1994, unreported)

- ❑ The matter in issue in this case comprised (a) referee reports obtained by the respondent in connection with applications for promotion to senior academic positions made by the applicant and (b) parts of referee reports which would disclose the identities of their respective authors in circumstances where the referees had consented to disclosure to the applicant of the contents of their reports, but had refused to consent to disclosure of their respective identities as authors of the reports.
- ❑ The respondent correctly conceded that the contents of referee reports comprise matter of a kind mentioned in s.41(1)(a) of the FOI Act, i.e. opinion, advice or recommendation obtained for the purposes of deliberative processes involved in the functions of the University. Four of the referee reports in issue, which were written by academics acting in their official capacities as Head of Department, Dean or Pro-Vice-Chancellor within the University, were not therefore eligible for exemption under s.46(1)(a) of the FOI Act, because of the terms of s.46(2)(a)(iii). Those four reports were claimed to be exempt under s.40(c) and s.41(1) of the FOI Act.
- ❑ Referee reports by academics not employed by the respondent were clearly not disqualified from possible exemption under s.46(1)(a) by the terms of s.46(2). However, there was a contest in respect of three other referee reports written by persons who were officers of the respondent at the time they prepared the reports, but who (the respondent argued) did not write the reports in their capacities as officers of the respondent. I decided that the three reports were provided on a voluntary basis by individuals considered to be of sufficient eminence in the academic community to act as referee in respect of specific aspects of the applicant's work and professional standing, and were not provided in the capacity of an officer of the respondent agency. Hence, s.46(2) did not disqualify those three reports from possible exemption under s.46(1)(a).
- ❑ I found that the matter in issue which was eligible for consideration under s.46(1)(a) was exempt matter under that provision. Having regard to uncontradicted evidence of an established convention understood and applied in the universities of Australia, New Zealand and the United Kingdom, I accepted that the referee reports were provided on the basis of a clear understanding on the part of the author of each report, and on the part of the University, that the University would restrict access to the report to those involved in the promotion process for which it was sought, for the limited purpose of being used to evaluate the claims of the candidate for promotion against relevant selection criteria. I accepted that an equitable obligation of confidence became binding on the respondent University upon the supply of confidential information for that limited purpose. In some instances, only identifying details of the author of the report had not been disclosed to the applicant, but this represented an acceptable exercise of the privilege, possessed by a supplier of confidential information which is subject to an obligation of confidence in the hands of a recipient, to selectively authorise disclosure of information which is otherwise subject to an obligation of confidence.
- ❑ As to the respondent's claim for exemption under s.40(c) in respect of the four reports written by Heads of Department, Deans or Pro-Vice-Chancellors as part of their duties of office, I expressed the view that (for reasons explained at paragraphs 139-151) disclosure to a candidate for promotion of reports required to be prepared on the candidate by the relevant Head of Department, Dean of Faculty and Pro-Vice-Chancellor could not reasonably be expected to have a substantial adverse effect on the management or assessment by the respondent of its personnel. However, since the effects of disclosure of matter in issue are ordinarily to be evaluated, for the purposes of s.40(c), as if disclosure were to any person entitled to apply for it under the FOI Act

(including, for instance, the candidate's rivals for promotion, or students in the candidate's Department), I considered it reasonable to expect that disclosure of the matter in issue would lead to a loss of candour in reports of the kind in issue that would be sufficiently widespread as to have a substantial adverse effect on the management or assessment by the University of its personnel. The four reports therefore satisfied the test for *prima facie* exemption under s.40(c), subject to the application of the public interest balancing test.

- ❑ At paragraphs 164-193, I reviewed Australian authorities which have held that when an exemption provision contains a public interest balancing test, it is possible in an appropriate case to recognise a legitimate public interest which favours disclosure of particular documents to a particular applicant for access, even though no such public interest consideration would be present when disclosure to other applicants was in contemplation. For reasons explained at paragraphs 196-203, I considered that this was an appropriate case for the application of that principle. In respect of three of the four reports, I found that there was a legitimate public interest in the applicant obtaining access, which carried sufficient weight to warrant a finding that disclosure of those reports to the applicant would, on balance, be in the public interest.
- ❑ The same considerations warranted a finding that disclosure to the applicant of 3 of the 4 reports by Heads of Department, Deans or Pro-Vice-Chancellors would not be contrary to the public interest, such that exemption under s.41(1) of the FOI Act was not established.

Re Woodyatt and Minister for Corrective Services (Decision No. 95001, 13 February 1995, unreported)

- ❑ The applicant was refused access to a report to the respondent on recommended changes to Queensland's corrective services legislation, the report being claimed to be exempt under s.36(1) of the FOI Act (the Cabinet matter exemption). The relevant FOI access application was lodged, and the respondent's decision refusing access was made, prior to the amendment of s.36 made by the *Freedom of Information Amendment Act 1993* Qld which took effect from 20 November 1993. The application for review by the Information Commissioner was lodged after that date. It was common ground that the whole of the report in issue was exempt matter if s.36 in its post-amendment form was the applicable law. For reasons explained at paragraphs 26-32, I found that the report was exempt even under s.36 in its pre-amendment form, except for certain segments which comprised merely factual matter. Whether the applicant was entitled to those segments of merely factual matter depended on whether the applicant had a right to have his FOI access application, and his application for review, dealt with on the basis that s.36 in its pre-amendment form was the applicable law.
- ❑ Section 20(1)(c) of the *Acts Interpretation Act 1954* Qld relevantly provides that the amendment of an Act does not affect a right accrued under the Act. At paragraphs 42-54, I considered the nature of the right conferred by s.21 of the FOI Act. I found that when a person lodges an application for access to documents of an agency or official documents of a Minister, which application complies with the requirements of the FOI Act, the person has a legally enforceable right to be given access under the FOI Act to the requested documents, other than any of the requested documents to which the relevant agency or Minister is entitled to refuse (or defer) access in accordance with exceptions to be found in the FOI Act itself. A qualified right is nonetheless a right for the purposes of s.20 of the *Acts Interpretation Act*.
- ❑ I found that the applicant, having lodged a valid FOI access application, had an accrued right to be given access under the FOI Act to any matter contained in the report in issue which was not exempt matter, and was entitled to the benefit of s.20 of the *Acts Interpretation Act* in respect of that accrued right. If an incorrect decision was made by the respondent such that the applicant was wrongly refused access to matter which at that time he had a right to be given access, it would be fundamentally unjust if, after taking action to enforce his right, he was subsequently denied access solely by reason of a subsequent change in the law which had the effect of making exempt from disclosure that which previously was not exempt from disclosure, and to which he should previously have been given access. It was to prevent injustice of this kind that the common law developed the principle that a statute should not be construed as operating retrospectively so as to override accrued rights (unless it was clearly intended to do so) and that provisions like s.20 of the *Acts Interpretation Act* have been enacted.
- ❑ The respondent contended that s.28(1) of the FOI Act, and the scheme of the FOI Act generally, manifested a sufficient "contrary intention" to displace the application of s.20 of the *Acts Interpretation Act*. I rejected that contention for reasons explained at paragraphs 59-73, which include an analysis of s.28(1) and s.88(2) of the FOI Act.
- ❑ The respondent further contended that the amended s.36 of the FOI Act, particularly s.36(4), manifested an intention to displace the operation of s.20 of the *Acts Interpretation Act*. For reasons explained at paragraphs 77-84, I rejected this contention. I also found, for reasons explained at paragraphs 85-100, that the *Freedom of Information Amendment Act 1993* Qld, which amended s.36 of the FOI Act, was not a declaratory Act intended to have retrospective effect.
- ❑ Hence I found that the applicant had an accrued right to be given access under the FOI Act to those segments of the report in issue comprising merely factual matter which, by virtue of s.36(2) in its pre-amendment form, was not eligible for exemption under s.36(1) in its pre-amendment form.

- At paragraph 58, I explained that all authorised decision-makers under the FOI Act (whether at the level of primary decision, internal review, or external review) must ordinarily have regard to the relevant facts and circumstances as they stand at the date a decision is given, and ordinarily apply the law in force at the date a decision is given. However, if a change in relevant statute law between the date of lodgement of a valid FOI access application and the date of a decision would affect the applicant's accrued right to be given access to non-exempt matter (not otherwise subject to an exception provided for in the FOI Act) falling within the terms of the FOI access application, then the decision-maker must have regard to s.20 of the *Acts Interpretation Act*. If the application of s.20 is not displaced by a contrary intention in a relevant Act, the decision-maker must give a decision in response to the FOI access application on the basis that the applicant's accrued right is not to be affected by the change in the law. An applicant will ordinarily be entitled to any benefit from a change in the law (unless the statute effecting the amendment makes provision to the contrary), but by virtue of s.20 of the *Acts Interpretation Act* (unless its application is displaced) an applicant's accrued right is not to be prejudiced by a subsequent change in relevant statute law. The material facts and circumstances would still have to be assessed as at the time of making a decision, but in light of the law in force before the change in the law took effect. A significant change in material facts or circumstances may still mean that a requested document which was not exempt at the time of lodgement of an FOI access application, has become exempt by the time of making a decision in response to the application (and vice versa), but that is simply a risk which an applicant must bear given the nature of many of the exemption provisions. Section 20 of the *Acts Interpretation Act* only operates in respect of changes in the statutory law; it does not operate to preserve a state of facts, a material alteration in which might affect an applicant's right of access.
- At paragraphs 11-17, I expressed views that were critical of the unnecessarily broad scope of the amendments to s.36 made in November 1993 by the *Freedom of Information Amendment Act 1993*. The original s.36 was predominantly designed to permit secrecy for proceedings within Cabinet and for the contributions of individual Ministers to Cabinet deliberations and decision-making (being the extent of protection necessary, according to the traditional understanding of its scope, for the convention of collective Ministerial responsibility - see *Re Hudson and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123, at paragraphs 13-21). The 1993 amendments, however, seemed designed to extend unqualified protection to the contributions of those who brief Ministers on issues that are to come or may come before Cabinet (amended s.36(1)(c)), any document submitted to Cabinet, whether or not the document was initially prepared for submission to Cabinet (amended s.36(1)(a)), and any document which a Minister has at some time proposed for submission to Cabinet, irrespective of whether that proposal was subsequently abandoned (amended s.36(1)(b)). Documents of this kind would formerly have fallen under the deliberative process exemption (s.41) and would have been exempt only if the disclosure of their contents would be contrary to the public interest.

The requirement under the former s.36(1)(a) that the matter in issue must have been brought into existence for the purpose of submission for consideration by Cabinet, which had placed sensible limits on the scope of the exemption, was dispensed with in the amended s.36(1)(a). Thus, documents submitted to Cabinet merely to provide background information relevant to a proposal contained in a Cabinet submission, and which do not reflect the views of a Minister on the proposal (but which could be valuable for informing the general public, or any interested member thereof) will be exempt, even though not initially prepared for the purpose of submission to Cabinet. The amended s.36(1)(a) was so wide that it would apply to a document submitted to Cabinet which has previously been released in the public domain, such as a Green Paper. It also permitted an avenue for potential abuse of the accountability objects of the FOI Act by enabling an agency or Minister to prevent disclosure of an embarrassing or damaging document, merely by ensuring that it is submitted to Cabinet for its consideration (even though the document was not initially prepared for the purpose of submission to Cabinet). I expressed my hope that the government would issue guidelines to FOI decision-makers encouraging the appropriate exercise of the discretion conferred by s.28(1) of the FOI Act in respect of documents technically exempt

under the amended s.36(1)(a), but the disclosure of which could do no harm to the effective working of the Cabinet process.

- ❑ Shortly after I released my decision in this case, s.36 was again amended so as to broaden it considerably beyond the scope of the November 1993 amendments. I have commented on the March 1995 amendments to s.36 and s.37 in Chapter 3 of this report. The Queensland government appears to have noted my comments in *Re Woodyatt*, in relation to retrospectivity of amending legislation, and there appears to be no doubt that the 1995 amendments to s.36 and s.37 were intended to be retrospective in operation.

Re Hearl and Queensland Police Service (Decision No. 95002, 3 March 1995, unreported)

This was a ‘sufficiency of search’ case in which the applicant identified two documents which he submitted should be in the possession or control of the Queensland Police Service (the QPS). There was objective evidence that the documents had been, and should be, in the possession or control of the QPS, and I required the QPS to undertake further searches and inquiries in an effort to locate them. These were detailed in the reasons for decision. Ultimately they proved fruitless, but I was satisfied that all reasonable avenues of search and inquiry had been pursued, and that the documents could no longer be located within the possession or control of the QPS.

Re Devine and Peninsula and Torres Strait Regional Health Authority (Decision No. 95003, 3 March 1995, unreported)

- ❑ This case involved consideration of public interest factors for and against provision of access to parts of the medical record of a former patient of the respondent Authority, who had been cared for by the applicant, a registered nurse, in the context of a claim that the former patient’s medical record was exempt under s.44(1) of the FOI Act. I recognised a public interest in facilitating the accountability of the Authority, both from the point of view of revealing the manner in which a public hospital operates and the way it conducts an investigation into complaints about the conduct of one of its staff (who was not the applicant). While I affirmed the approach taken in *Re Pemberton*, that there may be a public interest in a particular applicant having access to information which affects or concerns the applicant, I found no such interest in this case and determined that the public interest in protecting the patient’s privacy outweighed those factors in favour of disclosure. I therefore found the medical record exempt.
- ❑ The case also involved application of the principles set out in *Re “B”* as to the operation of s.46(1)(a) in circumstances where a third party supplied information, in the course of an investigation into the conduct of a member of staff of the Authority, which was not directly relevant to the investigation, and which would have been understood by the third party to have been provided ‘off the record’. I found that the matter was exempt.

Re Sutherland and Brisbane North Regional Health Authority (Decision No. 95004, 13 April 1995, unreported)

- ❑ This was a ‘reverse-FOI’ application by a general practitioner who objected to the respondent’s decision to give the third party (one of the applicant’s patients) access to a letter concerning the third party’s medical treatment, which the applicant had forwarded to a specialist employed by the respondent. The applicant argued that the document comprised information of a confidential nature that was communicated in confidence, and I had to decide whether the information in issue was exempt from disclosure to the third party under s.46(1)(a) or s.46(1)(b) of the FOI Act.

- ❑ I found that part of the letter contained information which was not confidential *vis-à-vis* the third party, and hence not exempt from disclosure to the third party. I found that the balance of the letter was exempt under s.46(1)(a), and made some observations (at paragraphs 18-21) on the circumstances in which communications between medical practitioners concerning a patient's medical treatment may be kept confidential from the patient.
- ❑ With respect to s.46(1)(b), I expressed the view that disclosure of the document in issue could not reasonably be expected to prejudice the future supply of like information. I did not think there was any reasonable basis for expecting that medical practitioners would refuse to supply necessary information, relating to the treatment of their patients, to other medical practitioners practising in the public health system, whose patient records may be subject to the FOI Act.

Re Banks and Queensland Corrective Services Commission (Decision No. 95005, 13 April 1995, unreported)

- ❑ This was an application by a prisoner to amend information that he had earlier obtained under the FOI Act. I decided that the information which remained in issue, after the respondent agreed to make a number of compromise amendments, concerned the personal affairs of the applicant. However, I decided that the information was not inaccurate, incomplete, out-of-date or misleading, and affirmed the decision of the respondent not to amend the information.
- ❑ In the course of my reasons for decision, I indicated that an applicant's right, under Part 4 of the FOI Act, to notate information relating to the applicant's personal affairs is a right to have the information notated on all copies of the document concerned, which are in the possession or control of the agency concerned.

Re Myers and Queensland Treasury (Decision No. 95006, 21 April 1995, unreported)

- ❑ This was a 'sufficiency of search' case in which the applicants sought access to a document recording a change in the shareholding of a private company, which they had reason to believe should have been lodged with the Office of State Revenue for payment of stamp duty. The respondent had a computer record of the lodgement of unspecified documents in the name of the relevant company, but could not account for the whereabouts of the unspecified documents. I therefore undertook, and required the respondent to undertake, further searches and inquiries to establish whether the respondent had possession of the document which the applicants were seeking. The searches and inquiries led to the conclusion that no such document had ever been in the possession of Queensland Treasury.
- ❑ At paragraph 51, I made some observations as to whether the respondent merely has temporary custody of documents lodged with it for assessment and payment of stamp duty, rather than the possession or control necessary to make a document a "document of an agency" for the purposes of the FOI Act.

Re Ronald Stewart and Department of Transport (Decision No. 95007, 12 May 1995, unreported)

- ❑ This case involved the application of the principles relating to 'sufficiency of search' cases set out in *Re Shepherd and Department of Housing Local Government and Planning* (1994) 1 QAR 464, in a situation where a person made an application to the respondent for documents concerning his personal affairs. It was necessary, in the course of searches for further relevant documents, to apply the principles set out in *Re Stewart and Department of Transport* (1993) 1 QAR 227 to determine what matter concerned the applicant's personal affairs. The case

highlights the difficulties that may arise when a person, seeking information about broader issues, frames an application in such a way as to avoid payment of the \$30 application fee, by requesting only matter which concerns his personal affairs. I found that, with the exception of one document, there were no reasonable grounds to believe that the agency held further documents falling within the terms of the FOI access application. As to the remaining document, I found that the search efforts of the agency, although ultimately unsuccessful, had been reasonable in all the circumstances.

- I also found that the name of a member of the public who had made a complaint about certain matters was exempt matter under s.44(1), as I could find no public interest factor which might outweigh the interest in maintaining the privacy of the complainant.

Re “JM” and Queensland Police Service (Decision No. 95008, 12 May 1995, unreported)

- The first issue raised by this case was a challenge to the sufficiency of search by the respondent for a requested document. Applying principles set out in *Re Shepherd*, I was satisfied from the evidence lodged by the respondent that there were no reasonable grounds for believing that the respondent held the document which the applicant asserted it held.
- The second issue concerned the application of s.22(a) and s.22(b) of the FOI Act, and paragraphs 21-43 of my reasons for decision contain a detailed analysis of those provisions. I expressed the view that a literal interpretation of the words “open to public access” in s.22(a) would give that provision a far more restricted sphere of operation than it was probably intended to have. At paragraph 36, I suggested that the wording of s.22(a) may require review by the legislature, and suggested an amendment that would make the wording of s.22(a) more consistent with the wording of s.22(b).
- I held that, by virtue of s.22(b), the respondent was entitled to refuse the applicant access under the FOI Act to copies of his criminal history and a Court brief, because those documents were reasonably available for purchase by the applicant under administrative arrangements made by the respondent.

Re Keith Stewart and Department of Transport (Decision No. 95009, 15 May 1995, unreported)

- This case involved similar ‘sufficiency of search’ issues to Decision No. 95007 and I made corresponding findings.
 - I also found that the home address and home telephone number of an officer of the respondent were exempt under s.44(1), in the circumstances of the case.

Re Carolyn Stewart and Department of Transport (Decision No. 95010, 15 May 1995, unreported)

This case involved similar ‘sufficiency of search’ issues to Decision No. 95007 and I made corresponding findings.

Re Ronald Stewart and Department of Transport (Decision No. 95011, 15 May 1995, unreported)

- This case involved the application of the principles relating to ‘sufficiency of search’ cases set out in *Re Shepherd* in a situation where there was a claim that the Department should have a copy

of an unsuccessful job application made by the applicant in 1984. I found that there were no reasonable grounds to believe that a document falling within the terms of the FOI access application had ever been in the possession or control of the Department.

- ❑ I also considered my jurisdiction to conduct a review in circumstances where the Department had contended that no formal application for internal review of the Department's initial decision had been made, or alternatively that, an application fee remaining unpaid, the Department was not obliged to progress the matter. I found that no application fee was payable (the documents in issue, if they had existed, would contain information concerning the applicant's personal affairs) and that I had jurisdiction to conduct the review.

Re Ronald Stewart and Department of Transport (Decision No. 94012, 16 May 1995, unreported)

This case involved issues identical to some of the issues dealt with in Decision No. 95007 and Decision No. 95011, and I made corresponding findings.

Re Carolyn Stewart and Minister for Transport (Decision No. 95013, 16 May 1995, unreported)

- ❑ This case involved similar "sufficiency of search" issues to Decision No. 95007 and I made corresponding findings.
- ❑ I also discussed (at paragraphs 10-16) the distinction between "documents of an agency" and "official documents of a Minister", noting that a Minister may hold documents on a particular subject not held by the Minister's department.

Re Ronald Stewart and Minister for Transport (Decision No. 95014, 16 May 1995, unreported)

This case involved similar 'sufficiency of search' issues to Decision No. 95007, and I made corresponding findings.

Re Fagan and Minister for Justice and Attorney-General and Minister for the Arts (Decision No. 95015, 26 May 1995, unreported)

- ❑ This was the first case involving review of the grounds for issue of a 'Ministerial Certificate' under s.42(3) of the FOI Act. In this case, the Minister had issued a certificate in relation to four documents comprising reports to the Premier by the Criminal Justice Commission on the extent and effect of Japanese organised crime in Queensland.
- ❑ At paragraphs 26-28, I referred to the formal requirements for a valid Ministerial Certificate, following decided authority from the Federal Court of Australia.
- ❑ At paragraphs 29-30, I held that my jurisdiction was confined to considering the reasonableness of the grounds on which a Ministerial certificate was given, rather than assessing the reasonableness of a course of conduct adopted by the Minister culminating in the issue of a Ministerial Certificate
- ❑ At paragraphs 36-43, I rejected a contention by the respondent that the documents in issue should be treated as entire documents, since it would not be appropriate to sever each document and consider the status of each subdivided portion (as contended by the applicant). In other words, I was being asked to overlook any portions of matter contained in the documents that were not

exempt matter, because the documents considered as a whole were clearly exempt. I considered that this was not a permissible approach for reasons explained at paragraphs 36-39, in which I addressed the significance of the framing of exemption provisions in terms which refer to exempt matter rather than exempt documents.

- ❑ The respondent also submitted that in reviewing whether matter was exempt, the process of review should not be conducted on a sentence by sentence, line by line, or piecemeal approach. At paragraph 43, I said that I had general sympathy for such an approach, but I cautioned against the application of any fixed rule. A common sense judgment must be made in the circumstances of each case, in light of the amount and nature of the information in issue, as to what constitutes an intelligible segment of matter, to which the particular applicant would wish to be given access. It is not difficult to envisage situations where a single word, or a few words, may constitute an intelligible segment of matter to which the applicant would wish to be given access, e.g. a name, or the title of an Office, or the title of a source document.
- ❑ At paragraph 46, I attempted to explain and illustrate the nature of the difference between review of the merits of a decision (which the Information Commissioner ordinarily undertakes) and the more limited form of review permitted by s.84 of the FOI Act, when a Ministerial certificate has been issued.
- ❑ For reasons explained at paragraphs 47-50, I was satisfied that there were reasonable grounds for the Minister to certify that all of the matter in issue was exempt matter under s.42(1)(a) of the FOI Act.

Re Campbell and University of Southern Queensland: Re Campbell and Department of Education (Decision No. 95016, 26 May 1995, unreported)

- ❑ These cases involved the application of the principles relating to ‘sufficiency of search’ cases set out in *Re Shepherd* in a situation where the applicant contended that further documents should be held by the respondent agencies relating to changes in a tertiary course at the time of semesterisation. I found that each agency had located and dealt with all documents in its possession or control which fell within the terms of the FOI access application.
- ❑ I also made general observations (at paragraphs 47-51) about the benefits which can accrue, in potential ‘sufficiency of search’ cases, through agencies giving detailed explanations to applicants about the type and extent of searches which have been undertaken in an effort to satisfy an FOI access application.

Re Alpert and Brisbane City Council (Decision No. 95017, 15 June 1995, unreported)

- ❑ This case involved consideration of the application of s.44(1) to documents relating to an application for approval for construction of a family home, including plans, conditions imposed, advice from consultants and Council records of inspections. I found that disclosure of the documents would disclose matter which concerned the personal affairs of the family who built and lived in the home. In considering the balance of public interest, I took into account the fact that, while the applicant had been a neighbour and had at one time a particular interest concerning a retaining wall which faced his property, he had subsequently sold his property and no longer had any special interest in the wall or other aspects of the house. While acknowledging a public interest in disclosure to enhance government accountability, I found that, in the circumstances of this case, the factors which favoured disclosure did not outweigh the public interest in maintaining the privacy of the home owners.

- ❑ The applicant also contended that not all relevant documents had been disclosed by the Council and so the case involved the application of the principles relating to ‘sufficiency of search’ cases set out in *Re Shepherd*. In that regard I found there were no reasonable grounds to believe that the Council had failed to locate and deal with all documents falling within the terms of the FOI access application.

Re Uksi and Redcliffe City Council (Decision No. 95018, 16 June 1995, unreported)

- ❑ This was a ‘reverse-FOI’ application in which the applicants objected to release by the respondent Council of documents relating to complaints made by them about damage to their property allegedly caused by the neighbouring property of the third party (the initial applicant for access under the FOI Act).
- ❑ The applicants claimed legal professional privilege in respect of letters to the respondent Council, and an engineer’s report allegedly obtained for use in anticipated litigation. While it was not clear that the engineer’s report satisfied the “sole purpose” test so as to attract legal professional privilege, it was quite clear that any privilege which might have attached to the report had been waived by its intentional disclosure to the Council. The correspondence from the applicants to the Council was not brought into existence for a purpose which would attract legal professional privilege. The applicants could not establish a case for exemption under s.43(1) of the FOI Act.
- ❑ The applicants also claimed that the documents in issue were exempt under s.42(1)(d) of the FOI Act, on the basis that disclosure of the documents could prejudice the fair trial of any subsequent civil action concerning the damage to their property. I expressed the view (at paragraph 34) that the words “a person’s fair trial” in s.42(1)(d) do not refer to a civil suit between parties, but to the trial of a person charged with a criminal offence. The words did not apply to a civil suit of the kind the applicants had in contemplation. The words “impartial adjudication of a case” in s.42(1)(d) did extend to a civil suit of the kind the applicants had in contemplation; however, I was unable to see any reasonable basis for an expectation that disclosure of the documents in issue could prejudice the impartial adjudication of such a case.
- ❑ The applicants also contended that the documents in issue concerned their personal affairs and were exempt under s.44(1) of the FOI Act. However, I concluded that most of the matter in issue was properly to be characterised as information which concerned the shared personal affairs of both the applicants and the third party, and (applying principles set out in *Re “B”* at paragraphs 172-178) that disclosure of all of the matter in issue to the third party would, on balance, be in the public interest.

Re Cardwell Properties Pty Ltd and Keith Williams (applicants) and Department of the Premier, Economic and Trade Development (respondent) and North Queensland Conservation Council Inc (third party) (Decision No. 95019, 29 June 1995, unreported)

- ❑ This was a ‘reverse-FOI’ application in which developers sought to challenge the decision of the Department to grant access to communications made by the developers to various government agencies in the course of negotiations over a proposed development project. The case involved the application of principles set out in *Re Cannon* concerning s.45(1)(c) of the FOI Act. I found that the matter in issue was not commercially sensitive in nature, but was for the most part rehearsal of the history of negotiations concerning the development project, complaints about inaction, and requests for urgent action. The developers provided no submission or evidence to demonstrate a likely adverse effect on their business, commercial or financial affairs through disclosure, or that disclosure would prejudice the future supply to government of like information. I found that neither kind of detriment could reasonably be expected to result from disclosure of the matter in issue. I also considered that, given the size of the proposed

development and its significance to the social, economic and physical environment of the Cardwell region, the public interest factors in favour of disclosure would outweigh any factors against disclosure.

- ❑ The case also required an application of the principles set out in *Re “B”* concerning s.46(1) of the FOI Act. I found that the requirements of s.46(1)(a) were not met with respect to any of the matter in issue, in particular determining that equity would not regard disclosure by the Department to be an unconscionable use of the information in issue. In this context I discussed the recent High Court decision of *Esso Australia Resources Ltd v Plowman* (1995) 69 ALJR 404 which recognised the existence of a “public interest exception” to obligations of confidence said to attach to information held by government, even where the information was supplied by persons outside government. For instance, Mason CJ (with whom Dawson and McHugh JJ agreed) said that the obligation of confidence in issue in the *Esso* case was “necessarily subject to the public’s legitimate interest in obtaining information about the affairs of public authorities”.
- ❑ I also found that no part of the matter in issue was exempt under s.46(1)(b), because prejudice to future supply of like information could not reasonably be expected to result from disclosure, and in any event disclosure would be in the public interest.

Re “EST” and Department of Family Services and Aboriginal and Islander Affairs (Decision No. 95020, 30 June 1995, unreported)

- ❑ This case contains a detailed analysis of s.35 of the FOI Act which permits an agency responding to an FOI access application to neither confirm nor deny the existence of a document containing matter that would be exempt matter under s.36, s.37 or s.42 of the FOI Act.
- ❑ I expressed the view that s.35 was intended to be used sparingly, and commented on circumstances in which its use would, and would not, be appropriate. Given the potential for misuse of s.35, I expressed the view (at paragraph 16) that the FOI Act should be amended to confer a specific power on the Information Commissioner to determine whether a s.35 response has been appropriately employed by an agency or Minister.
- ❑ At paragraph 20, I outlined some of the difficulties involved in conducting a review of a decision invoking s.35 of the FOI Act, especially with regard to affording procedural fairness to the applicant for access.
- ❑ At paragraphs 21-28, I referred to the five possible outcomes of an external review of a decision invoking s.35, and explained why the current legislative scheme only works satisfactorily when the respondent is found to have correctly invoked s.35. I called for amendments to make proper provision for a situation where an agency is found to have had no justification for invoking s.35.
- ❑ In the instant case, however, the current provisions worked satisfactorily because the respondent was justified in invoking s.35. The respondent was concerned, generally, to conceal the existence and/or identity of sources of notifications in child protection matters. The application of s.42(1)(b) of the FOI Act in such circumstances is explained at paragraphs 40-48.

Re “NKS” and Queensland Corrective Services Commission (Decision No. 95021, 30 June 1995, unreported)

- ❑ In this case, the applicant, who was a prisoner, challenged the decision of the respondent to refuse him access to information about him of a medical or psychiatric nature, and to give access instead to a qualified medical practitioner in accordance with s.44(3) of the FOI Act. The matter

which finally remained in issue consisted of observations made by a psychiatrist about the applicant.

- ❑ At paragraphs 7-9, I expressed the view that the internal review decision-maker did not have authority to exercise the discretion conferred by s.44(3) of the FOI Act. The discretion conferred by s.44(3) could only be exercised by the principal officer of an agency, or by a qualified medical practitioner appointed by the agency pursuant to s.44(4) of the FOI Act.
- ❑ After examining the evidence in light of the principles which I endorsed in *Re "S" and the Medical Board of Queensland*, I considered this an appropriate case in which to exercise the discretion conferred by s.44(3) of the FOI Act.
- ❑ In paragraph 20, I referred to considerations which may make it appropriate for an agency to insist that the qualified medical practitioner, to whom access is given pursuant to s.44(3), is a specialist in a particular field of medicine.