

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 5 of 1993
(Decision No. 93001)

Participants:

BRUCE JAMES CHRISTIE
Applicant

- and -

QUEENSLAND INDUSTRY
DEVELOPMENT CORPORATION
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - jurisdiction of Information Commissioner - *Freedom of Information Act 1992* (Qld) not applicable to Queensland Industry Development Corporation in relation to its investment functions - access to documents refused on basis that documents relate to investment functions of QIDC and FOI Act does not therefore apply - jurisdiction of Information Commissioner to investigate QIDC's claim.

FREEDOM OF INFORMATION - construction of s.11(1)(k) of the *Freedom of Information Act 1992* (Qld) - words and phrases: "investment"; "investment functions".

Freedom of Information Act 1992 (Qld) s.11(1), s.11(1)(k), s.11(2), s.71(1)(b), s.77
Freedom of Information Act 1992 (Cth) s.7(2); s.9(4); Sch 2 Pt II
Queensland Industry Development Corporation Act 1985 (Qld) s.4, s.11, s.12, s.45, s.48
Acts Interpretation Act 1954 (Qld) s.36

Geary and Australian Wool Corporation (No. V84/387, 26 April 1985) 7 ALN N312
Adams and the Tax Agents Board (1976) 1 ALD 251
Inland Revenue Commissioners v Gas Lighting Improvement Co Limited [1922] 2 KB 381
Gas Lighting Improvement Co Limited v Commissioners of Inland Revenue [1923] AC 723
Liberty and Co Ltd v Commissioners of Inland Revenue (1924) 12 Tax Cas 630
George Morgan and Co Limited v Federal Commissioner of Taxation (1927) 40 CLR 463
The Commissioner of Taxes v The Australian Mutual Provident Society (1903) 22 NZLR 445
The Crown v National Mutual Life Association of Australasia Ltd (1922) 25 WAR1
In the Will of Sheriff; In the Will of Lawson [1971] 2 NSWLR 438
Melville v Mutual Life and Citizens' Insurance Co Ltd (1980) 47 FLR 201
Kerr v Visa Vacations Pty Ltd (1986) 4 ACLC 614
Pacific Coast Coin Exchange of Canada et al. v Ontario Securities Commission (1977) 80 DLR (3d) 529
Re Ontario Securities Commission and C & M Financial Consultants Ltd (1979) 23 OR (2d) 378

DECISION

1. The Information Commissioner does not have jurisdiction to deal with the application for review dated 15 January 1993 lodged by Mr Christie in respect of a decision of the Queensland Industry Development Corporation (QIDC) made on 22 December 1992 refusing Mr Christie access to documents relating to a rural loan facility extended by QIDC to Mr Christie.
2. The Information Commissioner therefore decides not to review, or not to review further, the decision of QIDC which is the subject of Mr Christie's application for review dated 15 January 1993.

Date of Decision: 31 March 1993

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INFORMATION COMMISSIONER

OFFICE OF THE INFORMATION)
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S 5 of 1993
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Participants:

BRUCE JAMES CHRISTIE
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QUEENSLAND INDUSTRY
 DEVELOPMENT CORPORATION
 Respondent

REASONS FOR DECISION

Background

- 1 By letter dated 13 November 1992, Mr Bruce Christie wrote to the Freedom of Information Officer of the Queensland Industry Development Corporation (QIDC) in the following terms:

"I request through the Freedom of Information Act a full and complete copy of my file documents relating to business conducted through the QIDC by B J & M T Christie.

The business relates to account no. CHRISTBM/1."

- 2 Following an exchange of correspondence which is not relevant for present purposes, Mr Darren Solomon, a legal officer with QIDC, wrote to Mr Christie on 22 December 1992 in the following terms:

"Pursuant to Section 34 of the [Freedom of Information] Act I now provide my decision in respect to your application as follows:-

My inspection of the Corporation's records indicates that you were a client of the Corporation between approximately September 1988 and February 1992. More specifically, you were a client of the Corporation's Dalby Branch where you maintained a rural loan facility during that time. ...

1. *In respect to the information held by the Corporation pertaining to the rural loan facility you maintained with the Corporation at its Dalby Branch during the abovementioned period, the Corporation draws your attention to Section 11(1)(k) of the Act:*

"11(1) This Act does not apply to -

... (k) Queensland Industry Development Corporation in relation to its

investment functions"

Accordingly, as the Act does not apply to the Corporation's investment functions, the information retained by the Corporation and pertaining to the aforementioned rural loan facility is not available to you under the provisions of the Act.

2. *The Corporation, in its capacity as agent of the State Government in the administration of Government Schemes of Assistance is not exempt from the operation of the Act, therefore, the information retained by the Corporation by its Government Schemes Division is potentially available to an applicant under the provisions of the Act.*

Accordingly, pursuant to your request, I have enclosed a complete copy of the file retained by the Corporation's Government Schemes Division in respect to your dealings with that Division."

- 3 By letter dated 6 January 1993, Mr Christie requested an internal review of the decision to refuse access to the rural loan facility file, stating that he disputed that the rural loan facility is an investment function of QIDC. Mr Darren Solomon replied on behalf of QIDC by a letter dated 7 January 1993 in the following terms:

"Sections 52 and 60 of the Freedom of Information Act 1992 ("the Act") only provides an applicant with a procedure for internal review of a decision made by an agency under Part 3 or Part 4 of the Act.

As I advised in my correspondence to you dated 22 December 1992 the Corporation's investment functions are specifically exempt from the operation of the Act under Section 11(1)(k). That exemption is contained in Part 1 of the Act therefore no internal review procedure is available to you in respect to my decision in this matter."

- 4 Mr Christie subsequently lodged with the Information Commissioner an application for review, dated 15 January 1993, of QIDC's decision refusing access to the rural loan facility documents on the basis of s.11(1)(k) of the *Freedom of Information Act 1992* (the FOI Act).

Jurisdiction of the Information Commissioner

- 5 Pursuant to s.71(1)(b) of the FOI Act, the Information Commissioner has jurisdiction to investigate and review decisions of agencies and Ministers refusing to grant access to documents in accordance with applications under s.25 of the FOI Act.
- 6 Mr Christie made an application for access to documents of QIDC in purported reliance on s.25 of the FOI Act. QIDC has refused to grant access to documents as requested in that application. QIDC's stated basis of refusal, however, was that the documents sought related to the provision of a rural loan facility which is an investment function of QIDC: hence the FOI Act does not apply, and hence Mr Christie was not even entitled to make an application for access to those documents in reliance on s.25 of the FOI Act. By extension of that logic, QIDC would assert that Mr Christie was not even entitled to apply for internal review by an

officer of QIDC or external review by the Information Commissioner (those being entitlements conferred by the FOI Act, which, according to QIDC's contention, do not apply to its investment functions, of which the provision of a rural loan facility is one).

- 7 Recognising that QIDC's stance raised an issue as to my jurisdiction to deal with Mr Christie's application for review, I wrote to QIDC on 4 February 1993 in the following terms:

"QIDC's reliance on s.11(1)(k) of the FOI Act raises an issue as to the jurisdiction of the Information Commissioner to deal with the application for review lodged by Mr Christie. That issue may be succinctly stated as follows. If all of the documents in the possession or under the control of QIDC pertaining to Mr & Mrs Christie's rural loan facility (being the subject of Mr & Mrs Christie's application for access in purported reliance on s.25 of the FOI Act) fall within s.11(1)(k) of the FOI Act because they relate to the investment functions of QIDC, then the FOI Act does not apply to those documents and the Information Commissioner has no jurisdiction to investigate and review QIDC's decision to refuse access. If, however, all or some of those documents do not relate to the investment functions of QIDC, then the following consequences would apply:

- (a) *Mr & Mrs Christie would have made a valid application for access to documents under s.25 of the FOI Act;*
- (b) *QIDC would thereby have come under a legal obligation imposed by subsection 27(2) of the FOI Act to consider the application and make one or more of the decisions referred to in subsection 27(2);*
- (c) *Mr & Mrs Christie would have made a valid application for internal review in accordance with s.52, since QIDC's decision refusing access was a decision which QIDC was obliged to make by virtue of subsection 27(2), which is contained in Part 3 of the FOI Act, notwithstanding that the ground on which the decision is based appears in Part 1 of the FOI Act;*
- (d) *The requirements of s.73, including subsection 73(3), would have been satisfied by the application for review lodged with the Information Commissioner by Mr Christie and the Information Commissioner would have jurisdiction to investigate and review the decision of QIDC refusing to grant access to documents in accordance with Mr & Mrs Christie's application under s.25 of the FOI Act."*

- 8 An almost precisely analogous jurisdictional issue was raised in the Commonwealth Administrative Appeals Tribunal (the AAT) in the matter of *Geary and Australian Wool Corporation* (No. V84/387, 26 April 1985) 7 ALN N312. Subsection 7(2) of the Commonwealth's *Freedom of Information Act* 1982 provided that:

"(2) The bodies and Departments specified in Part II of Schedule 2 are exempt from the operation of this Act in relation to the documents referred to in that Schedule in relation to them."

- 9 Among the agencies listed in Schedule 2 Part II as being exempt in respect of particular

documents was:

"Australian Wool Corporation, in relation to documents in respect of its competitive commercial activities."

- 10 The Australian Wool Corporation had relied on these provisions to refuse access to documents requested by Mr Geary. When Mr Geary appealed to the AAT, the Australian Wool Corporation contended that by virtue of those same provisions the AAT had no jurisdiction to proceed with the application. The AAT (constituted by Mr Justice J.D. Davies, who was then President of the Tribunal, Mr F.A. Pascoe and Mr G.G. Grant) observed (at pp.4-6 of the decision) that:

"The statement filed by the Australian Wool Corporation leaves it fairly arguable whether or not all or some of the documents to which access is sought are documents in respect of the Corporation's competitive commercial activities ...

The Tribunal could not, without hearing further argument and without examining all or some of the documents held by the Australian Wool Corporation, come to a conclusion as to whether the subject documents held by it relate to its competitive commercial activities.

The question therefore is whether the Tribunal should now proceed to enter upon a consideration of that matter.

It is difficult to find any foundation for the Corporation's submission that the Tribunal has no jurisdiction to do so. The Tribunal has jurisdiction to review decisions of officers of the Corporation with respect to a refusal of access to documents in the possession of the Corporation which do not relate to its competitive commercial activities. In such a review, issues touching upon the limits of the Tribunal's jurisdiction may be raised. But the Tribunal has jurisdiction to investigate matters of that nature."

- 11 The Tribunal quoted at length from the decision of His Honour Mr Justice Brennan in *Re Adams and the Tax Agents Board* (1976) 1 ALD 251. One passage from that decision (at p.254) bears repeating in the present context:

*"An administrative body with limited authority is bound, of course, to observe those limits. Although it cannot judicially pronounce upon the limits, its duty not to exceed the authority conferred by law upon it implies a competence to consider the legal limits of that authority, in order that it may appropriately mould its conduct. In discharging its duty, the administrative body, will, as part of its function, form an opinion as to the limits of its own authority. The function of forming such an opinion for the purpose of moulding its conduct is not denied to it merely because the opinion produces no legal effect. In *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598, Dixon J, whilst denying the power of a Local Coal Reference Board to determine judicially the meaning of a statutory phrase upon which its jurisdiction depended, distinguished the Board's function of forming an opinion upon the question. He said, at p.618: 'I do not mean to say that the Board may not, for the purpose of determining its own action, "decide" in the sense of forming an opinion upon the meaning and application of the words "coal mining industry". It must make up its mind whether this or that*

particular function on the borders of the coal mining industry does or does not fall within the conception.'

Blackburn J, sitting in an administrative jurisdiction in Re Cilli's Objection (1970) 15 FLR 426 at 428; [1970] ALR 813 at 815, noted that an administrative body 'must satisfy itself that all its proceedings are in accordance with the law. It must therefore receive and consider, whenever the point is taken, an argument that it has no jurisdiction. To say that is, in truth, to say no more than that it must at all times act lawfully.'"

12 In *Geary*, the Tribunal said (at pp.8-9 of the decision):

"The question is whether the Tribunal may embark upon a consideration of the [jurisdictional] issue. In our opinion, the Tribunal has a duty to do so with a view to arriving at a decision within its jurisdiction. That function is not taken from the Tribunal by the Corporation's claim that all of the documents sought by the applicant relate to its competitive commercial activities. The Corporation's claim is no more than a claim that raises an issue to be considered. Without further examination of the matter, the Tribunal is not able either to accept it or reject it. ...

For these reasons, the Tribunal will proceed to examine the question whether the documents held by the Australian Wool Corporation, within the ambit of the applicant's request for access, relate to the Corporation's competitive commercial activities."

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

14 In my letter to QIDC dated 4 February 1993, I asserted:

"There is no doubt that the Information Commissioner is empowered under the FOI Act to investigate and review decisions of QIDC refusing access to documents which do not relate to QIDC's investment functions. In the instant case, I consider that I have power to investigate and determine whether or not the documents to which Mr & Mrs Christie requested access under the FOI Act relate to QIDC's investment functions, and hence whether or not I have jurisdiction to deal with Mr Christie's application for external review ... If QIDC can satisfy me that all the documents in question are covered by s.11(1)(k) of the FOI Act, then in accordance with subsection 77(2) I will decide not to review further, for lack of jurisdiction to do so. If, however, I am satisfied that some or all of the documents are not covered by s.11(1)(k) of the FOI Act, I will proceed to review QIDC's refusal of access to those documents and QIDC may wish to raise issues as to whether some documents are exempt under any applicable provisions of Part 3 Division 2 of the FOI Act."

15 I requested QIDC to supply me with:

- (a) copies of the documents to which Mr Christie had been refused access;

- (b) a written submission setting out QIDC's arguments as to the proper construction of s.11(1)(k), in particular the words "investment functions"; and
- (c) QIDC's analysis of why the documents in question must be covered by s.11(1)(k).

16 After several promptings, and the receipt of written submissions in which QIDC argued that I should determine the jurisdictional issue in its favour without looking at any documents, I received on 8 March 1993 the documents to which Mr Christie had been refused access in reliance on s.11(1)(k) of the FOI Act. Those documents have been examined. I am satisfied that all of the documents relate to the rural loan facility extended by QIDC to Mr & Mrs Christie in respect of the property "Lawnlea" (in the Dalby region) formerly owned by the Christies. The vast majority of documents on the files in question comprises correspondence from Mr Christie addressed to QIDC, and file copies of correspondence from QIDC addressed to Mr Christie. There are some brief notes of telephone conversations between Mr or Mrs Christie and officers of QIDC relating to aspects of the loan. There are also copies of correspondence exchanged between QIDC and agents acting on behalf of Mr & Mrs Christie, for example a firm of accountants and a real estate agent. (It is most likely that Mr Christie already has copies of those documents or could readily obtain them from the agents in question.) There is some correspondence between the Commonwealth Bank and QIDC of a routine kind seeking QIDC's consent as first mortgagee to the taking of a second mortgage over the property by the Commonwealth Bank to secure a business loan to Mr Christie. The remaining documents comprise a small number of internal memoranda and file notes that relate quite specifically to the rural loan facility. There is no document that does not relate to the rural loan facility, so that if QIDC can establish that the provision of a rural loan facility to Mr & Mrs Christie constitutes an investment function of QIDC, it follows that QIDC was entitled to refuse access to all of the documents on the files, on the basis that the documents were outside the application of the FOI Act.

The Relevant Provisions of the FOI Act

17 Section 11 is a provision which exempts some bodies totally from the operation of the FOI Act (e.g. Queensland Investment Corporation; Suncorp Insurance & Finance) and exempts some other bodies from the FOI Act in respect of particular functions or activities. Subsection 11(1)(k) provides:

"This Act does not apply to -

...

(k) Queensland Industry Development Corporation in relation to its investment functions;"

18 Parliament has chosen not to exempt QIDC entirely from the FOI Act, and it logically follows that Parliament contemplated that not all the functions of QIDC could be described as investment functions. As noted in paragraph 2 above, QIDC itself concedes that the functions of its Government Schemes Division do not constitute investment functions of QIDC, and are therefore subject to the FOI Act. Presumably, QIDC's personnel administration functions are also subject to the FOI Act, so that QIDC staff may rely on the rights conferred by the FOI Act to access their personnel files. There may be other functions of QIDC of which it can be said with certainty that they do not constitute investment functions. The key issue in this case is the determination, according to the proper construction of s.11(1)(k), of where the line is to be drawn which divides those functions of QIDC which are subject to the FOI Act from those which fall outside the

operation of FOI.

19 Subsection 11(2) raises difficulties. It provides:

"(2) In subsection (1), a reference to documents in relation to a particular function or activity is a reference to documents received or brought into existence in performing the function or carrying on the activity."

20 This provision has been adapted from subsection 7(4) of the Commonwealth *Freedom of Information Act* 1982, however, there appears to have been an oversight by the drafter that is productive of some confusion. Subsection 7(4) of the Commonwealth *Freedom of Information Act* 1982 is in the following terms:

"(4) In Part II of Schedule 2 a reference to documents in respect of particular activities shall be read as a reference to documents received or brought into existence in the course of, or for the purposes of, the carrying on of those activities."

21 As with the example of the Australian Wool Corporation quoted in paragraph 9 above, agencies are mentioned in Part II of Schedule 2 to the Commonwealth Act according to a formula such as: "X Corporation in relation to documents in respect of its Y activities". Subsection 11(1) does not use a similar verbal formula; in fact it contains no reference to documents in relation to a particular function or activity of a named body. The only reference to the word "document" that occurs in subsection 11(1) is in paragraph (j), where it is not even used in conjunction with a reference to a particular function or activity.

22 I do not think it is appropriate to treat subsection 11(2) as having been rendered meaningless by what I take to be a clear drafting error. I consider that Parliament's intention in enacting subsection 11(2) is clear enough once allowance is made for the drafting error, and Parliament's intention can be given effect to by either of two readings which produce the same result:

(a) by implying in s.11(1)(k) a reference to documents which would give meaning to s.11(2); s.11(1)(k) would have to be read as if it were in the following terms:

"This Act does not apply to -

...

(k) Queensland Industry Development Corporation in respect of documents in relation to its investment functions;" or

(b) by reading subsection 11(2) as if it were in these terms:

"In subsection (1), a reference to a particular function or activity means that this Act does not apply to documents received or brought into existence in performing the function or carrying on the activity."

Arguments Submitted by the Participants

23 The critical issue is the proper construction of the words "investment functions" in subsection 11(1)(k) of the FOI Act.

24 QIDC supplied a written submission on this issue, dated 12 February 1993, in the following terms:

"Sections 11 and 12 of the Queensland Industry Development Corporation Act 1985 ("QIDC Act") set out the functions and the powers of QIDC. In particular s.12 sets out the express powers of the Corporation to enable those dealing with the Corporation to satisfy themselves that the Corporation is not acting ultra vires and that it does have the various powers set out in subsection 12(2) as well as the incidental powers set out in subsection 12(1). The Corporation readily concedes that paragraphs (c) and (m) of subsection 12(2) draw a clear distinction between the powers of QIDC to lend and to invest. It is imperative that those sections make such a distinction when categorising the express powers of a body corporate, such as QIDC, as these provisions limit the Corporation's powers under the QIDC Act.

I would respectfully suggest that when considering the provisions of s.11(1)(k) of the FOI Act that the powers of QIDC are not relevant but rather, the functions of QIDC in s.11 of the QIDC Act should be considered. In particular a classification should be made of these functions and of those which might properly be described as "investment functions" within the meaning of s.11(1)(k) of the FOI Act.

I would submit that all the functions detailed in s.11 of the QIDC Act, with the exception of that contained in s.11(b), are properly the investment functions of QIDC. QIDC borrows moneys from a number of sources and lends that money to its clients. These loans are the only form of investment undertaken by QIDC apart from property, plant and equipment necessary to conduct the operations of QIDC. By way of illustration, I have enclosed a copy of the Corporation's most recent annual report and you will note at page 55 of that report how the Corporation's investment operations are categorised on a cash flow basis.

It is unfortunate that no definition of "investment functions" is provided in the FOI Act however it is the Corporation's submission that the pursuit of all functions set out in s.11 of the QIDC Act, with the exception of s.11(b), fall within the "investment functions" of the Corporation as referred to in the FOI Act.

The Corporation has interpreted the wording of the FOI Act to exempt its commercially competitive functions and in my submission this interpretation is assisted by the exemptions provided in the FOI Act ss.11(l), 11(m), 11(n) and 11(o) in relation to Queensland Investment Corporation, wholly owned subsidiaries of Queensland Treasury Corporation and Suncorp Insurance and Finance. This interpretation has been accepted by the Freedom of Information Liaison Officer from Queensland Treasury and by the Freedom of Information and Administrative Law Division of the Department of the Attorney General.

...

It may also be relevant to mention that QIDC is a nominated candidate for corporatisation. One of the principles of corporatisation is to ensure that

each Government owned enterprise ("GOC") competes on an equal basis with the private sector. Any special disadvantages of the GOC because of its public ownership will be removed, minimised or made transparent under the terms of the proposed GOC umbrella legislation.

The Corporation acknowledges that aspects of its operation in relation to Government Schemes of Assistance and Venture Capital are subject to the operation of the FOI Act. Those functions of the Corporation are not commercially competitive activities and it is respectfully submitted, are of the character of administrative function intended to be covered by the provisions of the FOI Act. However as I have already mentioned above, the Corporation's primary activity, pursuant to the objectives outlined in the QIDC Act, is that of a commercially competitive financier to Queensland industry. Statutory Corporations with similar commercial activities have been exempted from the operation of the FOI Act and I would respectfully submit that it is consistent to likewise exempt the Corporation's similar activities. This approach would appear to be confirmed by the impending GOC legislation.

I believe that the Corporation's interpretation of s.11(1)(k) of the FOI Act is consistent with Parliament's intention in passing that legislation and with the exemptions provided in s.11(1) to Corporations having similar activities."

- 25 I cannot accept the contention in the last four paragraphs quoted from QIDC's written submission that the words "investment functions" in s.11(1)(k) of the FOI Act should be construed as if they were equivalent to the words "commercially competitive activities". The words "commercially competitive activities" have actually been used by Parliament in s.11(1)(n), and could have been used in respect of QIDC if that were Parliament's intention. I cannot see that QIDC gets any assistance from paragraphs 11(1)(l), (m), (n) and (o) for a submission that the words "investment functions" are to be equated with "commercially competitive functions". Indeed, I should have thought that those provisions were evidence that Parliament had carefully differentiated between each body mentioned in s.11(1). Some are placed wholly outside the operation of the FOI Act, and some are placed partly outside and partly inside. In respect of the latter group, Parliament has again carefully differentiated between each body, giving for each body a specific and unique description of the functions or activities placed outside the FOI Act.
- 26 Nor can any assistance be derived from the assertion that QIDC is a nominated candidate for corporatisation. Parliament may in the future wish to reconsider the question of whether or not, and if so to what extent, QIDC should be subject to the FOI Act if proposals for corporatisation go ahead. In respect of Mr Christie's application for access to documents of QIDC, the task is to interpret Parliament's intention, at the time of enacting the FOI Act, as to precisely what functions of QIDC were to be outside the operation of the FOI Act and what functions of QIDC were to be subject to the FOI Act.
- 27 QIDC's submission has properly invited attention to the provisions of the *Queensland Industry Development Corporation Act 1985* (the QIDC Act), and some of those may bear on the question of the proper construction of subsection 11(1)(k) of the FOI Act. QIDC did not address any submission as to the meaning which should be accorded to the word "investment" or the phrase "investment functions", even though there are many reported cases which discuss the meaning of the word "investment", as set out below.
- 28 Mr Christie was invited to take the opportunity to put submissions to me on the meaning of

subsection 11(1)(k). He apologised for the fact that he could not afford legal representation, and explained that he was not (to use his own words) "an educated man", but he responded to my invitation by submitting a series of documents addressed to him from QIDC, which he asserted showed that QIDC always referred to the moneys advanced to him in respect of the "Lawnlea" property as a loan rather than an investment. He said that QIDC did not regard itself as an investor with him in the property, but strictly as a lender of money. Mr Christie also drew attention to several provisions in the QIDC Act in which the drafter has differentiated between QIDC's powers with respect to loans and with respect to investments. The argument as to whether any significance attaches to this for the purpose of construing the words "investment functions" in subsection 11(1)(k) is considered below.

The Meaning of "Investment Functions"

- 29 The word "investment" is not defined in the FOI Act nor in s.36 of the *Acts Interpretation Act 1954* (Qld) (which is a provision setting out the meaning which certain commonly used words and expressions are to have in all Queensland Acts, unless that meaning is displaced wholly or partly, by a contrary intention appearing in any Act).
- 30 In the Oxford English Dictionary (2nd ed.; 1989) the meaning given for the word "investment" which is most appropriate to the relevant statutory context is: "The conversion of money or circulating capital into some species of property from which an income or profit is expected to be derived in the ordinary course of business".
- 31 Superior courts in various Commonwealth jurisdictions have had occasion to consider the meaning of the word "investment" in a number of different statutory contexts, and while allowance must be made for the possibility of variations according to the objects which legislatures were seeking to achieve in different statutory contexts, there has been a remarkable consistency of judicial approach to ascribing a meaning to the word "investment".
- 32 There have been a series of English cases dating from the first half of this century considering the liability of companies to excess profits duty under the *Finance (No. 2) Act 1915* (UK). Each case has rather complex facts of its own which need not be recounted here. The Act contained a provision that in estimating the profits of a trade or business no account is to be taken of the income received from investments, except in the case of life assurance businesses and businesses where the principal business consists of the making of investments.
- 33 In *Inland Revenue Commissioners v Gas Lighting Improvement Co Limited* [1922] 2 KB 381, the Court of Appeal held that the purchase by the respondent, a petroleum company, of shares in certain foreign companies trading in petroleum, constituted an investment, so that income from the shares which was not to be taken account of in estimating profits for the purposes of the *Finance (No. 2) Act 1915* (UK). That conclusion was affirmed on appeal to the House of Lords: see *Gas Lighting Improvement Co Limited v Commissioners of Inland Revenue* [1923] AC 723. In the House of Lords, Viscount Cave L.C. said (at 729-730):

"That [the holdings of shares in the foreign companies] are investments in the ordinary sense of the term probably no one would deny. They are money put out in the shares and securities of undertakings other than the undertaking of the applicant company itself, with the expectation of receiving dividends or interest upon them; and they satisfy any one of the definitions quoted by the Master of the Rolls from well-known dictionaries and any other definition of an investment which I am able to conceive."

- 34 The definitions quoted in the judgment of the Master of the Rolls (Lord Sterndale) in the Court of Appeal (at p.388-9) were as follows:

"... so far as its business meaning is concerned, the word "investment" exactly describes what the holdings (to use a neutral word) of the respondents in these companies are. I see in the Oxford English Dictionary "investment" is defined as "The conversion of money or circulating capital into some species of property from which an income or profit is expected to be derived in the ordinary course of trade or business", and then the word is distinguished from speculation ... Another dictionary defines "investment" as the "Putting out of capital" - that is, establishing an investment in it, "for the purpose of obtaining interest for it". And Webster describes it as the "Laying out of money in the purchase of some species of property, the amount of money invested, or that in which money is invested"."

- 35 In *Liberty and Co Ltd v Commissioners of Inland Revenue* (1924) 12 Tax Cas 630, another case under the *Finance (No. 2) Act 1915* (UK), the Court of Appeal applied the judgment of the House of Lords in *Gas Lighting Improvement Co Limited v Commissioners of Inland Revenue* in concluding that the holdings of the appellant company in War Loan and other British Government securities were investments, for the purpose of computing the applicant's liability to excess profits duty.

- 36 The judgment of the House of Lords in *Inland Revenue Commissioners v Gas Lighting Improvement Co Limited* was followed by Knox CJ in the High Court of Australia in *George Morgan and Co Limited v Federal Commissioner of Taxation* (1927) 40 CLR 463, a case arising under the *War-time Profits Tax Assessment Act 1917* (Cth), a statute which so far as one can judge from the report seems to have mirrored those provisions of the *Finance (No. 2) Act 1915* (UK) which were under consideration in the line of cases referred to above. Knox CJ held that sums of money deposited by the appellant company with a bank in order to earn interest were "investments" within the meaning of s.15(16) of the *War-time Profits Tax Assessment Act* (1917). He said (at p.465):

"In my opinion, the deposits in question were undoubtedly investments within the ordinary meaning of that word, and no reason exists for attributing to the word "investments" in sub-sec. 16 of sec. 15 any other than its ordinary meaning. In Inland Revenue Commissioners v Gas Lighting Improvement Co ... Lord Sterndale M R referred to a dictionary definition of the meaning of the word "investment" as "the putting out of capital ... for the purpose of obtaining interest for it", and on appeal to the House of Lords ... Lord Sumner expressed the opinion that in the corresponding section of the English Act the word should be given its ordinary business meaning. The meaning which has, in my experience, been attributed to the word in New South Wales among lawyers and men of business coincides with the definition above referred to, and, taking that as the meaning of the word, I feel no doubt but that placing money on fixed deposit at interest with a bank is an investment."

- 37 In *The Commissioner of Taxes v The Australian Mutual Provident Society* (1903) 22 NZLR 445, the New Zealand Court of Appeal considered the tax consequences of a practice adopted by the respondent insurance company of applying the surrender value (or part thereof) of a life policy in payment of overdue premiums, the money so applied, with interest thereon, becoming a charge on the money payable under the policy and the

surrender value thereof. The court had to determine whether the interest so charged was interest from an "investment" within the meaning of s.55 of the *Land and Income Assessment Act 1900* (NZ). One of the three majority judges, Edwards J, said (at p.456-7):

"There is no statutory definition of the word "investment". The word must therefore be read in its popular meaning. That popular meaning embraces, I think, every mode of application of money which is intended to return interest, income, or profit. Money employed as capital in a business is, in popular language, money invested in a business; money used for the purchase of negotiable instruments is an investment; so also money lent upon a bond or other personal security; so money deposited with a bank or other financial institution at interest.

Money advanced by the defendant's society upon the security of its own policies is therefore, in my opinion, clearly an investment."

- 38 In *The Crown v National Mutual Life Association of Australasia Ltd* (1922) 25 WAR1, a Full Court of the Supreme Court of Western Australia had to consider the revenue implications of a practice of the defendant life assurance company of granting loans at interest to certain of its members in Western Australia on the security of their policies. A majority of the Court held that loans on members' policies were investments for the purposes of s.8(a) of the *Dividend Duties Act Amendment Act 1918* (WA), by which it was provided that every life assurance company shall pay duty upon the amount of interest on its investments received in any year (it was held that the interest capitalised was interest received within the meaning of that provision). Northmore J, delivering the majority judgment, said (at p.6-7):

"[The loans to members] consist of monies actually advanced out of its funds by the company. The amounts are advanced by way of loan at interest, and it is difficult to understand how the nature of the security taken for the loan can determine whether such a transaction is or is not an investment. A man may lend his money on personal, or on gilt edged security, but in either case the loan is an investment. In my opinion, the loans on members' policies are investments in every sense of the word, and they are, in fact, a particularly safe form of investment."

- 39 Three Australian cases from more recent times are also worth noting. A clause in a will giving the trustees of an estate power to invest the trust funds, was construed by Helsham J of the New South Wales Supreme Court in *In the Will of Sheriff; In the Will of Lawson* [1971] 2 NSWLR 438. Helsham J said [at p.442]:

"... the hearing before me was argued solely upon the basis of the meaning of the word "invest" as it was used in the wills relevant here ... Investment of trust funds will ordinarily mean the laying out of trust monies in acquisition of property with the object or purpose of obtaining some return by way of income or pecuniary return for the benefit of those ultimately entitled. In its dictionary meaning the word "invest" in relation to its monetary context is, in the revised third edition of the Shorter Oxford Dictionary, given a primary meaning as follows: "To employ (money) in the purchase of anything from which interest or profit is expected". There is added a colloquial meaning: "to lay out money"."

His Honour held that trust funds must be used for an income producing or profit purpose,

and therefore the use of trust funds for the purchase of a property in which a beneficiary was to reside, was not an authorised use of trust funds.

- 40 In *Melville v Mutual Life and Citizens' Insurance Co Ltd* (1980) 47 FLR 201, Lockhart J in the Federal Court of Australia had to consider the meaning of the word "invest" in the course of construing subsection 39(2) of the *Life Insurance Act* 1945 (Cth) which provided that the assets of a statutory fund of a company registered under the Act "... shall not, without the sanction of the Court, be invested directly or indirectly in any share or interest in any company or undertaking carrying on life assurance business whether in Australia or elsewhere". Lockhart J said (at p.206-7):

"Invest" is not defined by the Act. It is defined by the Shorter Oxford English Dictionary, so far as relevant, as meaning: "To employ (money) in the purchase of anything from which interest or profit is expected ... to make an investment ... colloq. to lay out money". In Wharton's Law Lexicon, the relevant meaning given is: "To lay out money." ...

No doubt Parliament chose to use the word "invested" in s.39(1) because the section is dealing with the use of the assets of a statutory fund of a company carrying on life insurance business; and it is assumed that the company will use it prudently for the purpose of obtaining a return by way of income or some other pecuniary gain for the benefit of policy holders. It is in this sense that the word is used in s.39(1) and (2)."

- 41 In the recent Queensland case of *Kerr v Visa Vacations Pty Ltd* (1986) 4 ACLC 614, Dowsett J had to consider the meaning of the term "investment contract" in paragraph (b)(iii) of the definition of "prescribed interest" in the *Companies (Qld) Code*, in a context where it was alleged that s.169 of the Code had been breached by the defendant making offers to the public of a scheme for holiday accommodation. Dowsett J said (at p.621-622):

"Now it is of the substance of [an investment] contract that there be an investment of money. The word "invests" has been the subject of judicial consideration on numerous occasions. In Re Wragg (1919) 2 Ch.58 Lawrence J considered an authorisation in a will permitting the trustees to "invest any monies forming part of the trust estate in or upon such investments 'of whatever nature and wheresoever' as his trustees should in their absolute and uncontrolled discretion think fit ...". At page 64 his Lordship said:

"Without attempting to give an exhaustive definition of the words 'invest' and 'investment' I think that the verb 'to invest' when used in an investment clause may safely be said to include as one of its meanings 'to apply money in the purchase of some property from which interest or profit is expected and which property is purchased in order to be held for the sake of the income of which it will yield'; whilst the noun 'investment' when used in such a clause may safely be said to include as one of its meanings 'the property in the purchase of which the money has been so applied'. ..."

[His Honour also referred to in *Re Power's Will Trusts* (1947) Ch.572 which is to like effect as *In the will of Sheriff*, cited above. His Honour also set out the passage from Lockhart J's judgment in *Melville v MLC* which has been

set out above.] ...

Although as the extract from The Shorter Oxford English Dictionary recognises, the word "invest" has a broad colloquial meaning which might be sufficient to encompass any outlay of money, I see no warrant for construing the definition of "investment contract" as using the notion in such a colloquial way. It seems likely to me that the word is used in the more correct sense of using money for the purpose of producing profit, not a concept which would be broad enough to encompass paying in advance for a holiday. For this reason, I consider that the definition of "investment contract" would not extend to encompass the arrangement here in question. One does not normally speak of a person who pays for a holiday as an "investor". "

- 42 The meaning of the term "investment contract" has received extensive judicial consideration in North America where the United States Federal Government, the Federal Government of Canada, and almost every State legislature in the USA and provincial legislature in Canada has enacted legislation for the protection of members of the public who may invest in public offerings. The history of such statutes is briefly reviewed by the Supreme Court of Canada in *Pacific Coast Coin Exchange of Canada et al. v Ontario Securities Commission* (1977) 80 DLR (3d) 529 which considered the meaning of the term "investment contract" in the Securities Act, RSO 1970, of the Province of Ontario. In that case, the Supreme Court of Canada approved a meaning for the term "investment contract" that had come to be consistently accepted and applied in both State and Federal jurisdictions of the United States of America:

"An investment contract thus came to mean a contractual scheme for the "placing of capital or laying out of money in a way intended to secure income or profit from its employment"." (See per de Grandpré J at page 539; followed by Anderson J in *Re Ontario Securities Commission and C & M Financial Consultants Ltd* (1979) 23 OR (2d) 378 at p.381.)

- 43 With the guidance obtained from these cases, I consider that the words "investment functions" in the context of s.11(1)(k) of the FOI Act must be construed as meaning those functions of the QIDC which involve the laying out of money, or the placing of capital, with the purpose or intention of obtaining a return of income or profit from the employment of those funds. According to that meaning, the transaction whereby QIDC advanced a substantial sum of money to Mr & Mrs Christie, upon the security of a registered mortgage over the property "Lawnlea" at a commercial rate of interest, clearly falls within the investment functions of QIDC.
- 44 It is possible to argue that some of the dictionary definitions and the cases referred to above would support a slightly more limited meaning of the word "investment", i.e. a laying out of money to acquire some form (or species) of property with the intention of obtaining income or profit. That may have been the distinction Mr Christie had in mind when he submitted (as noted in paragraph 28 above) that QIDC's documents always referred to the transaction as a loan rather than an investment, i.e. that an investor must take some form of ownership interest in the income producing property. I do not think that it is a necessary requirement of the word "investment" that the person laying out money must acquire some form of ownership of income or profit producing property. In several of the cases discussed above, it was accepted that a loan intended to return interest was an investment (see *The Crown v National Mutual Life Association of Australasia Ltd*, noted in paragraph 38 above; *The Commissioner of Taxes v The Australian Mutual Provident Society*, noted in paragraph 37

above; *George Morgan & Co Ltd v Federal Commissioner of Taxation*, noted in paragraph 36 above; and *Liberty & Co Ltd v Commissioners of Inland Revenue*, noted in paragraph 35 above). In this case at any event, QIDC had acquired the security of a registered first mortgage over the property formerly owned by Mr & Mrs Christie.

45 It remains to deal with the argument foreshadowed in the last two sentences of paragraph 28 above, that a more restricted meaning of the word investment is appropriate when regard is had to various provisions of the QIDC Act itself. There are three areas in the QIDC Act where the drafter appears to have drawn a distinction between the lending of money by QIDC and the investment of moneys by QIDC. The first is in s.4 in the definition of the term "financial arrangements", paragraph (c) of which refers to "the lending of money" and paragraph (m) of which refers to "the investment of moneys". I do not think any significance can be placed on this, since the definition appears aimed at casting its sphere of operation as widely as possible. Many of the activities referred to in other paragraphs of the definition would necessarily involve the investment of moneys (as that term has been explained above), and the degree of overlap between the various paragraphs of the definition tells against any intention to draw a strict distinction between the lending of money and the investment of moneys.

46 Section 12 of the QIDC Act provides as follows:

"12. Powers. (1) The Corporation has the power to do, in Queensland or elsewhere, all things necessary or convenient to be done for or in connection with the discharge of its functions or the attainment of its objectives.

(2) Without limiting the generality of subsection (1), the powers of the Corporation referred to in that subsection include the following powers:

...

(c) to lend moneys on such terms and conditions and upon such security as it things fit;

...

(m) to invest moneys;"

47 The other paragraphs of subsection 12(2) to a large extent mirror the paragraphs of the definition of "financial arrangements" already referred to, and similar considerations apply to those previously noted. I think it is understandable that there is likely to be some degree of overlap in a provision setting out the powers of a Corporation, where a drafter is generally aiming to be as comprehensive as possible to guard against any prospect that an anticipated activity of the Corporation might be held to be *ultra vires*. In this regard, I accept what was submitted by QIDC in the first paragraph of their written submission quoted at paragraph 24 above, and I do not think that any significance can be attached to the fact that the drafter saw fit to mention separately among the list of specific powers granted to QIDC, the power to lend money and the power to invest moneys.

48 Part 4 of the QIDC Act contains a number of provisions which attach conditions to the exercise by QIDC of some of its powers, and again loans by QIDC are apparently treated separately from investments by QIDC. Section 45 of the QIDC Act is in the following terms:

"45. Loans by the Corporation. (1) Except as prescribed by section 42(3),

the Corporation for the purposes of exercising any of its powers and authorities or discharging any of its functions and duties under this Act, may and is hereby authorised to make loans or advances to, or enter into any other financial arrangements with, a business undertaking where the Corporation assumes the risks of a lender, on such terms and conditions as the Board thinks fit.

(2) Unless otherwise approved by the Governor in Council on the recommendation of the Treasurer, the Corporation is not authorised to enter into financial arrangements, such as are referred to in subsection (1), with a business undertaking for a sum or sums greater in the aggregate than 10 per centum of the equity of the Corporation."

49 Section 48 of the QIDC Act provides as follows:

"48. Investments by the Corporation. (1) The Corporation, for the purpose of exercising any of its powers and authorities and discharging any of its functions and duties under this Act, is hereby authorised to invest in, or undertake any other financial arrangement with, a business undertaking whereby the Corporation assumes the risk of ownership, on such terms and conditions as the Board thinks fit.

(2) Unless otherwise approved by the Governor in Council on the recommendation of the Treasurer, the Corporation is not authorised to make any investments or other financial arrangements as prescribed in subsection (1) with a business undertaking for a sum or sums greater in the aggregate than five per centum of the equity of the Corporation.

(3) Unless otherwise approved by the Governor in Council on the recommendation of the Treasurer, the total amount of any such investments or other financial arrangements undertaken by the Corporation pursuant to this section shall not exceed the equity of the Corporation."

50 I think the significance of the apparent distinction between loans and investments is somewhat undermined by the express mention in both s.45(1) and s.48(1) of the term "any other financial arrangement", which as noted above was defined to include both the lending of money, the investing of money and a great many other activities beside. I think that when properly understood in the context of Part 4, the true purpose of these provisions is:

- (a) in the case of s.45, to limit the authority of QIDC (without the approval of the Governor in Council on the recommendation of the Treasurer) to enter into any financial arrangement with a business undertaking where QIDC assumes the risk of a lender, to sums less in the aggregate than 10% of the equity of QIDC; and
- (b) in the case of s.48, to limit the authority of QIDC (without the approval of the Governor in Council on the recommendation of the Treasurer) to invest in a business undertaking whereby QIDC assumes the risk of ownership, to situations where any one investment does not exceed an amount equivalent to 5% of the equity of QIDC, and the total amount of such investments does not exceed the equity of QIDC.

51 I think s.48 is to be read as applying to a particular kind of investment, i.e. one where QIDC assumes the risk of ownership, and there is no warrant for drawing any implication that the word "investment" should consequently be given a more restricted meaning when it is used,

in relation to QIDC, in a more general context (i.e. one not suggestive of any such restriction) such as s.11(1)(k) of the FOI Act.

52 Accordingly, I see no reason to construe s.11(1)(k) other than according to the meaning which I have attributed to the words in paragraph 43 above. It follows that the FOI Act does not apply to those documents to which Mr Christie was denied access, being the rural loan facility files.

53 It by no means follows that QIDC was correct in asserting in the third paragraph of its submission quoted at paragraph 24 above, that all the functions detailed in s.11 of the QIDC Act, with the exception of that contained in s.11(b), are properly the investment functions of QIDC. The concession is rightly made in respect of s.11(b), but one need only read the other functions listed in s.11 to see that they do not necessarily all fall within the term "investment functions", as it has been explained above. Section 11 of the QIDC Act is in the following terms:

"11. Functions. In the pursuit of the Corporation's objectives, the functions of the Corporation shall be as follows:-

- (a) to provide or assist in the provision of financial resources or other services to business undertakings;*
- (b) to administer such schemes of structural adjustment, debt reconstruction or other financial support for any business undertaking or class of business undertaking as may be approved from time to time by the Governor in Council;*
- (c) to make recommendations in relation to the granting of guarantees to business undertakings on behalf of the Government of Queensland;*
- (d) to engage or participate in the establishment or expansion of economic activity either alone or with any other business undertaking;*
- (e) to bring together or co-ordinate financial resources for private investment and to increase the availability of capital and export finance to business undertakings;*
- (f) to promote ownership of business undertakings by persons resident or incorporated in Queensland;*
- (g) to increase the opportunities for persons resident or incorporated in Queensland to invest and participate in the development of business undertakings; and*
- (h) to operate as a commercial business undertaking and to generate profits for the public benefit."*

54 Taking paragraph 11(a) by way of example, if QIDC were itself to provide financial resources to a business undertaking with the intention of obtaining a return of interest, income or profit, that would clearly fall within the description "investment functions". However, if QIDC were "... to provide ... other services to business undertakings", such as

corporate advisory services, that would not constitute an investment function of QIDC. If, pursuant to paragraph 11(c), QIDC investigated the financial standing of a business undertaking in order to make a recommendation as to whether the Government of Queensland should grant a guarantee to the business undertaking, that would not seem to fall within the description of an investment function of QIDC. Similar qualifications may apply to other paragraphs of s.11 of the QIDC Act.

- 55 I also wish to record my disagreement with a position taken by QIDC during the course of my review. QIDC was slow to comply with my request that the documents to which Mr Christie had sought access be produced to me for inspection. In a letter to me dated 12 February 1993, QIDC said:

"... If the Corporation is able to satisfy you that the documents in question are covered by that section then the entire file of Mr and Mrs Christie pertaining to their rural loan need not be reviewed by you. With respect, there seems little point in copying an entire file when the content of the file is irrelevant to the initial question at hand.

If the Corporation is unable to satisfy you that, on a proper construction of s.11(1)(k) the rural loan facility of Mr and Mrs Christie is not covered by that section, then a copy of the file will be provided to you with our submission as to which documents contained in that file are exempt under the applicable provisions of Part 3, Division 2 of the FOI Act. ..."

- 56 In response to telephone calls insisting on the production of the documents to me, QIDC wrote again to me by letter dated 25 February 1993 in the following terms:

"... I note despite my submissions to you your office still requires access to, or copies of, all documents covered by Mr and Mrs Christie's initial request for access to documents made or purported to be made in reliance upon s.25 of the Freedom of Information Act 1992 ("the Act"), and in respect of which access has been refused by the Corporation.

As you have conceded in your correspondence to the Corporation dated 4 February 1993 the initial question to be decided is whether or not you have jurisdiction to deal with Mr and Mrs Christie's application. The Corporation agrees that this question is fundamental, not only to the specific application at hand, but also to the application of the provisions of the Act to the Corporation generally.

At the risk of repetition it is the Corporation's submission, that this jurisdictional question is centred upon the interpretation of s.11(1)(k) of the Act and as such the question before your office is not one as to the application of the Act to individual documents of the Corporation, but rather the application of the Act to the Corporation per se in respect to its investment functions. In other words; what are the "investment functions" of the Corporation? Once the meaning of "investment functions" is determined it will be a simple matter to decide whether you have jurisdiction to review the Corporation's decision pursuant to s.71(1)(b) of the Act.

With respect, your proposal for dealing with this jurisdictional question requires the Corporation to justify its general exemption under s.11(1)(k) of the Act by reference to each individual document in question. I would

submit that this approach may be better suited to exemptions claimed under Division 2 of Part 3 of the Act rather than the "blanket" exemptions provided in s.11. ..."

57 Again I insisted on production of the documents for my examination. By letter dated 3 March 1993, I wrote to QIDC in the following terms:

"... The last paragraph on page 2 of my letter to Mr Solomon dated 4 February 1993 [reproduced at paragraph 7 above] correctly states the preliminary issue for determination in my review. Mr Solomon's attempts to redefine the issue in such a manner as to render irrelevant the actual documents to which Mr Christie sought access, are unconvincing. My review was triggered by a request for access to particular documents, which request was refused by QIDC. The question is whether Mr Christie is entitled under the FOI Act to access to those documents. That in turn raises the issue of whether those documents relate to the investment functions of QIDC. Of course, the crucial issue is the proper construction of the words "investment functions" in s.11(1)(k) of the FOI Act, but with all due respect, it cannot seriously be asserted that the actual documents to which Mr Christie sought access are totally irrelevant to my review. ..."

58 I reiterate that it is not possible to take a blanket approach to the application of the FOI Act to documents held by QIDC, of the kind initially urged by QIDC in the letters quoted above. If documents in the possession of or under the control of QIDC do not relate to QIDC's investment functions, they are subject to the FOI Act. Rarely will it be possible to confidently assert that all documents on a particular file must relate to QIDC's investment functions. Indeed, not all documents which relate (in the broadest sense of that word) to the investment functions of QIDC will necessarily fall outside the operation of the FOI Act, because of the limiting effect of subsection 11(2) of the FOI Act: only those documents which are received, or brought into existence, by QIDC in performing a function that involves the laying out of money (or the placing of capital) with the purpose or intention of obtaining a return of income or profit from the employment of those funds, fall outside the FOI Act.

59 This point can be illustrated by reference to two documents which appeared on one of QIDC's files when produced to me, but which would not have been on that file at the time QIDC made its decision refusing Mr Christie access. They are a letter from the Parliamentary Commissioner for Administrative Investigations setting out the detail of a complaint lodged by Mr Christie, and QIDC's response. Although both documents relate to the rural loan facility, I do not think it can be said that they were received or brought into existence by QIDC in performing an investment function. The commercial relationship between Mr & Mrs Christie and QIDC had been terminated more than a year previously when, the loan from QIDC was discharged. Rather QIDC was being asked to account for administrative action taken in respect of the rural loan facility. While it would be improper to express a concluded view, since it is not an issue in this application and QIDC has not addressed any argument to me in respect of it, I think it is likely that those two documents are not excluded from the FOI Act by s.11(1)(k) (whether or not they may be exempt from disclosure under other provisions of the FOI Act itself). Thus if Mr Christie were to make a fresh application under the FOI Act for the same files, QIDC may have to deal with those two documents on the basis that they do not fall outside the operation of the FOI Act. There is little likelihood of Mr Christie making such an application since the member of the Parliamentary Commissioner's office dealing with Mr Christie's complaint will advise Mr Christie of the content of those two documents. I mention this merely to illustrate the fallacy in the approach initially urged by QIDC in this case.

60 I have found that QIDC was entitled to refuse Mr Christie access to the relevant documents, in reliance on s.11(1)(k) of the FOI Act. Though in a sense, I have (in the terms of s.89(1)(a) of the FOI Act) affirmed the decision of which review was sought, I think the correct legal position is that having investigated the jurisdictional issue posed at paragraph 7 above, I am satisfied that I have no jurisdiction to deal with Mr Christie's application for review dated 15 January 1993 for the reason that the FOI Act does not apply to the documents to which he sought access. Accordingly, my decision is framed in terms of s.77 of the FOI Act as a decision not to review, or not to review further, the decision of QIDC in relation to which an application has been made by Mr Christie under s.73 of the FOI Act.

.....
F N ALBIETZ
INFORMATION COMMISSIONER