OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 04/2001
Application L 7/00
Application S 49/00

L 7/00
Participants:

MICHAEL GILL
Applicant

BRISBANE CITY COUNCIL
Respondent

S 49/00
Participants:

BRISBANE CITY COUNCIL
Applicant

CRIMINAL JUSTICE COMMISSION
Respondent

MICHAEL GILL
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - report on investigation into alleged misconduct and related documents - whether communications made for the dominant purpose of obtaining legal advice or assistance or for use in anticipated legal proceedings - application of s.43(1) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - whether disclosure could reasonably be expected to prejudice the investigation of a possible contravention of the law in a particular case - whether disclosure could reasonably be expected to enable the existence or identity of a confidential source of information to be ascertained - whether disclosure could reasonably be expected to prejudice the effectiveness of a lawful method or procedure for investigating or dealing with a possible contravention of the law - whether disclosure could reasonably be expected to prejudice a system or procedure for the protection of persons - application of s.42(1) of the *Freedom of Information Act 1992* Qld.

ii

FREEDOM OF INFORMATION - refusal of access - record of interview with Council officer subject to investigation - whether disclosure could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of its personnel - whether information communicated in confidence - application of s.40(c) and s.46(1) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - record of interview with third party - whether information concerning the personal affairs of the third party - whether its disclosure would, on balance, be in the public interest - whether disclosure could reasonably be expected to prejudice the effectiveness of a method or procedure for the conduct of, or prejudice the attainment of the objects of, a test, examination or audit by an agency - whether disclosure would disclose information that has a commercial value to the agency or information concerning the business, professional, commercial or financial affairs of the agency - application of s.44(1), s.40(a), s.40(b), s.45(1)(b) and s.45(1)(c) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - observations by Information Commissioner on the legal and ethical obligations of a respondent agency in the conduct of a review under Part 5 of the *Freedom of Information Act 1992* Qld - obligation to rely only on exemption provisions that are honestly believed, on reasonable grounds, to be applicable to the matter in issue - obligation to disclose to the Information Commissioner all relevant evidence in the possession or control of, or known to, the agency, whether favourable to the agency's case or not - obligation to assist the Information Commissioner to arrive at the correct decision required by law in the application of the *Freedom of Information Act 1992* Qld to the matter in issue, and not to place undue emphasis on defeating the application.

Freedom of Information Act 1992 Qld s.28(1), s.40(a), s.40(b), s.40(c), s.42(1)(a), s.42(1)(b), s.42(1)(e), s.42(1)(h), s.43(1), s.44(1), s.45(1)(b), s.45(1)(c), s.46(1)(a), s.46(1)(b), s.81, s.88(2)
Criminal Justice Act 1989 Qld s.33(4)

Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners (No. 2) [1972] 2 QB 102
Anderson and Australian Federal Police, Re (1986) 4 AAR 414
Attorney-General (NT) v Kearney (1985) 158 CLR 500
Attorney-General (NT) v Maurice (1986) 161 CLR 475
Australian Competition & Consumer Commission v Australian Safeways Stores Pty Ltd & Ors (1998) 153 ALR 393
"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Bessey and Australian Postal Corporation, Re (2000) 60 ALD 529
Cairns Port Authority and Department of Lands, Re (1994) 1 QAR 663
Cannon and Australian Quality Egg Farms Limited, Re (1994) 1 QAR 491
Cimino and Director-General of Social Services, Re (1982) 4 ALN N106a
Collie and Australian Securities and Investments Commission Re (Commonwealth Administrative Appeals Tribunal, Senior Member Beddoe, No. Q1997/1255, 10 September 1999, unreported)
Commissioner, Australian Federal Police v Propend Finance Pty Ltd

(1997) 71 ALJR 327

DECISION

1. In application for review no. L 7/00, I set aside the decision under review (being the decision made by Mr Askern on behalf of the Brisbane City Council on 21 January 2000). In substitution for it, I decide that:

   (a) folio 106 is exempt matter under s.43(1) of the *Freedom of Information Act 1992* Qld;
   (b) the matter in issue specified in paragraph 92 of my accompanying reasons for decision is exempt matter under s.44(1) of the *Freedom of Information Act 1992* Qld; and
   (c) the balance of the matter in issue (which is identified in paragraph 14 of my accompanying reasons for decision) does not qualify for exemption from disclosure to the applicant under the *Freedom of Information Act 1992* Qld.

2. In application for review no. S 49/00, I decide to vary the decision under review (being the decision made by Mr Evans on behalf of the Criminal Justice Commission on 3 February 2000) by finding that the matter in issue specified in paragraph 92 of my accompanying reasons for decision is exempt matter under s.44(1) of the *Freedom of Information Act 1992* Qld, but that the balance of the matter in issue does not qualify for exemption from disclosure to the applicant under the *Freedom of Information Act 1992* Qld.

Date of decision: 6 June 2001

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F N ALBIETZ
INFORMATION COMMISSIONER

TABLE OF CONTENTS

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REASONS FOR DECISION

Background

1. In application for review no. L 7/00, Mr Gill seeks review of the decision by the Brisbane City Council (the Council) to refuse him access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to documents relating to Mr Gill's allegation that a complaint he made about a neighbour's dog attacking him was not properly handled by a Council officer. Application for review no. S 49/00 is a 'reverse FOI' application by the Council objecting to a decision by the Criminal Justice Commission (the CJC) to give Mr Gill access, under the FOI Act, to a copy of one of the documents to which the Council had refused Mr Gill access. The Council has relied on 12 exemption provisions of the FOI Act in its objection to disclosure of the matter in issue.

2. In 1996, Mr Gill complained to the Council (initially by telephone, but subsequently by letter dated 14 November 1996) that on 25 October 1996 he had been attacked by a dog which was being taken for a walk on a leash by the dog's owner. Mr Gill described it as a

forceful attack, in which he was lucky not to sustain any physical injury. A Council officer attended on Mr Gill in person to discuss his complaint, and the Council officer subsequently interviewed the owner of the dog. The Council officer apparently considered that the matter had been resolved.

3. Some two and a half years later, on 7 March 1999, Mr Gill allegedly saw the same dog involved in a dog fight at his local shopping centre, while the dog was being walked by its owner. On 15 March 1999, Mr Gill wrote to the CJC complaining of a "deliberately corrupted process" in the Council's handling of his earlier complaint, apparently on the basis of his belief that the identity of the dog owner prompted the Council officer to vary normal Council procedures for dealing with complaints of that kind, so as to accord special treatment to the dog owner. The CJC initially declined to deal with the complaint, informing Mr Gill (by letter dated 17 March 1999) that the conduct alleged by him would not, if substantiated, constitute official misconduct (as defined in the *Criminal Justice Act 1989* Qld) on the part of any Council officer, and suggesting that Mr Gill consider seeking mediation, through the Dispute Resolution Centre, of his differences with the dog owner. However, Mr Gill persisted. On 4 June 1999, he wrote to the Chief Executive Officer (CEO) of the Council, again complaining of a "deliberately corrupted process" in the handling of his 1996 complaint. Mr Gill also wrote to the CJC on 8 June 1999, insisting that it reconsider the stance taken in its letter to him dated 17 March 1999.

4. On 11 June 1999, the CEO of the Council referred Mr Gill's complaint for investigation by the Corporate Investigation Unit (the CIU) of the Council. On the same day, there was communication between the CIU and the CJC. The CJC has given Mr Gill access, under the FOI Act, to a copy of a facsimile transmission dated 11 June 1999 to the CJC from the CIU's principal investigator, Mr R J Clarke, which states: *It is my intention to establish the details of the original complaint and then take it further IF the Commission requires it*. The CJC verbally advised the CIU to carry out an investigation, and report to the CJC on the results.
That was confirmed in a letter dated 22 June 1999 from the CJC to the CIU (a copy of which has been disclosed to Mr Gill by the CJC, under the FOI Act). Mr Clarke conducted an investigation (which included interviewing Mr Gill and the dog owner) and prepared a report dated 16 July 1999 (the Report) which was forwarded to the CJC, and to the CEO and other senior officers of the BCC.

5. In a memorandum dated 29 July 1999 (to which the CJC subsequently gave Mr Gill access under the FOI Act), a Senior Legal Officer of the CJC analysed Mr Gill's complaint and the investigation report obtained from the CIU, and concluded that Mr Gill's complaint was not substantiated. In a letter to Mr Gill dated 13 August 1999, the CJC informed Mr Gill of the reasons for its decision to take no further action in respect of his complaint. Mr Gill subsequently wrote to both the CJC and the Council, refusing to accept the findings of the investigation and setting out further contentions. However, both the Council and the CJC informed Mr Gill in writing that they regarded the matter as finalised.

FOI application to the Council

6. By an FOI access application to the Council dated 14 November 1999, Mr Gill sought:

> *Copies of all documents relating to my complaint about a dangerous dog at* [address of owner]. *This includes the records of how my original complaint was handled in 1996 and all subsequent Council records including a copy of the investigations carried out both in 1998 and 1999 when I raised the matter again following a further incident involving the dog in question.*

7. By letter dated 7 January 2000, Mr P Wesener of the Council agreed to release some documents to Mr Gill, but decided that all other responsive documents held by the Council were exempt from disclosure under s.43(1) of the FOI Act (the legal professional privilege exemption).

8. By an undated application (received at the Council prior to 21 January 2000), Mr Gill sought internal review of Mr Wesener's decision. By letter dated 21 January 2000, Mr D Askern, Manager of the Brisbane City Legal Practice, informed Mr Gill that he had decided to uphold the decision to refuse the applicant access to the matter in issue under s.43(1) of the FOI Act. By letter dated 8 February 2000, Mr Gill applied to me for review, under Part 5 of the FOI Act, of Mr Askern's decision.

Council's 'reverse-FOI' application

9. By letter dated 24 November 1999, Mr Gill made an FOI access application to the CJC for all documents on the CJC complaint investigation file concerning his complaint to the CJC. In accordance with s.51 of the FOI Act, the CJC consulted the Council to ascertain its position in respect of documents provided to the CJC by the Council. By letter dated 14 December 1999, Mr Wesener advised that the Council objected to the disclosure of the Report on the ground that it was exempt under s.43(1) of the FOI Act. By letter dated 5 January 2000, Mr R Kenzler of the CJC informed Mr Gill of his decision to grant him access to some 15 documents (comprising 49 pages), but to refuse him access to one document (the Report) on the ground that it was exempt matter under s.43(1) of the FOI Act.

10. Mr Gill sought internal review of Mr Kenzler's decision. The internal review was undertaken by Mr R A Evans, the CJC's Official Solicitor, who decided on 3 February 2000 that the Report did not qualify for exemption under s.43(1) of the FOI Act. Mr Evans informed the Council that:

> *It is my opinion that this document is merely a report of an investigation only and does not constitute legal advice. It does not appear that the document was brought about for the "dominant purpose" of providing legal advice and in fact contains no legal advice. Further, the fact that the report was prepared by a lawyer, or requested by or provided to a lawyer, does not automatically mean the document constitutes legal advice and therefore attracts legal professional privilege.*

11. By letter dated 25 February 2000, the Council applied to me for review, under Part 5 of the FOI Act, of Mr Evan's decision, stating that the Council maintained its position that the Report was exempt under s.43(1) of the FOI Act.

12. As the Report is a document in issue in both applications for review, I have decided to deal with the two reviews together.

External review process

13. Copies of the Report, and other documents to which the Council refused Mr Gill access, have been obtained and examined. I have also examined the documents to which the Council and the CJC gave Mr Gill access, in order to understand the chronology of relevant events, and the extent of the explanation given to Mr Gill for finding that no action was warranted in respect of his 1999 complaints.

14. The documents in issue in this review are:

    (a) the Report (folios 30-36) and attachments to the Report, comprising letters from Mr Gill to the Council, and material prepared by the relevant Council officer in the course of dealing with Mr Gill's 1996 complaint (folios 13-28);
    (b) working papers of the CIU (folios 5-7, 9-11, 117);
    (c) a record of information gathered by Mr Clarke of the CIU from the owner of the dog (folio 12);
    (d) a letter from the CJC to Mr Clarke dated 13 August 1999 (folio 86);
    (e) a one page "report" by Mr Clarke to the CEO of the Council dated 16 August 1999 (folio 87);
    (f) e-mails to and from Mr Askern dated 13 September 1999 and 13 October 1999 (folios 106 and 110 respectively).

15. By letter dated 9 August 2000, the Deputy Information Commissioner conveyed to the Council his preliminary view that the matter in issue did not qualify for exemption under s.43(1) of the FOI Act. In the event that it did not accept the Deputy Information Commissioner's preliminary view, the Council was invited to lodge a written submission and/or evidence in support of its case for exemption.

16. By letter dated 7 September 2000, the Council advised that it did not accept that preliminary view, and set out written submissions in support of its case. No evidence was lodged in support of its case. The Council stated that it wished to claim that the matter in issue is exempt from disclosure under 11 additional exemption provisions of the FOI Act, not previously claimed. The Council asserted that:

    (a) all of the matter in issue is exempt from disclosure to the applicant under s.42(1)(a), s.42(1)(b), s.42(1)(e), s.42(1)(h) and s.43(1) of the FOI Act; and, in the alternative
    (b) parts of the Report are exempt as follows:
        (i) section headed "Discovery Interview with Local Laws Manager" (folios 34-35), claimed as exempt under s.40(c) and s.46(1) of the FOI Act; and
        (ii) section headed "Interview with Owner of the Dog" and CIU file note (folio 12), claimed as exempt under s.44(1), s.40(a), s.40(b), s.42(1)(e), s.45(1)(b) and s.45(1)(c) of the FOI Act.

17. Staff from my office consulted the owner of the dog regarding the Council's s.44(1) claim. The owner advised, by letter received on 23 January 2001, that she objected to the disclosure to Mr Gill of information concerning her.

18. In making my decision, I have taken into account the following:

    - the contents of the matter in issue;
    - the contents of the documents to which Mr Gill was given access, under the FOI Act, by the Council and by the CJC;
    - the initial decisions of the Council and the CJC (dated 7 January 2000 and 5 January 2000, respectively);
    - the internal review decisions of the Council and the CJC (dated 21 January 2000 and 3 February 2000, respectively);
    - the letter from Mr Askern of the Council to Mr Gill, dated 1 February 2000;
    - the applications for external review from the applicant and the Council (dated 8 February 2000 and 25 February 2000, respectively);

- written submissions on behalf of the Council, dated 7 September 2000; and
- written submission from the owner of the dog, dated 23 January 2001.

Application of s.43(1) of the FOI Act

19. In its initial and internal review decisions (and in its objection lodged with the CJC), the Council claimed that all of the matter in issue qualifies for exemption under s.43(1) of the FOI Act, which provides:

> ***43.(1)*** *Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.*

20. Following the judgments of the High Court of Australia in *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 74 ALJR 339, the basic legal tests for whether a communication attracts legal professional privilege under Australian common law can be summarised as follows. Legal professional privilege attaches to confidential communications between a lawyer and client (including communications through their respective servants or agents) made for the dominant purpose of -

(a) seeking or giving legal advice or professional legal assistance; or
(b) use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.

Legal professional privilege also attaches to confidential communications between the client or the client's lawyers (including communications through their respective servants or agents) and third parties, provided the communications were made for the dominant purpose of use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.

21. There are qualifications and exceptions to this statement of the basic tests, which may, in a particular case, affect the question of whether a document attracts the privilege, or remains subject to the privilege; for example, the principles with respect to waiver of privilege (see *Re Hewitt and Queensland Law Society Inc* (1998) 4 QAR 328 at paragraphs 19-20 and 29).

22. I have previously held, in *Re Potter and Brisbane City Council* (1994) 2 QAR 37, that communications to and from salaried employee legal advisers in the Brisbane City Legal Practice are capable of attracting legal professional privilege, and I need not repeat the analysis that supported that conclusion.

23. Pursuant to s.81 of the FOI Act, the Council has the onus of establishing that its decision (that the documents in issue are exempt under s.43(1) of the FOI Act) was justified. The Council has supplied copies of the documents in issue, but has not put forward any additional evidence in support of its case, only written arguments. Examination of the contents of documents claimed to be subject to legal professional privilege is frequently sufficient to establish whether or not they satisfy the legal tests to attract the privilege. In this case, I have also examined the contents of documents to which Mr Gill was given access by the Council and by the CJC, and they also assist by disclosing some of the context and circumstances attending the creation of the documents in issue. I have assessed the documents in issue in the light of the written arguments put forward on behalf of the Council.

24. The first of these was contained in Mr Wesener's notice of decision to Mr Gill, dated 7 January 2000:

> *(I)* *The exempt documents were created following receipt of your* [i.e., Mr Gill's] *letter dated 4 June 1999 alleging official misconduct on the part of the Council officer who investigated your original complaint in 1996.*
>
> *The exempt documents came into existence for the "sole purpose" of investigating a contravention or possible contravention of the law (which term includes a reference to misconduct or official misconduct within the meaning of the Criminal Justice Act 1989), and, obtaining or collecting evidence for use in any legal proceedings which may have flowed from that investigation, should an adverse finding have been found.*
>
> *If however, the exempt documents were not created for the "sole purpose" mentioned above then they certainly came into existence for the "dominant purpose" described in the preceding paragraph …*
>
> *(II)* *The investigation into your complaint was conducted by the CIU at the direction of the Manager, Brisbane City Legal Practice, as legal adviser to Council.*
>
> *Council on 5 August, 1997, determined the responsibilities of Brisbane City Legal Practice (and the Manager) which include, amongst other things, "the investigation of fraud, corrupt practice and official misconduct within the Council and, in that connection, liaison with the CJC."*
>
> *All investigations undertaken by the CIU are carried out at the express direction of the Manager, Brisbane City Legal Practice and the outcome of each investigation is reported back to the Manager, as legal adviser to Council, in order to advise Council, as the client, of what action, if any, should be taken.*
>
> *CIU is also the Council's Liaison Office with the Criminal Justice Commission (CJC). As such the investigators conduct investigations (at the request of the CJC) into allegations of possible misconduct or official misconduct and report their findings, through the Manager, Brisbane City Legal Practice, to the CJC for assessment and determination of what action, if any, should be taken.*
>
> …
>
> *(IV)* *While the exempt documents are to and from non-agent third parties, they satisfy a twofold test; namely, that at the time of preparation, litigation for possible misconduct or official misconduct was contemplated, and that the documents were prepared solely and/or dominantly for the purposes of that litigation should an adverse finding have been found.*

> *(V) It is not essential that a solicitor order an investigation for the purposes of possible litigation, only that the investigation is conducted for a solicitor, even though in this instance that is not the case. No distinction is seen between information obtained upon the suggestion of a solicitor, with a view of its being submitted to the solicitor for the purpose of him or her advising upon it, and that procured spontaneously by the client for the same purpose.*
>
> *(VI) Communications between a party and a non-professional agent or third party are privileged if they are made:-*
>
> *(i) in answer to inquiries made by the party as the agent for or at the request or suggestion of his solicitor, or without such a request, but for the purpose of being laid before a solicitor or counsel for the purpose of obtaining his advice, or enabling him to prosecute or defend an action, or enabling him to prepare the brief; and*
>
> *(ii) for the purpose of litigation contemplated or existing at the time.*
>
> *(I) The exempt documents are confidential in character and were created for the "sole and/or dominant purpose" mentioned in (I) above and would be protected from being produced in legal proceedings. The fact that some of the documents contain material which may be factual or administrative as distinct from legal advice does not remove the operation of the privilege.*
>
> …

25. In his internal review decision dated 21 January 2000, Mr David Askern, the Manager of the Brisbane City Legal Practice, said:

> *You submit that it is singularly inappropriate that I should conduct the* [internal] *review because the investigation the subject of your FOI application was undertaken at my direction.*
>
> …
>
> *While the investigation in question was conducted under my direction, I took no active part in it.*
>
> …
>
> *As the investigation was undertaken by CIU at the direction and under the control of Brisbane City Legal Practice with a view to providing advice on proposed or anticipated legal action, documents produced as a result of that investigation are clearly the subject of a claim for legal professional privilege. …*

26. Mr Gill wrote to Mr Askern on 28 January 2000 querying Mr Askern's decision. In a response dated 1 February 2000, Mr Askern said:

> *… I wish to clarify a number of points.*

> *Firstly, the proposed or anticipated legal action for which the investigation was undertaken was the possibility raised by your complaint that a Council employee may have to be prosecuted for official misconduct. Whether or not you personally intended legal action was irrelevant to that consideration.*
>
> *Secondly, any investigation undertaken by the Council into this matter was done at the direction and with the authority of the CJC.*
>
> *Thirdly, I was not a player and a referee, as alleged by you, and refer you to my 21 January 2000 letter in this regard.*

27. In his written submission on behalf of the Council dated 7 September 2000, Mr Askern stated:

> *The complaint* [sic - it appears from the context that this word should have referred to the Report] *was forwarded to this Legal Practice for the dominant purpose of seeking legal advice regarding the complaint received and the options available to the Council, and/or using the same in legal proceedings which were contemplated.*
>
> *In determining what is the "dominant" purpose for ascertaining whether a document is subject to legal professional privilege, the "purpose" must be considered at the time the matter was initiated and not after the evidence is considered. The fact that the findings in the report indicate that there is no substance to the complaint and thus no legal proceedings will be instituted does not take away from the fact that legal proceedings were contemplated prior to the Report being prepared.*

Claim for 'advice privilege' in respect of the Report

28. There are a number of anomalies and inconsistencies in the above submissions. I note, for example, the apparent inconsistency between the statement in the first Askern letter quoted above that the investigation was undertaken by the CIU at the direction and under the control of Brisbane City Legal Practice, and the statement in the second Askern letter quoted above that any investigation undertaken by the Council into this matter was done at the direction and with the authority of the CJC.

29. In my view, it is quite clear from the second paragraph of the Report that Mr Gill's complaint was referred (on 11 June 1999) by the CEO of the Council to the CIU for investigation. It is also quite clear from the second full paragraph on p.2 of the Report that, on 11 June 1999, the CJC had requested that the CIU investigate Mr Gill's complaints and submit its report for consideration by the CJC. The Report (which was finalised some five weeks later, being dated 16 July 1999) was addressed to the CEO of the Council, with copies also to be delivered to another senior officer of the Council, to the Acting Chief Officer, Complaints Section, Official Misconduct Division, of the CJC, and to Mr Askern as Manager of the Brisbane City Legal Practice.

30. Based on my examination of the material put before me, I consider that the dominant purpose for the preparation of the Report was to inform senior management of the Council of all relevant facts and circumstances relating to the handling of Mr Gill's 1996 complaint (so that they were sufficiently well informed to decide on the appropriate action to take in

response to Mr Gill's 1999 complaint), and to likewise inform the CJC so that it could decide on the appropriate response, under the relevant statutory framework in which the CJC operates, to Mr Gill's complaint to the CJC. It would be difficult (and in the circumstances of this case, unnecessary) to say that one of those two purposes was pre-dominant over the other. The CJC would have been in a position to dictate a course of action if it considered there was sufficient evidence to warrant disciplinary action against an officer of the Council, and therefore the Council would presumably have deferred any decision in that regard until the CJC stated its position. Certainly, in his facsimile transmission to the CJC dated 11 June 1999 (quoted in paragraph 4 above), Mr Clarke indicated that the purpose of his investigation would be to establish what occurred in the handling of Mr Gill's 1996 complaint to the Council, and to take the matter further if the CJC required it. One might therefore argue that, in practical terms, the purpose of submitting the Report to the CJC for its consideration was the dominant purpose for the creation of the Report. However, the CEO of the Council would still have had to consider and determine an appropriate response by the Council to Mr Gill's complaint, and there might have been residual issues for the Council to consider, e.g., the efficacy of its established complaint-handling procedures in respect of alleged dangerous animals.

31. Although a copy of the Report was to be forwarded to Mr Askern, there is nothing in the material before me to indicate that the dominant purpose of the creation of the Report was to submit it to Mr Askern with a view to his giving legal advice to the Council. The author of the Report has set out his own conclusions on the merits of Mr Gill's complaint. The Report contains no request for legal advice or professional legal assistance from Mr Askern. If the dominant purpose of the creation of the Report had been to put it before Mr Askern with a view to his giving legal advice to the Council, one might expect to find a record of a request for legal advice, and/or a record of the advice given, among the documents claimed to be exempt under s.43(1) of the FOI Act. There is no such document in issue. It is possible that advice was sought and given orally, with no record kept. If that were the case, it would have been necessary for the Council to put forward sworn evidence to establish that the dominant purpose of the creation of the Report was for communication to Mr Askern for the purpose of his providing legal advice that was sought and given orally. On the material before me, it is more probable than not that by the time the Report was finalised, there was no occasion for Mr Askern to give legal advice, since it was clear that the CJC would determine whether or not there was sufficient evidence to warrant further action against a Council officer, and the CJC's conclusion (that there was not) probably obviated any necessity for Mr Askern to give legal advice.

32. Even if there had been evidence that the Report was forwarded to Mr Askern for the purpose of seeking legal advice, examination of the material before me indicates that this could only have been an ancillary purpose, not the dominant purpose, for the creation of the Report. If there had been such evidence, the actual copy of the Report (or other document in issue) forwarded to Mr Askern in conjunction with a request for legal advice might attract legal professional privilege as a privileged copy of a non-privileged document, in accordance with the principle established in the High Court decision of *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 71 ALJR 327. However, that would not absolve the Council from an obligation to give access, under the FOI Act, to the non-privileged original document, and to any other non-privileged copies, in the possession or control of the Council (assuming they did not qualify for exemption on other grounds): see *Re Hobden and Ipswich City Council* (1998) 4 QAR 404 at pp.420-421, paragraph 43.

33. I do not accept that the Council can gain any assistance in this regard from the administrative arrangements referred to in point (II) of Mr Wesener's reasons for decision quoted at paragraph 24 above. Apparently, the Council determined on 5 August 1997 that the operations of the CIU would be placed under the management and supervision of the Manager, Brisbane City Legal Practice, whose responsibilities would therefore include "the investigation of fraud, corrupt practice and official misconduct within the Council and, in that connection, liaison with the CJC". It is open to any agency to require its salaried employee legal advisers to undertake administrative functions. However, the involvement of lawyers in performing administrative functions certainly does not clothe with legal professional privilege, communications to and from lawyers that are made in the course of, or for the purposes of, performing administrative functions.

34. In *Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners (No. 2)* [1972] 2 QB 102, Lord Denning MR, in holding that the work of salaried employee legal advisers could attract legal professional privilege, also observed (at p.129):

> *I speak, of course, of their communications in the capacity of legal advisers. It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege.*

35. The following tribunal decisions all afford examples of communications made by a legally-qualified employee of a public sector agency which were found to have been made in an executive capacity, rather than in a professional capacity pursuant to a relationship of lawyer and client: *Re Gunawar and Directorate of School Education* (1994) 6 VAR 418 at p.428, p.430; *Re Munday and ACT Attorney-General's Department* (Australian Capital Territory Administrative Appeals Tribunal, Professor L J Curtis (President), No. C95/85, 29 August 1996, unreported) at p.3; *Re Lapham and Department of Education and Community Services* (Australian Capital Territory Administrative Appeals Tribunal, Professor L J Curtis (President), No. AT 98/65; 10 November 1998, unreported) at pp.5-7; *Re Collie and Australian Securities and Investments Commission* (Commonwealth Administrative Appeals Tribunal, Senior Member Beddoe, No. Q1997/1255, 10 September 1999, unreported) at p.17, paragraph 47.

36. In *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 (at pp.530-531), Dawson J saw no reason for denying privilege to communications passing between salaried lawyers and their employers "provided that they are consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client". (Dawson J's statement was cited with apparent approval by Mason and Wilson JJ in *Waterford v Commonwealth of Australia* (1987) 163 CLR 54 at p.61, and re-stated by Dawson J in the same case at pp.95-96.)

37. Thus, the assertion in Mr Wesener's reasons for decision that all investigations undertaken by the CIU are carried out at the express direction of the Manager, Brisbane City Legal Practice (which, in any event, is apparently one of his administrative responsibilities) with the outcome reported back to that officer, in order for advice to be given as to what action, if any, should be taken, is not, in itself, determinative of whether legal professional privilege attaches to the communications. As part of his administrative functions, the Manager, Brisbane City Legal Practice, may give advice or recommendations for action which are merely administrative in character. Any particular communication to or from the Manager, Brisbane City Legal Practice, or the qualified lawyers he supervises, will only attract legal

professional privilege if the relevant lawyer was consulted in a professional capacity in relation to a professional matter, such that the communication arose from the relationship of lawyer and client, and it otherwise satisfies one of the tests for legal professional privilege referred to in paragraph 20 above. The circumstances attending any such communication, as well as the content of the communication, must be carefully examined with these principles in mind.

38. The fact that the CIU is administratively placed within the Brisbane City Legal Practice does not clothe what is a routine investigation report into an allegation of misconduct, with legal professional privilege. I cannot find any justification for making such a claim. In my view, the Report is not materially different in character to the kinds of reports that were under consideration by the High Court of Australia in *Grant v Downs* (1976) 135 CLR 674. In *Esso Australia Resources Ltd v Commissioner of Taxation*, a majority of the High Court rejected the 'sole purpose' test favoured by three of the five judges in *Grant v Downs*, in favour of the 'dominant purpose' test adopted by Barwick CJ in *Grant v Downs* (who, it should be noted, held that the reports in issue in *Grant v Downs* did not attract legal professional privilege under his 'dominant purpose' test). However, the joint judgment of Gleeson CJ, Gaudron and Gummow JJ in *Esso* made it clear that reports of the kind in issue in *Grant v Downs* would not attract legal professional privilege under their 'dominant purpose' test (at pp.347-348, and p.351):

> *Like the present case, and the leading English case of* Waugh v British Railways Board [1980] AC 521, Grant v Downs *was about discovery and inspection of documents in pending litigation. Although privilege, where it applies, attaches to communications, not to pieces of paper, discovery is concerned with documents, and privileged communications are frequently in writing. If a written communication is made for the sole purpose of seeking or giving legal advice, or obtaining or providing legal services, the problem of present concern does not arise. It arises where the documentary communication comes into existence for some purpose or purposes in addition to the legal purpose.*
>
> *As the facts of the cases illustrate, this is not an unusual situation. In* Grant v Downs, *the inmate of a public psychiatric hospital died in circumstances which gave rise to an action by his widow against the New South Wales Government for damages under the* Compensation to Relatives Act 1897 *(NSW). In accordance with standard Departmental practice, reports had been made about the occurrence. Upon discovery it was claimed that the reports were privileged. They were said to have been prepared for a number of purposes: to assist in determining whether there had been a breach of staff discipline; to detect whether there were any faults in the hospital's systems and procedures; and to enable the Department to obtain legal advice as to its possible liability and to obtain legal representation in the case of any coronial or civil proceedings. Such a multiplicity of purposes is commonplace, especially in large corporations or bureaucracies, which will often have their own internal legal staff, who are amongst those to whom such reports will be directed. In* Waugh, *an employee of a railway board was killed in a collision between locomotives. His widow sued the board. There was an internal inquiry into the accident, resulting in a report. The report was prepared for two purposes: to assist the board to decide whether there was a need to revise safety and operational procedures; and to obtain legal advice in anticipation of litigation.*

> *In both cases, the claims for privilege were disallowed. In neither case was the obtaining of legal advice or assistance the dominant, let alone the sole, purpose of bringing the documents into existence. …*
>
> …
>
> *A reading of the joint judgment* [of Stephen, Mason and Murphy JJ in *Grant v Downs*] *shows that a reason which influenced the decision was a concern that, in large corporations and public authorities, especially those with internal legal officers, routine reports and other documents prepared by subordinates for the information of their superiors would also, in the ordinary course, be provided to lawyers for the purpose of obtaining legal advice or assistance. It was regarded as unacceptable, and contrary to the interests of justice, that such documents should be privileged merely because one of their intended destinations was the desk of a lawyer.*
>
> …
>
> [After explaining their view that, in order to avoid the outcome regarded as unacceptable by Stephen, Mason and Murphy JJ in *Grant v Downs*, it was not essential to have preferred a 'sole purpose' test to a 'dominant purpose' test, Gleeson CJ, Gaudron and Gummow JJ concluded:]
>
> *… The dominant purpose test should be preferred. It strikes a just balance, it suffices to rule out claims of the kind considered in* Grant v Downs *and* Waugh*, and it brings the common law of Australia into conformity with other common law jurisdictions.*

Claim for 'litigation privilege' in respect of the Report and working documents of the CIU

39. It is also claimed that the Report and the other documents in issue came into existence for the dominant purpose of obtaining or collecting evidence for use in any legal proceedings which may have flowed from that investigation, should an adverse finding have been made. My findings above as to the dominant purpose for the creation of the Report indicate that I do not accept that the Report was created for the dominant purpose of use in legal proceedings. However, there is another basis on which the Report, and working papers of the CIU, fail to qualify for 'litigation privilege', which I should explain.

40. Where 'litigation privilege' is invoked for a particular communication, it is a requirement that relevant legal proceedings had commenced, or were reasonably anticipated, at the time of the relevant communication. The learned author of *Cross on Evidence* (5th Aust ed) has remarked (at p.698; footnote 29):

> *Where litigation has not been commenced it must be reasonably contemplated, not merely some vague apprehension of litigation generally:* Laurenson v Wellington City Corp *(1927) NZLR 510 at 511. The question whether litigation was contemplated at the relevant time is one of fact which must be determined upon an objective standard. See* Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd *(1985) 3 NSWLR 44. See also* Warner v The Women's Hospital *(1954) VLR 410.*

41. In *Australian Competition & Consumer Commission v Australian Safeways Stores Pty Ltd & Ors* (1998) 153 ALR 393, Goldberg J considered the meaning of "anticipated" in respect of legal proceedings. At pages 424 - 425, he stated:

> *Whether proceedings are anticipated must be determined by reference to objective criteria and not simply by reference to the subjective statements of a participant in the relevant information gathering or litigation preparing process.*
>
> *It is necessary to determine whether, at the time the documents were brought into existence, it can be said that proceedings were reasonably anticipated.*
>
> *Where legal proceedings are anticipated one needs more than speculation as to the possibility of such proceedings; one needs a probability or likelihood that such proceedings will commence.*
>
> *The concept of anticipated proceedings involves the notion that there is a reasonable probability or likelihood that such proceedings will be commenced - not that they will be but rather that more probably than not they will be.*

42. There is nothing in the material before me, viewed objectively, that affords support for a finding that legal proceedings were reasonably anticipated at the time of creation of the Report and the other documents in issue. Indeed, Mr Clarke's facsimile transmission to the CJC dated 11 June 1999, quoted in paragraph 4 above, indicates that his purpose in preparing the Report was confined to establishing what occurred in the handling of Mr Gill's 1996 complaint, and taking the matter further only if the CJC required it. That tends to indicate that litigation was not even subjectively contemplated at the time of creation of the Report.

43. The fact that the Council considers it appropriate to investigate a complaint received from a member of the public, alleging improper conduct against a Council officer, would not ordinarily give rise to a reasonable anticipation of litigation. There may be exceptional cases where the nature of the complaint, the strength of the evidence initially put forward to support it, and the action that an organisation would legally be required to take upon confirmation of the validity of the complaint, warrant a finding that litigation was reasonably anticipated from the commencement of the investigation into the complaint. However, in the ordinary case, the following comments by Goldberg J in *Australian Competition & Consumer Commission v Australian Safeway Stores Pty Ltd & Ors* at p.1611, would normally hold true:

> *… The process of investigation is logically anterior to, and a precursor to, the point at which it may be said that proceedings are prospective or reasonably anticipated. If evidence is required for proceedings it can be expected that until that evidence gathering process is well advanced, a view will not be able to be formed that proceedings are prospective or reasonably anticipated. That is a reason why it is difficult to ascribe a dominant purpose to the preparation of the anticipated proceedings before the evidence gathering process is well-advanced and the evidence has been evaluated.*

44. As would be the case with any organisation of substantial size serving large numbers of clients (in this case, one that provides services to and otherwise interacts (e.g., in enforcement of local laws) with hundreds of thousands of citizens and ratepayers), a substantial number of complaints about the conduct of officers of the Council would no doubt be received in any year. It would be very surprising if even a substantial minority of the complaints referred for investigation proceeded through to the stage where legal proceedings resulted.

45. It should be noted in this regard that, in the context of 'litigation privilege', the legal proceedings that must have commenced, or been reasonably anticipated, are court or tribunal proceedings: see *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, per Deane J at p.490. The internal disciplinary processes of a public sector organisation cannot, in my view, be properly characterised as legal proceedings, in the sense required for 'litigation privilege' to be invoked. The process by which some alleged or suspected wrongdoing in an employment context is investigated and dealt with (perhaps resulting in a disciplinary charge laid by an authorised officer who hears the relevant employee's response to the charge and decides whether or not the charge is proven, and, if so, whether to impose a penalty ranging from a reprimand to dismissal) is, in my view, to be properly characterised as an executive/administrative function - part of the process of management by a public sector organisation of its human resources, within the relevant employment law context. If there are subsequent proceedings in a court or tribunal by way of challenge to a decision to impose a disciplinary sanction, those subsequent proceedings would be properly characterised as litigation or legal proceedings (for the purposes of the law relating to legal professional privilege).

46. Nor, in my view, would a report on an initial investigation of suspected official misconduct be ordinarily characterised as having been made in anticipation of litigation. Suspected official misconduct must be referred to the CJC, which would itself have to undertake some kind of investigative or evaluative process before deciding whether to charge a person with official misconduct, and, in my view, such an investigative or evaluative process involves the discharge of an executive/administrative function on the part of the CJC. It could not be properly characterised as litigation or a legal proceeding. (On the other hand, the hearing before a Misconduct Tribunal of a charge of official misconduct probably would answer the description of a legal proceeding.)

47. There may be a moment, in the course of some investigations, when it becomes apparent that relevant legal proceedings will probably be instituted, such that, after that time, evidence gathered for the dominant purpose of use in those anticipated proceedings will qualify for privilege. However, the course of the investigation of Mr Gill's complaints certainly never reached such a stage. This was a routine investigation which never appears to have raised a suggestion of possible disciplinary sanctions, let alone the possibility of some form of prosecution or other legal proceedings.

Summary of findings

48. While I have referred throughout the above discussion to the Report (including its attachments), my comments and findings apply equally to the working papers and other material created for the purposes of the CIU investigation (i.e., the matter in issue identified in subparagraphs 14(b) and (c) above). For the reasons given in paragraphs 29-38 above, I find that the matter in issue which is identified in subparagraphs 14(a), (b) and (c) above was not created for the dominant purpose of seeking or giving legal advice or professional legal assistance, nor for the dominant purpose of use, or obtaining material for use, in legal proceedings. I also find (for the reasons given in paragraphs 40-47 above) that at the time of its creation, no relevant legal proceedings had commenced, or were reasonably

anticipated.

I therefore find that the matter in issue identified in subparagraphs 14(a), (b) and (c) above does not qualify for exemption under s.43(1) of the FOI Act.

Other documents claimed to be exempt under s.43(1)

49. Folio 86 is a letter dated 13 August 1999 from the CJC to Mr Clarke informing him of the outcome of the CJC's consideration of Mr Gill's complaint, in light of the material in the Report forwarded to the CJC by Mr Clarke. This document was not a communication between lawyer and client, and clearly did not come into existence for the purpose of use in pending or anticipated legal proceedings. Moreover, the information conveyed in folio 86 cannot be regarded as a confidential communication *vis-à-vis* Mr Gill. The CJC wrote separately to Mr Gill on the same day, conveying essentially the same information, although accompanied by a more detailed explanation of the reasons for the CJC's conclusion. There is no possible basis on which folio 86 could attract legal professional privilege, and I find that it does not qualify for exemption under s.43(1) of the FOI Act.

50. Folio 87 is a one-page "report" dated 16 August 1999 from Mr Clarke addressed to the CEO of the Council, with copies to go to Mr Askern and another senior officer of the Council. It is clear from my examination of its contents that the purpose of folio 87 was merely to convey the outcome of the CJC's consideration of Mr Gill's complaint. Folio 87 clearly did not come into existence for one of the purposes that might attract legal professional privilege (see paragraph 20 above), and I find that it does not qualify for exemption under s.43(1) of the FOI Act.

51. Folio 106 is an e-mail from a member of Council staff to Mr Askern, together with Mr Askern's reply. This document records a request for professional legal advice or assistance (in considering, and settling the terms of, a draft letter), and the advice given by Mr Askern. I am satisfied that, in this instance, Mr Askern was consulted in a professional capacity, that the communications arose from the relationship of lawyer and client, and that they were made for the dominant purpose of seeking and giving legal advice or assistance. I find that folio 106 qualifies for exemption under s.43(1) of the FOI Act.

52. Folio 110 is an e-mail from Mr Clarke to Mr Askern, and Mr Askern's reply. The communications it records are different in character to those recorded in folio 106. I am unable to construe the communications recorded in folio 110 as a request for professional legal advice or assistance, and the provision of such advice or assistance. I consider that the communications have the character of a request for information or direction about executive or administrative action within Council, and the response. I am not satisfied that the communications recorded in folio 110 were made pursuant to a relationship of lawyer and client, or were made for a purpose which attracts legal professional privilege. I find that folio 110 does not qualify for exemption under s.43(1) of the FOI Act.

Application of s.42(1) of the FOI Act

53. In his letter dated 7 September 2000, Mr Askern made the following submission on behalf of the Council:

> *Council claims that the Report in its entirety is exempted from access or disclosure pursuant to sections 42(1)(a) and (e) FOI as the disclosure could reasonably be expected to prejudice the investigation of a possible contravention of the law or the effectiveness of a lawful method or procedure for investigating or dealing with a possible contravention of the law.*

The possible contraventions of the law were a possible breach of section 1143 of the Local Government Act 1993 ("LGA") and/or official misconduct pursuant to the Criminal Justices Act 1989 ("CJA"). Section 42(4) FOI defines a contravention of the law to include possible misconduct or official misconduct within the meaning of the CJA. Further, a report relating to misconduct or official misconduct within the CJA is expressly excluded from the matters not exempted under section 42(2) FOI.

The Criminal Justice Commission ("CJC") in its letter dated 29 November 1999 [sic - the correct date was 22 June 1999] *requested CIU to handle and investigate the matter and to provide a copy of the Report to the CJC to enable it to make its own determination regarding the conduct in question.*

AND, OR IN THE ALTERNATIVE

A large part of the investigation by the Corporate Investigations Unit of the Council ("CIU") is enforcing the law.

The effectiveness of the lawful methods or procedures for investigating and establishing the existence of misconduct and offences for instituting legal proceedings (Section 42(1)(b), (e) and (h) FOI) would be seriously undermined and compromised if there is to be the disclosure of identity of complainants and witnesses and their evidence and the preliminary views or opinions which are expressed or arise therefrom.

The CIU is not an independent body such as the CJC or Police who may formalise upon a final view and who are accountable to outside persons. The CIU is accountable to the Brisbane City Legal Practice and to the Council itself. Its views are expressed and decided upon for consideration of other persons, and in particular, the Manager of the Brisbane City Legal Practice.

Even leaving aside the question of the purpose for their views, their views necessarily must draw upon all interviews and statements and information which has been provided in confidence. Complaints and information simply will not be provided for fear of reprisals in the event that allegations or information is not substantiated or pursued.

54. The provisions of s.42(1) that the Council has relied upon are set out below:

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

> *(e) prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law); or*
>
> *(h) prejudice a system or procedure for the protection of persons, property or environment;...*

55. The Council has the onus of establishing that disclosure of the matter in issue could reasonably be expected to have the prejudicial consequences specified in each of the subsections relied upon (see s.81 of the FOI Act). The phrase "*could reasonably be expected to*" imposes a requirement that there be a reasonably based expectation (that the relevant prejudicial consequences would follow as a consequence of disclosure of the matter in issue), namely, an expectation for which real and substantial grounds exist. A mere possibility, speculation or conjecture is not enough. In this context "*expect*" means to regard as likely to happen. (See *Re "B" and Brisbane North Regional Health Authority* (1994)
1 QAR 279, at pp.339-341, paragraphs 154-160, and the Federal Court decisions referred to there.)

Section 42(1)(a)

56. It is clear from the material before me that the investigation of Mr Gill's allegations has been finalised, so far as both the Council and the CJC are concerned. The CJC has considered the Council's report of the investigation and has concluded that Mr Gill's allegations are unsubstantiated. Both the Council and the CJC have made it clear to Mr Gill that there is no prospect of re-opening an investigation into his allegations, despite his protestations. Section 42(1)(a) of the FOI Act focuses on prejudice to the investigation of a possible contravention of the law in a particular case. Since the only case, investigation of which could arguably be prejudiced, has been finalised, I find that disclosure of the matter in issue could not reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law in a particular case. I therefore find that the matter in issue does not qualify for exemption under s.42(1)(a) of the FOI Act.

Section 42(1)(b)

57. A detailed analysis of s.42(1)(b) is set out in *Re McEniery and Medical Board of Queensland* (1994) 1 QAR 349. At paragraph 16 of that decision, I said that matter will be eligible for exemption under s.42(1)(b) if three requirements are satisfied. The first requirement is that there must exist a confidential source of information (i.e., a person who has supplied information on the understanding, express or implied, that his or her identity will remain confidential). In this case, however, there are no sources of information that could be considered a "confidential source" of information *vis-à-vis* Mr Gill. The only sources of information drawn upon by Mr Clarke for the purposes of his investigation were the Council officer who handled Mr Gill's 1996 complaint, the owner of the dog (the identities of both are known to Mr Gill), and Mr Gill himself. I am not satisfied that disclosure of any of the matter in issue could reasonably be expected to enable the existence or identity of a confidential source of information to be ascertained, and I find that none of the matter in issue qualifies for exemption under s.42(1)(b) of the FOI Act.

Section 42(1)(e)

58. In relation to the Council's reliance on s.42(1)(e), I note that the Council has adduced no evidence to support its contention that disclosure of the matter in issue to Mr Gill (who was also the complainant) would prejudice the effectiveness of Council's methods or procedures for investigating complaints about allegedly dangerous animals, or allegations of misconduct by Council staff. The correct approach to the interpretation and application of this exemption provision was explained in *Re "T" and Queensland Health* (1994) 1 QAR 386. The object of s.42(1)(e) is to provide a ground for refusing access to information, where disclosure of the information could reasonably be expected to prejudice the effectiveness of lawful methods and procedures employed by government agencies undertaking law enforcement activities.

59. At p.393 (paragraphs 23-24) of *Re "T"*, I stated:

> *23. There is a diverse group of government agencies in Queensland performing law enforcement functions directed towards preventing, detecting, investigating or dealing with contraventions or possible contraventions of the law. Each agency will have developed (and will probably continue to develop and refine) methods and procedures to assist in the performance of its particular law enforcement responsibilities. Some methods and procedures may depend for their effectiveness on secrecy being preserved as to their existence, or their nature, or the personnel who carry them out, or the results they produce in particular cases. It is not possible to list the types of methods or procedures which may qualify for protection under s.42(1)(e) of the FOI Act. Each case must be judged on its own merits. The question of whether or not the effectiveness of a method or procedure could reasonably be expected to be prejudiced by the disclosure of particular matter sought in an FOI access application, is the crucial judgment to be made in any case in which reliance of s.42(1)(e) is invoked.*
>
> *24. There may be cases where the disclosure of particular matter will so obviously prejudice the effectiveness of law enforcement methods or procedures that the case for exemption is self-evident, but ordinarily in a review under Part 5 of the FOI Act it will be incumbent on an agency to explain the precise nature of the prejudice to the effectiveness of a law enforcement method or procedure that it expects to be occasioned by disclosure, and to satisfy me that the expectation of prejudice is reasonably based. I will ordinarily not be able to refer in my reasons for decision to the precise nature of the prejudice, nor in many cases to the nature of the relevant methods or procedures (where that would subvert the reasons for claiming an exemption in the first place) but I will, in any event, need to be satisfied that the agency has discharged its onus under s.81 of the FOI Act of establishing all requisite elements of the test for exemption under s.42(1)(e) of the FOI Act.*

60. In *Re Anderson and Australian Federal Police* (1986) 4 AAR 414, Deputy President Hall of the Commonwealth AAT said (at p.425):

> *Questions of prejudice are, I think, more likely to arise where the disclosure of a document would disclose covert, as opposed to overt or routine methods or procedures.*

61. In *Re Lapidos and Auditor-General of Victoria* (1989) 3 VAR 343, Deputy President Galvin of the Victorian AAT said (at p.352):

> *Document No. 14 identifies certain methods or procedures but of so patently an ordinary and fundamental kind as to preclude the conclusion that disclosure of them would or would be reasonably likely to prejudice their effectiveness.*

62. At p.394 (paragraph 30) of *Re "T"*, I said:

> *Obviously, the method used by law enforcement agencies of gathering information in relation to an investigation from as many sources as possible, the evaluation of that information and the placement of it on the agencies' records is a fundamental and overt method, the disclosure of which would not prejudice its effectiveness in the future.*

63. In this case, the Council's investigator merely conducted and recorded interviews with relevant sources of information, and evaluated the information obtained, which is the obvious course of action to take in this type of investigation. The Council has not provided any evidence to support its claims that these procedures might be prejudiced in any way by the disclosure of the matter in issue in this case. I find that the matter in issue does not qualify for exemption under s.42(1)(e) of the FOI Act.

Section 42(1)(h)

64. The Council has provided neither evidence, nor argument, to support its reliance on s.42(1)(h) of the FOI Act. There has been no attempt to identify a system or procedure for the protection of persons, property or environment, and explain why there is a reasonable basis for expecting that disclosure of the matter in issue could prejudice such a system or procedure. I am not satisfied on the material before me that disclosure of any of the matter in issue could reasonably be expected to have the prejudicial consequences specified in s.42(1)(h). I find that the matter in issue does not qualify for exemption under s.42(1)(h) of the FOI Act.

Claims for exemption in respect of part of the Report headed "Discovery Interview with Local Laws Manager" (folios 34-35) and Attachments Ca-Cf inclusive (folios 5-7 and 9-22)

Section 40(c)

65. Section 40(c) of the FOI Act provides:

> ***40.*** *Matter is exempt matter if its disclosure could reasonably be expected to—*
>
> *...*
>
> *(c) have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; ...*

unless its disclosure would, on balance, be in the public interest.

66. Where an agency makes a claim for exemption under s.40(c), I must determine:

(a) whether any adverse effects on the management or assessment by the agency of its personnel could reasonably be expected to follow from disclosure of the matter in issue; and, if so,

(b) whether the adverse effects amount to a substantial adverse effect on the management or assessment by the agency of its personnel. The adjective "substantial" in the phrase "substantial adverse effect" means grave, weighty, significant or serious (see *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663, at pp.724-725, paragraphs 148-150).

If those requirements are satisfied, I must then consider whether the disclosure of the matter in issue would nevertheless, on balance, be in the public interest.

67. The segment of the Report now under consideration details an interview with the Local Laws Manager, who was the Council officer who handled Mr Gill's 1996 dog complaint. This segment of the Report details the Council officer's recollections of his 1996 investigation, and the documents he was able to locate from that investigation. The basis of Council's reliance on s.40(c) in this case is not apparent, as there has been no evidence put forward by the Council to support its claims, and the only assertion made in its written submission was that the summary of interview with the Council employee was made on a confidential basis. I do not accept that the information obtained from the Council employee was supplied on a confidential basis, for the reasons explained in paragraph 74 below. The investigation was straightforward and there was no adverse finding against the officer. On the material before me, I am not satisfied that disclosure of this segment of the Report, and its corresponding attachments, could reasonably be expected to have any adverse effect on the management or assessment by the Council of its staff, let alone a substantial adverse effect, and I find that the matter in issue is not exempt from disclosure to the applicant under s.40(c) of the FOI Act.

Section 46(1)

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

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

69. The test for exemption under s.46(1)(a) must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind the respondent agency not to disclose the information in issue. Presumably the Council claims that the identifiable plaintiff, who would have standing to bring an action for breach of confidence against the Council, is the Local Laws Manager.

70. There are five cumulative requirements for protection in equity of allegedly confidential information:

(a) it must be possible to specifically identify the information, in order to establish that it is secret, rather than generally available information (see *Re "B"* at pp.303-304, paragraphs 60-63);
(b) the information in issue must have "the necessary quality of confidence"; i.e., the information must not be trivial or useless information, and it must have a degree of secrecy sufficient for it to be the subject of an obligation of conscience (see *Re "B"* at pp.304-310, paragraphs 64-75);
(c) the information must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see *Re "B"* at pp.311-322, paragraphs 76-102);
(d) disclosure to the applicant for access would constitute an unauthorised use of the confidential information (see *Re "B"* at pp.322-324, paragraphs 103-106); and
(e) disclosure would be likely to cause detriment to the confider of the confidential information (see *Re "B"* at pp.325-330, paragraphs 107-118).

71. Matter will be exempt under s.46(1)(b) if:

(a) it consists of information of a confidential nature;

(b) it was communicated in confidence;

(c) its disclosure could reasonably be expected to prejudice the future supply of such information; and

(d) the weight of the public interest considerations favouring non-disclosure equals or outweighs that of the public interest considerations favouring disclosure.

[See *Re "B"* at pp.337-341; paragraphs 144-161].

72. The information obtained by Mr Clarke from the Local Laws Manager consists, for the most part, of:

- information known to or obtained from Mr Gill through communication with him at the time of his 1996 complaint (some of the attachments to the Report are letters or documents signed by Mr Gill); or
- information the substance of which has subsequently been made known to Mr Gill by the CJC through its letter to him dated 13 August 1999 accounting for the outcome of the CJC's consideration of Mr Gill's complaint, and through other documents disclosed to Mr Gill by the CJC, under the FOI Act (notably the memorandum by a Senior Legal Officer analysing Mr Gill's complaint in the light of the material contained in the Report).

73. I consider that the matter in issue does not have the necessary quality of confidence, *vis-à-vis* Mr Gill, that is required for the application of s.46(1)(a) or s.46(1)(b).

74. In addition, the Council has not provided any evidence to support its claim that the information was provided by the Local Laws Manager on the understanding that it would be treated in confidence. There is no evidence of an express assurance of confidential

treatment having been sought or given, and I am not satisfied that there was anything in the nature of the information supplied (which is essentially a straightforward account of the steps taken in dealing with Mr Gill's 1996 complaint), or in the circumstances attending its communication, to warrant a finding that there was an implicit mutual understanding that it would be treated in confidence, as against Mr Gill. The Local Laws Manager was the person who dealt with the 1996 complaint, and his actions were under investigation. It must have been understood that the Council would need to respond to Mr Gill's 1999 complaint, and might draw on information supplied by the Local Laws Manager for that purpose. Moreover, by the time Mr Clarke interviewed the Local Laws Manager, it was clear that Mr Clarke's report would be forwarded to the CJC for evaluation. Pursuant to s.33(4) of the *Criminal Justice Act 1989* Qld, the CJC had a statutory obligation to respond to Mr Gill's complaint. If the CJC proposed to take no action on the complaint, it was obliged to explain to Mr Gill the reasons for taking no action. It must or ought to have been understood that the CJC would probably need to draw on the information contained in the Report in order to respond to Mr Gill, as indeed subsequently occurred. The material before me does not support a finding that any understanding or obligation of confidence attended the communication of the information in question.

75. In relation to s.46(1)(b), I find (for the reasons explained above) that the information communicated was not of a confidential nature and was not communicated in confidence. Further, there is no evidence before me which would establish a reasonable expectation of any prejudice to the future supply of information to the Council from staff seeking to explain their conduct, in answer to an allegation of improper conduct, if the relevant segments of the Report and attachments were disclosed.

76. I find that the segments of the Report (and attachments) now under consideration do not qualify for exemption from disclosure to the applicant under s.46(1)(a) or s.46(1)(b) of the FOI Act.

Claims for exemption in respect of part of the Report headed "Interview with Owner of the Dog" and record of interview in CIU File Note

77. The matter in issue now under consideration appears on folios 31-32 of the Report, and in folio 12 which is a file note containing a record of an interview by Mr Clarke with the owner of the dog.

78. The Council contended that this matter is exempt under s.44(1) of the FOI Act, as the information "*relates to the personal affairs of another person, which is not the subject of the investigation*". The Council also stated:

> *It is noted that this exemption category [s.44(1)] previously has not been raised by the Council in support of its decision to refuse access and disclosure. Notwithstanding, Council seeks also to rely upon sections 40(a), 40(b), 42(1)(a), 42(1)(e), 45(1)(b) and 45(1)(c) of the FOI and requests that you re-consider your preliminary view having regard to this exemption category and the other matters contained in this submission.*

79. The Council provided no evidence, and no written argument, explaining the basis for the application to the particular matter in issue of these seven additional exemption claims. Following receipt of Council's submission, staff from my office contacted the Council to ascertain whether the dog owner had been consulted regarding possible disclosure, under the FOI Act, of information relating to her. The Council advised that the owner had not been

consulted, and said (in a facsimile transmission dated 13 November 2000): *If* [the dog owner] *has no objection to the release of the document "Interview with Dog Owner", Council has no objection. Council maintains its section 44 objection to the CIU File Note (folio 12).*

80. Staff from this office consulted the owner of the dog to ascertain whether she objected to disclosure of the relevant matter in issue. The owner originally indicated (by telephone) that she probably would not object to disclosure, but that she would like to view copies of the documents in issue. Copies were sent to the owner to seek written confirmation of her position. The owner responded by letter dated 23 January 2001, advising that she had decided that she did object to the disclosure to the applicant of the information in view of:

- the length of time since the original complaint was made (i.e., the original complaint was made in 1996);
- the fact that there is no continuing contact between her and the complainant (Mr Gill); and
- the owner's concern that she may be harassed by Mr Gill if the information were disclosed.

81. I note that the dog owner provided no material to substantiate her concern about harassment by Mr Gill, and there is no material before me that would afford objective support for such a concern.

82. I will now address each of the Council's claims for exemption of the relevant segment of the Report and the CIU file note (folio 12).

Section 44(1)

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

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

84. In applying s.44(1) of the FOI Act, the first question to ask is whether disclosure of the matter in issue would disclose information concerning the personal affairs of a person other than the applicant for access. If that is the case, a public interest consideration favouring non-disclosure is established, and the matter in issue will be exempt, unless there are public interest considerations favouring disclosure which outweigh all public interest considerations favouring non-disclosure.

85. In *Re Stewart and Department of Transport* (1993) 1 QAR 227, I discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations) as it appears in the FOI Act (see pp.256-257, paragraphs 79-114, of *Re Stewart*). In particular, I said that information concerns the "personal affairs of a person" if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:

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

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

86. The matter in issue now under consideration contains information concerning the personal affairs of the owner of the dog (including her address and some details regarding the dog). It also records statements made by the owner as to the dog's behaviour, and the owner's account of events leading up to the 1996 complaint to the Council by Mr Gill. I consider that much of this information does concern the personal affairs of the owner of the dog, and that information is *prima facie* exempt from disclosure under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.44(1).

Public interest balancing test

87. Mr Gill was contacted and advised of the Council's claim that the matter now under consideration is exempt from disclosure under s.44(1) of the FOI Act. Mr Gill argued that there was a strong public interest in disclosure to him, as he considered that he had a right to know that the complaint he made about the dog was properly investigated. I accept that there is a public interest in enhancing the accountability of the Council with respect to investigation of complaints made to it, and that this has particular force for the benefit of a complainant seeking to understand how his or her complaint was dealt with by an agency. I note in this regard that in *Re Pemberton and the University of Queensland* (1994) 2 QAR 293 at pp.368-377, paragraphs 164-193, I reviewed FOI decisions by Australian courts and tribunals which have recognised a principle that there may be a public interest in a particular applicant having access to particular information because that applicant's involvement in, and concern with, the particular information is of such a nature or degree as to give rise to a justifiable 'need to know', which is more compelling than for other members of the public.

88. I accept that these considerations tell in favour of a finding that disclosure to Mr Gill would, on balance, be in the public interest. Disclosure of the response of the dog owner would provide Mr Gill with a better understanding of the information which the Council relied on in deciding whether further action in relation to both his 1996 and 1999 complaints was necessary. In that regard, it would assist in promoting the accountability of the Council for its handling of Mr Gill's 1996 complaint, and its decision (concurred with by the CJC) that his 1999 complaint was not substantiated.

1. On the other hand, some of the matter in issue comprises identifying particulars of the owner (including her name, address, and the name and breed of her dog). Mr Gill is already aware of the name and address of the dog owner, so there is no substantial privacy interest to be safeguarded *vis-à-vis* Mr Gill. However, the disclosure of such information, recorded in a document disclosed under the FOI Act (meaning that there would be no restriction, apart from any imposed by the general law, on its further use or dissemination by Mr Gill) would pose some threat to the privacy of information concerning the dog owner's personal affairs.

90. Weighing the competing public interest considerations telling for and against disclosure in this case, I consider that, on balance, the public interest is best served by deleting the identifying particulars of the dog owner, but otherwise disclosing to Mr Gill the detail of the information obtained from the dog owner by Mr Clarke. Mr Gill does not need the identifying particulars to assist his understanding of how the Council dealt with his complaints, and deletion of the identifying particulars will give some small measure of privacy protection to the dog owner.

91. This result may seem anomalous to Mr Gill, since he has already been given access to documents under the FOI Act, by both the Council and the CJC, which contain identifying particulars of the dog owner. Certainly, it represents inconsistent conduct on the part of the Council to now claim exemption for personal affairs information of the dog owner, which is similar in character to information the Council has previously disclosed to Mr Gill under the FOI Act. Two points should be made in this regard. The first is that agencies possess a general discretion, under the terms of s.28(1) of the FOI Act (see *Re Norman and Mulgrave Shire Council* (1994) 1 QAR 574 at p.577, paragraph 13), to choose to give access, under the FOI Act, to exempt matter; whereas, in a review under Part 5 of the FOI Act, that discretion is denied to me by the terms of s.88(2) of the FOI Act. The second is that the dog owner was apparently not consulted and given an opportunity to object to the previous disclosure of information concerning her personal affairs. The dog owner's expressed desire to have me consider and apply s.44(1) should be respected.

92. I note that the identifying particulars of the dog owner appear in a number of documents in issue in addition to folios 12 and 31-32. I find that disclosure of identifying particulars of the dog owner would disclose information concerning her personal affairs, that disclosure of the identifying particulars would not, on balance, be in the public interest, and hence that they are exempt matter under s.44(1) of the FOI Act. I will forward to the Council and the CJC, together with these reasons for decision, copies of the documents in issue on which I have marked the particular segments of matter which I have found to be exempt under s.44(1) of the FOI Act.

93. I find that disclosure to the applicant of the rest of the matter in issue which comprises information concerning the personal affairs of the dog owner would, on balance, be in the public interest, and that, accordingly, it does not qualify for exemption from disclosure to the applicant under s.44(1) of the FOI Act.

Section 40(a) and (b)

94. Sections 40(a) and (b) of the FOI Act provide:

> ***40.*** *Matter is exempt matter if its disclosure could reasonably be expected to—*
>
> *(a) prejudice the effectiveness of a method or procedure for the conduct of tests, examinations or audits by an agency; or*
>
> *(b) prejudice the attainment of the objects of a test, examination or audit conducted by an agency; ...*
>
> *unless its disclosure would, on balance, be in the public interest.*

95. I consider that the matter in issue claimed to be exempt under s.40(a) and s.40(b) cannot be properly characterised as bearing any relationship to the conduct of a "test, examination or audit", giving those words their ordinary and natural meaning. Even if it could, there is no evidence before me to support a finding that disclosure of that information could reasonably be expected to have either of the prejudicial consequences referred to in s.40(a) or s.40(b). The Council has not satisfied the onus which it bears pursuant to s.81 of the FOI Act. I find that none of the matter in issue qualifies for exemption under s.40(a) or s.40(b) of the FOI Act.

Section 42(1)(a) and (e)

96. For the same reasons given in paragraph 56 above, I find that none of the matter now under consideration qualifies for exemption under s.42(1)(a) or s.42(1)(e) of the FOI Act.

Section 45(1)(b) and (c)

97. The Council has claimed that this segment of the Report, and the corresponding file note record of interview, are exempt from disclosure under sections 45(1)(b) and (c) of the FOI Act. Those sections provide as follows:

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

98. The requirements of these exemption provisions are explained in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491. The Council has offered no evidence or written argument to support these exemption claims. It is, with respect, ludicrous to suggest that the information obtained by Mr Clarke from the dog owner is information that has a commercial value to the Council or another person. Nor could the information possibly be characterised as information concerning the "business, professional, commercial or financial affairs" of the Council or another person, according to the meaning of that phrase, in the context of s.45(1)(c), which I explained in *Re Cannon* at paragraph 87 and in *Re Pope and Queensland Health* (1994) 1 QAR 616 at paragraph 29. I find that the matter in question does not qualify for exemption under s.45(1)(b) or s.45(1)(c) of the FOI Act.

Observations on the responsibilities of respondent agencies in a review under Part 5 of the FOI Act

99. Several of the exemption provisions invoked by Mr Askern on behalf of the Council in his written submission dated 7 September 2000 were entirely lacking in merit, and no effort was made to discharge the onus (imposed by s.81 of the FOI Act) requiring the Council to establish that the Information Commissioner should give a decision adverse to the applicant for access. This tactic on the part of the Council has required that time and effort be expended by my staff and myself in addressing meritless exemption claims (which has also added unnecessarily to the length of these reasons for decision), and occasioned unnecessary further delay not only in finalising these reasons for decision, but in finalising other cases which are waiting on my attention. Such conduct is, in my view, contrary to the obligations of a government agency as a party to court or tribunal proceedings.

100. It is established law that, in proceedings of the Commonwealth Administrative Appeals Tribunal (the AAT) which functions under materially identical provisions to those which govern the review functions of the Information Commissioner under Part 5 of the FOI Act, agency representatives have a duty to assist the AAT in reaching the correct decision. The relevant legal position is summarised in paragraph 9.72 of the Australian Law Reform Commission's Report No. 89, "Managing Justice":

> *In the conduct of review tribunal proceedings, agency representatives have been held by the Federal Court to have a duty to assist the AAT in reaching the correct decision. Under this principle, the role of the agency's representative is equated to that of counsel for the Crown, particularly with regard to disclosure of evidence. The agency should ensure that all relevant facts and documents are before the AAT, whether favourable to the applicant or not, and should not place undue emphasis on defeating the application.*

1. In *Re Cimino and Director-General of Social Services* (1982) 4 ALN N106a, the AAT said that "*it is very important that representatives of the department approach their task … as it were as counsel for the Crown, ensuring only that all the facts are before the tribunal and not placing emphasis on defeat of the application.*" See also *Re Crnkovic and Repatriation Commission* (1990) 20 ALD 131 at p.138; *Re Ermolaeff and Commonwealth* (1989) 17 ALD 686 at p.687; *Re Stewart and Department of Employment, Education and Training* (1990) 20 ALD 471 at p.477, quoting from unreported parts of the decision of Davies J in *Re Mann and Capital Territory Health Commission (No. 2)* (1983) 5 ALN N368; *Re Bessey and Australian Postal Corporation* (2000) 60 ALD 529 at pp.552-554.

102. In *Scott v Handley* (1999) 58 ALD 373 at pp.383-384, a Full Court of Federal Court of Australia (Spender, Finn and Weinberg JJ) explained the obligations of government agencies and officers as parties to legal proceedings:

> *43. The second respondent is, as we have noted, an officer of the Commonwealth. As such he properly is to be expected to adhere to those standards of fair dealing in the conduct of litigation that courts in this country have come to expect - and where there has been a lapse therefrom, to exact - from the Commonwealth and from its officers and agencies. The spirit of this "model litigant" responsibility, now long enshrined in a policy document of the Commonwealth, is perhaps best captured in the observations of Griffith CJ in* Melbourne Steamship Co Ltd v Moorehead *(1912) 15 CLR 333 at 342:*

> "I am sometimes inclined to think that in some parts - not all - of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken."

> *44. Insistence upon that standard is a recurrent theme in judicial decisions in this country in relation to the conduct of litigation by all three tiers of government: see eg* Yong v Minister for Immigration and Multicultural Affairs *(1997) 75 FCR 155 at p.166;* Hughes Aircraft Systems International v Airservices Australia *(1997) 76 FCR 151 at 196-7;* SCI Operations Pty Ltd v Commonwealth *(1996) 69 FCR 346 at 368;* DPP (Cth) v Saxon *(1992) 28 NSWLR 263 at 267;* Kenny v South Australia *(1987) 46 SASR 268 at 273;* Logue v Shoalhaven Shire Council *[1979] 1 NSWLR 537 at 558-9;* P & C Cantarella Pty Ltd v Egg Marketing Board (NSW) *[1973] 2 NSWLR 366 at 383-4; see also* Re v Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd *[1988] 1 AC 858 at 876-7.*
>
> *45. As with most broad generalisations, the burden of this fair dealing standard is best appreciated in its particular exemplifications in individual cases. The courts have, for example, spoken positively of a public body's obligation of "conscientious compliance with the procedures designed to minimise cost and delay":* Kenny's *case, above, at 273; and of assisting "the court to arrive at the proper and just result":* P & C Cantarella Pty Ltd v Egg Marketing Board, *above, at 383. And they have spoken negatively, of not taking purely technical points of practice and procedure:* Yong's *case, above, at 166; of not unfairly impairing the other party's capacity to defend itself:* Saxon's *case, above, at 268; and of not taking advantage of its own default:* SCI Operations Pty Ltd, *above, at 368.* (My underlining)

103. The role of an agency in administering the FOI Act, and in justifying its decisions in a review under Part 5 of the FOI Act, should not be that of an adversary in legal proceedings, raising whatever obstacles and hurdles, valid or otherwise, might assist in wearing down an opponent. In a review under Part 5 of the FOI Act, the respondent agency has an obligation to assist the Information Commissioner to arrive at the correct decision required by law in the application of relevant provisions of the FOI Act to the documents in issue. This involves raising exemption provisions which are honestly believed, on reasonable grounds, to be applicable to the documents or matter in issue, and explaining and supporting the basis of the exemption claims with relevant written argument and evidence. It also involves disclosing to the Information Commissioner all relevant evidence in the possession or control of, or known to, the agency, which bears on the exemption claim, whether it is favourable to the agency's case or not. It is not, however, appropriate for an agency to invoke a multitude of weakly argued, or unsupported, exemption claims in the hope that one of them may somehow succeed, or to complicate and delay the finalisation of a review under Part 5 of the FOI Act.

104. I trust that the Council, and other agencies, will, in future cases, bear in mind their ethical and legal obligations as government party participants in review proceedings under Part 5 of the FOI Act.

Conclusion

105. In application for review no. L 7/00, I set aside the decision under review (being the decision of Mr Askern dated 21 January 2000). In substitution for it, I decide that:

(a) folio 106 is exempt matter under s.43(1) of the FOI Act;
(b) the matter in issue specified in paragraph 92 above is exempt matter under s.44(1) of the FOI Act; and
(c) the balance of the matter in issue does not qualify for exemption from disclosure to the applicant under the FOI Act.

106. In application for review no. S 49/00, I decide to vary the decision under review (being the decision of Mr Evans on behalf of the Criminal Justice Commission dated 3 February 2000) by finding that the matter in issue specified in paragraph 92 above is exempt matter under s.44(1) of the FOI Act, but that the balance of the matter in issue does not qualify for exemption from disclosure to the applicant under the FOI Act.

.....
F N ALBIETZ
INFORMATION COMMISSIONER