



FOURTH ANNUAL REPORT

**OFFICE**

*of the*

**QUEENSLAND  
INFORMATION COMMISSIONER**

**1 JULY 1995 TO 30 JUNE 1996**

PRESENTED TO PARLIAMENT

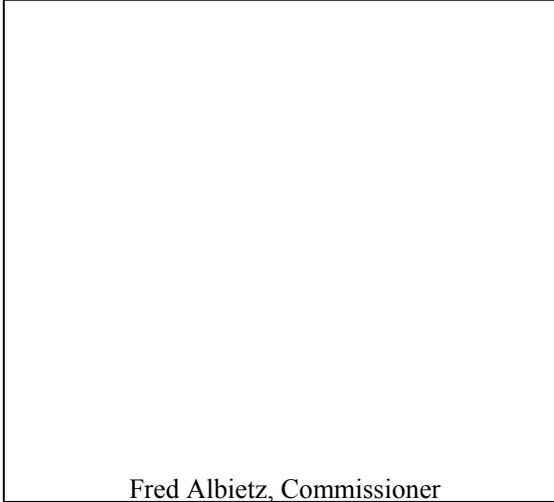
BY AUTHORITY  
J.R. SWAN, GOVERNMENT PRINTER, QUEENSLAND - 1996



# CONTENTS

	<b>PAGE</b>
<b>EXECUTIVE SUMMARY</b> .....	1
<b>CHAPTER 1: Constitution &amp; Functions; Structure &amp; Organisation</b> .....	4
Part A Constitution & Functions .....	4
Enabling Legislation; Statutory Powers & Functions .....	4
Public Finance Standards - Program Structure & Goals .....	8
Part B Structure & Organisation .....	8
<b>CHAPTER 2: Overview of Operations During the Reporting Year</b> .....	10
Goals and Performance in 1995/96 .....	15
<b>CHAPTER 3: General Observations on the FOI process in Queensland</b> .....	18
<b>The place of Freedom of Information legislation in a representative democracy, and the goal of cultural change</b> .....	18
The objects of FOI legislation .....	19
Open government and representative democracy .....	21
Public Office as a Public Trust .....	22
The backlash against FOI - objections on grounds of costs and efficiency .....	28
The goal of cultural change .....	30
<b>Matters raised in my third Annual Report</b> .....	31
Cabinet matter/Executive Council matter exemptions .....	31
Government-owned corporations .....	33
Aggregate student data .....	35
<b>Inter-Departmental Working Group Report</b> .....	36
<b>Use of the FOI Act by the community</b> .....	36
<b>APPENDICES</b>	
1 Applications for external review received during reporting year, by category (as per s.71 of the FOI Act) .....	38
2 Applications for external review received during reporting year, by respondent agency or minister .....	39
3 Notes on significant issues dealt with in formal decisions published by the Information Commissioner in 1995/96 .....	40
4 Summaries of decisions issued by means of letters to participants, in 1995/96 .....	64

# EXECUTIVE SUMMARY



Fred Albiez, Commissioner

The Information Commissioner is the independent external review authority established by s.61 of the *Freedom of Information Act 1992* Qld (the FOI Act) to whom aggrieved persons may apply for investigation and review of decisions made by agencies or Ministers (in the administration of the FOI Act) that fall within the categories of decision specified in s.71 of the FOI Act (the categories are listed in paragraphs 1.1 to 1.3 of this Report).

In 1995/96, the Office of the Information Commissioner again increased its output, with the finalisation of 203 external review applications, as compared to 179 in the previous reporting period (an increase of 13%). This

increased output was achieved with a small increase in professional staff (from 6 full-time staff to the equivalent of 6.3 full-time staff over the course of the year), made possible by some additional temporary funding. Encouragingly, for the first time, the office was able to complete nearly as many external review applications as it received in the course of a reporting period. This indicates that the present level of resourcing is adequate to meet recurring demand for the Information Commissioner's services. The remaining impediment to the achievement of desired standards of timeliness of service is the large backlog of cases accumulated principally during the first two years after the commencement of the FOI Act, when the resources allocated to the office were manifestly inadequate to deal with the unforeseen pent-up demand for use by Queenslanders of the FOI Act, and of the right to seek review by the Information Commissioner of unfavourable decisions made by agencies or Ministers (see Table 4 in Chapter 2). It is anticipated that additional temporary funding allocated to the office for the 1996/97 financial year will enable some inroads to be made into the backlog.

**Table 1 - Applications for review under Part 5 of the FOI Act - 1995/96**

Pending at start of reporting period (1/7/95)	286
Opened during the reporting period	209
Completed during the reporting period	203
Pending at end of reporting period (30/6/96)	292

**Note 1:** a table showing the distribution of the applications for review received during 1995/96, across the categories of decision subject to investigation and review by the Information Commissioner (as specified in s.71 of the FOI Act), appears at Appendix 1.

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

The Office of the Information Commissioner has now accumulated substantial experience and expertise in the resolution of FOI disputes, having (in 3½ years from commencing operations) dealt with a total of 826 applications for review, and resolved 534. While there have been many recurring areas of dispute, there has been no shortage of novel cases, posing new problems in the interpretation

and application of the FOI Act, as citizens seek to make use of it to access government-held information over a wide variety of areas of state and local government administration. My office continues to accord prime importance to its responsibility to provide authoritative guidance for FOI administrators on the correct interpretation and application of the provisions of the FOI Act, not only by publishing formal decisions of a high standard, but also, in the mediation/negotiation phase of the review process, by explaining to agencies, whether in conference or in correspondence, the basis on which my office considers that an agency may have misunderstood or misapplied the FOI Act in a particular case.

The Office of the Information Commissioner also accords great importance to offering a dispute resolution service that is as informal and inexpensive for participants (including government agencies) as the issues requiring resolution in a particular case will permit. My office places emphasis on informal methods of dispute resolution, endeavouring, in all cases, to undertake a preliminary assessment of the documents in issue as quickly as possible, and to negotiate with the participants in the review with a view to achieving settlement, or at least narrowing the range of issues in dispute which must proceed to a formal determination. This approach is intended to serve the aims of the FOI Act by procuring, as quickly as possible, the disclosure of as much information as possible. Procedures are tailored to suit the circumstances of each individual case, with a view to keeping down the costs of participation in the external review process, not only for applicants but also for agencies (and hence for the public purse). The Office of the Information Commissioner consciously tries to reduce or eliminate unnecessary expense and formality for participants, at least so far as the duty to accord procedural fairness, and the complexity of the issues for determination in any particular case, will allow. In 1995/96, 159 of the 203 applications finalised were resolved without the need for a formal determination. This represents a proportion of 78% of cases resolved by informal means.

**Table 2 - Outcome of external reviews completed during 1995/96**

No jurisdiction	21
Decision not to review/review further under s.77 of the FOI Act	1
Agency granted further time to deal with application	0
Resolved/Withdrawn following mediation	138
Decision issued - affirming decision under review	19
Decision issued - varying decision under review	12
Decision issued - setting aside decision under review; making decision in substitution	12
<b>TOTAL</b>	<b>203</b>

Of the 138 cases resolved or withdrawn following mediation, seven involved questions of whether a fee or charge was payable by the applicant. The remaining 131 cases involved disputes over access to, or amendment of, information. In 64 of them, the applicant was successful in obtaining, in whole or in part, access to documents, or amendment of personal affairs information, which had previously been refused by an agency. Of the remaining 67 cases, 25 were 'reverse FOI' applications, by third parties who had been consulted under s.51 of the FOI Act, seeking to overturn decisions of agencies to disclose documents to an initial applicant for access under the FOI Act. Fourteen of those 25 cases were resolved in a manner that allowed the initial applicant to have access to the information in issue, or at least part of it. In the remaining 42 cases, the applicant either accepted the correctness of the agency's decision, or for other reasons resolved not to pursue the application further.

**Table 3 - Time for resolution of cases completed during 1995/96.**

Under 1 month	22	15 - 18 months	4
1 - 3 months	39	18 - 21 months	9
3 - 6 months	39	21 - 24 months	12
6 - 9 months	23	24 - 27 months	6
9 - 12 months	17	27 - 30 months	9
12 - 15 months	18	over 30 months	5
TOTAL			203

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

In my third Annual Report, I noted that the year 1994/95 had witnessed a significant retreat from the principles of openness, accountability and responsibility which the FOI Act was intended to enshrine. A series of, in my opinion, ill-considered and unnecessarily wide exemptions or exclusions from the right of access to documents of agencies and Ministers (conferred by s.21 of the FOI Act) were introduced by amendments to the FOI Act and the *Freedom of Information Regulation 1992* Qld. I stated my view that this trend must cause concern to those who welcomed the FOI Act as one means, but an important means, of redressing the imbalance between the governors and the governed in our community, with respect to access to information pertaining to the operations of government which affect the community at large.

I note that no action has yet been taken in regard to my comments, and I revisit them briefly in Chapter 3 of this Report. In that Chapter, I also voice my concerns at the continuing culture of non-disclosure apparent in some agencies, and urge all agencies and staff of agencies to regularly reconsider and reassess their approach to disclosure of information to members of the community, with a view to establishing agency policies which will encourage disclosure, except in cases where it is essential that disclosure be restricted.

---

## CONSTITUTION & FUNCTIONS; STRUCTURE AND ORGANISATION

### PART A : CONSTITUTION & FUNCTIONS

#### Enabling Legislation; Statutory Powers and Functions

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

*71.(1) The functions of the Commissioner are to investigate and review decisions of agencies and Ministers of the following kinds—*

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

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

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

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

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

- power to determine the procedure to be followed on a review under Part 5 of the FOI Act (s.72(1)(a));
- power to give directions to participants in a review as to the procedure to be followed on a review under Part 5 of the FOI Act (s.72(2));
- power to extend the time limit for lodging an application for review (s.73(1));
- power to make preliminary inquiries of an applicant, or a respondent agency or Minister, in order to determine whether the Information Commissioner has power or jurisdiction to review the matter to which the application relates, or whether the Commissioner may decide not to review the matter under s.77 of the FOI Act (s.75);
- power to require the production of a document or matter for inspection for the purpose of enabling the Information Commissioner to determine whether the document or matter is exempt, or is an official document of a Minister (s.76(1));
- power to decide not to review, or not to review further, a decision in respect of which the Information Commissioner is satisfied that the application for review is frivolous, vexatious, misconceived or lacking in substance (s.77);
- power to permit third parties to be participants in the review process (s.78);
- power to grant an extension of time to an agency or Minister to deal with an application under the FOI Act, and to grant such an application subject to conditions such as reduction or waiver of charges (s.79(2) and (3));
- power to try to effect a settlement between the participants, or suspend a review to allow the participants to negotiate a settlement (s.80);
- power to require an agency or Minister to provide an additional statement of reasons for a decision under review, where the initial statement of reasons is considered to be inadequate (s.82);
- power, for the purposes of a review, to obtain information from such persons, and make such inquiries, as the Information Commissioner considers appropriate (s.83(2));
- power to permit a participant to be represented by another person when appearing before the Information Commissioner (s.83(4));

- ❑ power to give to persons written notices requiring the giving of information in writing, or the production of documents to the Information Commissioner, or requiring a person to attend before the Information Commissioner and answer questions relevant to a review (s.85);
- ❑ power to examine witnesses on oath or affirmation (s.86);
- ❑ power to refer a question of law arising on a review under Part 5 of the FOI Act to the Supreme Court for decision (s.97).

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

- (a) review any decision that has been made by an agency or Minister in relation to the application concerned; and
- (b) decide any matter in relation to the application that could, under the FOI Act, have been decided by an agency or Minister;

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

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

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

Section 89(2) provides that the Information Commissioner must include in the decision the reasons for the decision. Section 89(5) provides that the Information Commissioner may arrange to have decisions published. I have made arrangements with the Law Book Company for my formal decisions to be published in the looseleaf service *Queensland Administrative Law*, edited by Dr Chris Gilbert and Mr William Lane. The decisions are subsequently published in a bound series of reports entitled the *Queensland Administrative Reports (QAR)*. The Department of Justice has arranged for distribution to FOI Co-ordinators in government agencies of copies of my formal decisions, shortly after they are given. Access to the decisions on computer disk has also been available from that source, on request by a government agency. Copies of any of my formal decisions which have not been reported are made available to members of the public, on request to my Office.

1.7 The Information Commissioner can properly be described as a specialist tribunal. The Information Commissioner has been conferred with powers and functions, and a role in the scheme of the FOI Act, which are comparable to those of the Commonwealth Administrative Appeals Tribunal (the Commonwealth AAT) and the Victorian Administrative Appeals Tribunal (the Victorian AAT) which undertake the function of independent external review authority in the scheme of the *Freedom of Information Act 1982 Cth* (the Commonwealth FOI Act) and the *Freedom of Information Act 1982 Vic* (the Victorian FOI Act), respectively.

Unlike those two bodies, however, which are tribunals of general jurisdiction, the Information Commissioner provides a specialised dispute resolution service confined to disputes under the FOI Act. Moreover, it is clear from Part 5 of the FOI Act and its legislative history that the Queensland Parliament intended that the Information Commissioner provide a speedier, cheaper, more informal and more user-friendly method of dispute resolution than the court system or tribunals such as the Commonwealth AAT and the Victorian AAT, which adopt court-like procedures. In Chapter 2 of my first Annual Report (1992/93) I traced the evolution of the Information Commissioner model of dispute resolution for FOI cases. I note that that model has been embraced in the freedom of information statutes of Western Australia, South Australia and Tasmania, although in the last two instances the South Australian Ombudsman and the Tasmanian Ombudsman have been given determinative powers in FOI matters, without the creation of a new statutory office of Information Commissioner.

- 1.8 Since one of the professed objects of freedom of information legislation (see s.5(1)(a) of the FOI Act) is to enhance the accountability of the executive branch of government, it is essential to the credibility of the entire scheme of the legislation that the opportunity is provided for aggrieved applicants to have adverse decisions reviewed on their merits by an authority independent of the executive government. The public is not likely to accept the administration of the FOI Act as being credible, fair and just, if the ultimate decision-making power on whether to grant or refuse access to information which may reflect on the efficacy or propriety of operations of the executive branch of government, were to remain in the hands of officials within the executive branch of government. Many of the exemption provisions in the FOI Act are unavoidably couched in terms which call for the making of value judgments, for example, as to whether disclosure (of particular documents) would involve a reasonable expectation of prejudice (see s.39, s.40, s.42 of the FOI Act) or a reasonable expectation of a substantial adverse effect (see s.40, s.47(1)(a), s.49 of the FOI Act) or as to where the balance of public interest lies when competing public interests favouring disclosure and non-disclosure are identified and weighed. If the public is to have confidence in the administration of the FOI Act, it requires the assurance that judgments made by agency officials and by Ministers (who are potentially subject to institutional pressures which may cause their judgments to favour the interests of their own organisation or the interests of the government of the day), can be tested by independent review.
- 1.9 Section 61(2) of the FOI Act provides that the Parliamentary Commissioner for Administrative Investigations (the Parliamentary Commissioner), appointed under the *Parliamentary Commissioner Act 1974*, is to be the Information Commissioner (unless another person is appointed as the Information Commissioner by the Governor-in-Council on an address from the Legislative Assembly - this has not occurred, and so far as I am aware, is not proposed). By virtue of my appointment as Parliamentary Commissioner, therefore, I also hold the separate statutory office of Information Commissioner.

### **Public Finance Standards - Program Structure and Goals**

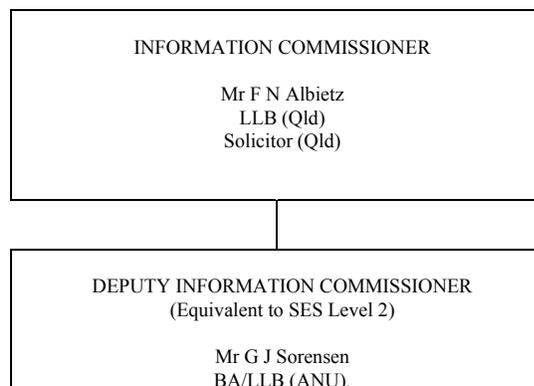
- 1.10 Although the Office of Information Commissioner and the Office of Parliamentary Commissioner are separate statutory offices, funding is provided for the Office of the Information Commissioner under the program budgeting arrangements for the Office of the Parliamentary Commissioner. The Office of the Information Commissioner has its corporate services functions of finance, personnel, administration and information technology performed by the Corporate and Research Division of the Office of the Parliamentary Commissioner. In terms of program management, the Office of the Information Commissioner forms part of the program "Complaint Investigation and Resolution", Office of

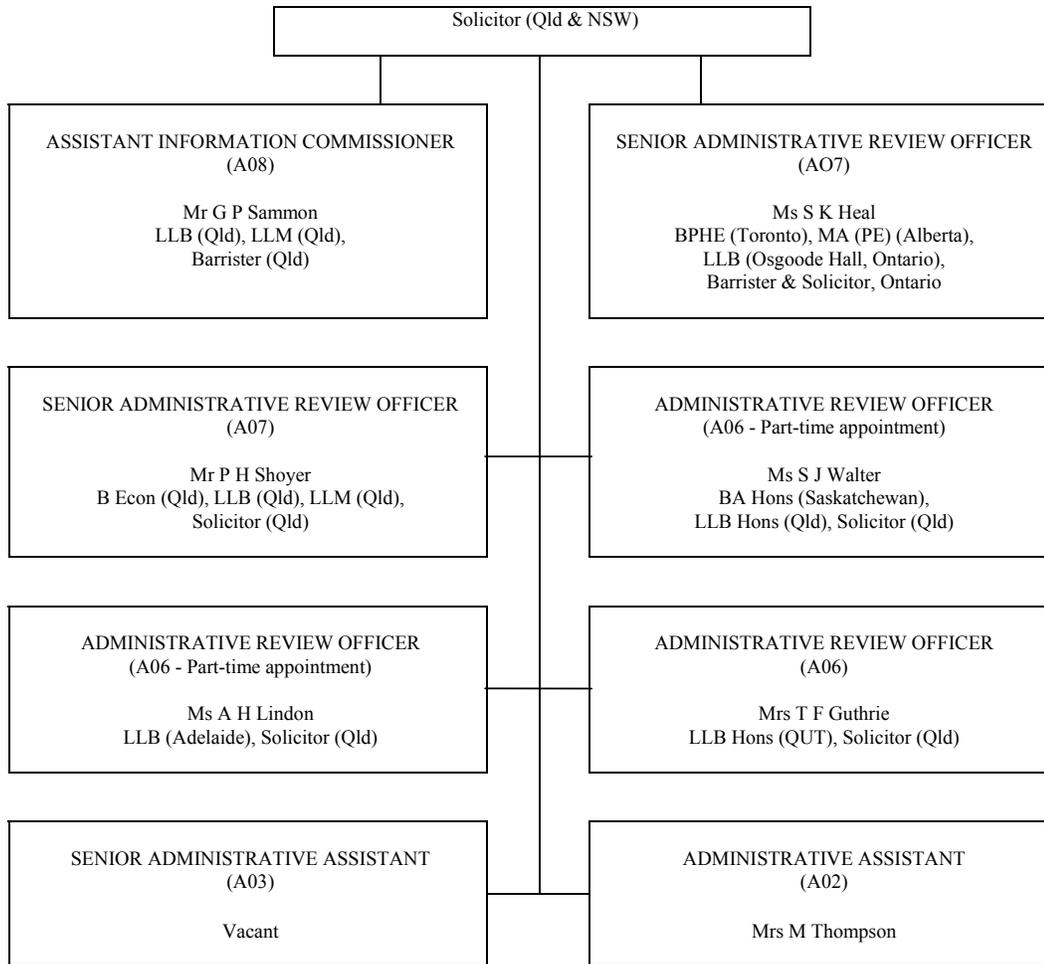
the Parliamentary Commissioner. The audited financial statements for 1995/96 in respect of that program have been certified and will be published in the 22nd Annual Report of the Parliamentary Commissioner. In 1995/96, \$486,462 was paid in salaries and related costs in respect of staff of the Office of the Information Commissioner, with other costs, including administration costs, being met from the resources of the Office of the Parliamentary Commissioner.

- 1.11 The program goal for the "Complaint Investigation and Resolution" program is to ensure responsive, independent and impartial investigation of grievances from members of the public. While this goal is in a general sense appropriate to the role and functions of the Information Commissioner, its wording was obviously chosen for the Parliamentary Commissioner's role, which covers most of state government administration and all local government administration, and which involves attempting to resolve grievances without the aid of determinative powers. In contrast, the role of the Information Commissioner is confined to reviewing decisions of specified kinds made under the FOI Act, and the Information Commissioner can exercise determinative powers, i.e., can make decisions which are binding on the participants to a dispute (subject to a participant's right to seek judicial review by the Supreme Court if an error of law in the Information Commissioner's decision can be demonstrated). I have endorsed more specifically appropriate goals and performance indicators for the Office of the Information Commissioner which are explained in Chapter 2 of this report.

## **PART B : STRUCTURE & ORGANISATION**

- 1.12 The principal place of business of the Office of the Information Commissioner is Level 25, Jetset Centre, 288 Edward Street, Brisbane, 4000 (telephone (07) 3246 7100).
- 1.13 I, Frederick Norman Albietz, was appointed by the Governor-in-Council on 16 May 1991 to a three year term as Parliamentary Commissioner for Administrative Investigations pursuant to s.5 of the *Parliamentary Commissioner Act 1974*, and on 16 May 1994 was re-appointed to a further three year team. By virtue of that appointment, I also hold office as Information Commissioner pursuant to s.61(2) of the FOI Act.
- 1.14 The following organisational chart sets out the structure of the Office of the Information Commissioner, as at 30 June 1996, and also identifies the staff member occupying each position:





## OVERVIEW OF OPERATIONS DURING THE REPORTING YEAR

- 2.1 In 1995/96, the Office of the Information Commissioner again increased its output, with the finalisation of 203 external review applications, as compared to 179 in the previous reporting period (an increase of 13%). I congratulate my staff for their dedication, professionalism and sustained efforts during the year. Encouragingly, for the first time, the office was able to complete nearly as many external review applications as it received in the course of a reporting period. This indicates that the level of resourcing presently allocated to the office is adequate to meet recurring demand for the Information Commissioner's services, and the only impediment to the achievement of desired standards of timeliness of service is the remaining backlog of cases which accumulated principally during the first two years after the commencement of the FOI Act, when the resources allocated to the office were manifestly inadequate to deal with the unforeseen pent-up demand for use by Queenslanders of the FOI Act, and of the right to seek independent external review of unfavourable decisions made by agencies or Ministers. The history of performance of the office, in terms of numbers of applications dealt with, is set out in Table 4 below. In 1995/96, the increased outputs by the office, combined with a further slight decline in the number of new applications received, has meant that the large backlog accumulated in previous years has not significantly increased during the reporting period.

**Table 4 - Applications dealt with by the Office of the Information Commissioner**

Reporting period	Applications received	Applications completed	Applications pending	Equivalent full-time professional staff
18/1/93 - 30/6/93	120	27	93	2
1/7/93 - 30/6/94	274	125	242	4
1/7/94 - 30/6/95	223	179	286	6
1/7/95 - 30/6/96	209	203	292	6.3
Total	826	534		

- 2.2 Unfortunately, while a significant backlog remains, there will continue to be an unacceptably high proportion of applicants for review who will not have their cases dealt with in the timely manner that the office aspires to achieve. I understand and sympathise with the concerns of applicants, and agencies, to have timely resolution of disputes which proceed to external review. During the reporting period, I have implemented measures aimed at streamlining the external review process. I have—

- increased even further the emphasis on attempts at informal resolution of disputes by mediation and negotiation between the participants;
- adopted the practice of giving my formal decisions by way of letters to the participants, in less complex cases involving the application of settled principles to the facts of the particular case, and where the formal decision has little or no broader instructive value that would warrant its wider publication. These 'letter decisions' (summarised in Appendix 4) are still formal decisions under s.89 of the FOI Act, but

preparation in this form provides some privacy for participants, permits some short-cuts to be taken in the expression of reasons for decision (eg., cross-referencing to other material already in the hands of the participants), and is generally less time-consuming than the preparation of formal decisions for publication; and

- ❑ reduced, wherever possible, the length of my published decisions (a step not lightly undertaken, given the statutory requirement to produce complete written reasons for decision, the need to explain my decision completely in the event that the matter should be challenged in the Supreme Court, and the reduction in the educative value of decisions which do not fully discuss issues of significance to agencies and members of the public).

Despite these measures, many applicants for review have been left dissatisfied with the fact that their cases have not been speedily resolved. The individual case-loads allocated to professional staff simply remain too high for all files to be progressed in a timely fashion. I have continued to prioritise the case-loads of staff according to the factors identified in paragraphs 2.15 and 2.16 of my second Annual Report (1993/94). For the financial year 1996/97, the Office of the Information Commissioner has been allocated additional temporary funding which I propose to use to implement a more streamlined management structure, and hire additional staff, in an effort to reduce the accumulated backlog of appeals.

- 2.3 In Chapter 2 of my second Annual Report (1993/94), I referred (at paragraphs 2.2 to 2.6) to the complex nature of some of the legal issues that arise under the FOI Act, and the compounding effect which can occur when there is a large volume of information in issue. Decisions which proceed through to the stage of external review can ordinarily be expected to involve the more difficult issues of principle which are capable of arising under the FOI Act. The purpose of an external review authority is to take a more careful look at the more complex and contentious issues that arise in the administration of the FOI Act, while affording the opportunity (which, due to statutory time constraints, is not ordinarily available at primary, and internal review, decision-making levels) for participants in a review to provide detailed inputs to the decision-making process by way of evidence and/or submissions on the issues for determination. Although it is best, whenever possible, to avoid an unduly legalistic approach to the application of the FOI Act, that is generally not possible with respect to applications for external review that cannot be resolved informally by negotiation, and must proceed to a formal decision by the Information Commissioner. In the usual case, an applicant is asserting a legal right (in accordance with s.21 of the FOI Act) to be given access to requested documents, and the respondent agency is asserting that the matter in issue falls within one of the exceptions to the right of access provided for in the FOI Act, usually one of the exemption provisions in Part 3, Division 2. The participants are entitled to have such a dispute resolved according to law, and I am obliged to resolve it according to proper legal standards and principles, including the duty to accord procedural fairness. A participant who is aggrieved by a formal decision of the Information Commissioner has the right to apply to the Supreme Court for judicial review if the participant considers that a legal error has been made. Moreover, Australian law imposes fairly onerous obligations as to the extent, and substantive content, of the reasons which must be furnished by a tribunal which (like the Information Commissioner pursuant to s.89(2) of the FOI Act) is required to give reasons for decisions: see H. Katzen "Inadequacy of Reasons as a Ground of Appeal", (1993) 1 *Australian Journal of Administrative Law*, p.33.
- 2.4 In my first and second Annual Reports, I expressed my views on the effectiveness of the Information Commissioner model for independent, external review of decisions made under freedom of information legislation. (For a considered assessment of the advantages of the Information Commissioner model, see P. Bayne, "External Review of FOI decisions by the Information Commissioners" (1995) 3 *Australian Journal of Administrative Law*, p.53). I also indicated that the performance achieved by the Western Australian Information Commissioner confirms that when a reasonable balance is achieved between the resources

available to an Information Commissioner, and the extent of the demand for an Information Commissioner's dispute resolution service, the Information Commissioner model is the most efficient and cost-effective for the interests of all concerned. The "review and complaint resolution" branch in the Office of the Western Australian Information Commissioner, with the same number of professional staff as my office, has achieved excellent standards of timeliness in the resolution of cases, having received considerably fewer applications for review than my office has received. (In its first 30 weeks of operation, the Office of the Western Australian Information Commissioner received 61 appeals, and resolved 26; in 1994/95 it received 123 formal appeals and resolved 105; and in 1995/96 it received 168 formal appeals and resolved 206). The performance of my office in 1995/96 demonstrates that, absent the large backlog of cases referred to in paragraph 2.2, my office is capable, with its present resourcing, of matching the timely disposal of cases achieved by the Western Australian Information Commissioner. For the moment, however, as a consequence of the substantial backlog of cases, it remains true to say that the Information Commissioner model of dispute resolution in Queensland works efficiently and cost-effectively for those whose cases are given priority, but standards of timeliness inevitably suffer for the participants in other cases.

- 2.5 In Chapter 4 (pp.24-29) of my first Annual Report (1992/93), I explained the procedural approach that would ordinarily be adopted for the resolution of FOI disputes. That approach has been adhered to during 1995/96. The main emphasis of that approach is on negotiation with the participants to resolve as many issues in dispute as possible. When that process is exhausted, opportunities are given to the participants to lodge evidence and written submissions in support of their respective cases, preparatory to a formal determination. The procedures adopted are intended to keep the costs for participants (including government agencies) as low as possible.
- 2.6 In my second and third Annual Reports, I included information comparing the performance of the Office of the Information Commissioner with the performance of the Commonwealth AAT and the Victorian AAT in the first years following the commencement of FOI legislation in the respective jurisdictions. Those figures are updated in Table 5 below. Comparisons have been made with the Commonwealth and Victoria because the number of applications made to the relevant external review authorities in other Australian jurisdictions have been much lower, and do not afford meaningful comparisons (except for Western Australia which is referred to in paragraph 2.4).

**Table 5: Comparison of performance of external review authorities - Queensland, Commonwealth and Victoria**

	Queensland	Commonwealth	Victoria
	Period: 19.11.92 - 30.6.93	Period: 1.12.82 - 30.6.83	Period: 5.7.83 - 30.6.84
Applications to external review authority	120	69	59
Resolved by formal decision	7	3	Not available
Resolved without formal decision	20	16	Not available
Total resolved	27	19	Not available

Pending at end of reporting period	93	50	Not available
	<b>Period: 1.7.93 - 30.6.94</b>	<b>Period: 1.7.83 - 30.6.84</b>	<b>Period: 1.7.84 - 30.6.85</b>
Applications to external review authority	274	203	112
Resolved by formal decision	20	16	40
Resolved without formal decision	105	125	20
Total resolved	125	141	60
Pending at end of reporting period	242	112	58
	<b>Period: 1.7.94 - 30.6.95</b>	<b>Period: 1.7.84 - 30.6.85</b>	<b>Period: 1.7.85 - 30.6.86</b>
Applications to external review authority	223	334	119
Resolved by formal decision	43	46	29
Resolved without formal decision	136	213	59
Total resolved	179	259	88
Pending at end of reporting period	286	187	89
	<b>Period: 1.7.95 - 30.6.96</b>	<b>Period: 1.7.85 - 30.6.86</b>	<b>Period: 1.7.86 - 30.6.87</b>
Applications to external review authority	209	267	151
Resolved by formal decision	44	64	18
Resolved without formal decision	159	85	89
Total resolved	203	149	107
Pending at end of reporting period	292	305	133

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

- 2.7 One other interesting comparison with the Commonwealth and Victoria (illustrated in tables 6A, 6B and 6C below) is that the percentage of total FOI applications which proceed through to the stage of external review is more than twice as high in Queensland, which tends to suggest that the less formal Information Commissioner model for dispute resolution in FOI cases is less expensive and less intimidating for applicants aggrieved by agency decisions.

**Table 6A - Commonwealth of Australia - Proportion of external review applications to total FOI applications**

Period	No. of appeals to Commonwealth AAT	Total no. of FOI applications	As a %
1.12.82 to 30.06.83	69	5,702	1.21%
1983/84	203	19,390	1.05%
1984/85	310	33,213	0.93%
1985/86	267	36,727	0.73%
1986/87	171	30,007	0.57%

**Table 6B - Victoria - Proportion of external review applications to total FOI applications**

Period	No. of appeals to Victorian County Court or AAT	Total no. of FOI applications	As a %
1983/84	59	4,285	1.38%
1984/85	112	4,702	2.38%
1985/86	119	9,062	1.31%
1986/87	151	9,431	1.60%

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

**Table 6C - Queensland - Proportion of external review applications to total FOI applications**

Period	No. of applications for review by Information Commissioner	Total no. of FOI applications	As a %
19.11.92 - 30.6.93	120	4,988	2.41%
1993/94	274	8,275	3.30%
1994/95	223	7,602	2.93%
1995/96	209	8,542	2.45%

- 2.8 One of the most important functions of my Office is to provide authoritative guidance for FOI administrators on the correct interpretation and application of the provisions of the FOI Act. This is done not only through the publication of formal decisions, but through attempting, in the mediation/negotiation phase of the review process, to explain to agencies, both in conference and in correspondence, the basis on which my Office considers that an agency may have misunderstood or misapplied the FOI Act in a particular case. The quality of formal decisions is, of course, of prime importance in discharging the educative and normative (i.e. standard-setting) role expected of an external review authority. Notes on the significant issues dealt with in each published formal decision given in 1995/96 are set out in Appendix 3 to this report.

## **GOALS & PERFORMANCE IN 1995/96**

- 2.9 I have established three general goals for the Office of the Information Commissioner. I have also established key performance indicators to measure the achievements of the Office in meeting the goals. I set out below each goal, together with its relevant performance indicators, before proceeding to evaluate the performance of the Office in the reporting period.

### **Goal 1**

To conduct the investigation and review of decisions subject to review under Part 5 of the FOI Act, with a high standard of professionalism, timeliness and efficiency, in order to establish the correct decision required by the provisions of the FOI Act (or resolve the dispute

by informal means) with as much expedition as the requirements of procedural fairness, and the issues for determination in the case, will allow.

#### **Performance Indicators**

- ❑ achievement in each reporting period of a target number for total cases resolved (the target to be set by the Information Commissioner by reference to actual performance in past reporting periods, expected optimum performance for each available member of professional staff, and expected efficiency/productivity improvements). An additional measure of performance to be noted will be the percentage variation in the number of resolved cases, compared with previous reporting periods.
- ❑ proportion of cases completed in the reporting period which were resolved within 12 months of lodgement (and percentage variation in that proportion over previous reporting periods).
- ❑ average time for finalisation of cases completed in the reporting period (and percentage variation in that average time over previous reporting periods).

#### **Goal 2**

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

- promote informal resolution of disputes (or reduction of the number of issues in dispute requiring formal resolution) by negotiation and mediation; and
- avoid or minimise unnecessary expense to participants (including government agencies).

#### **Performance Indicators**

- ❑ proportion of total cases assessed for investigation and review during the reporting period in which informal dispute resolution methods (i.e. negotiation/mediation) were undertaken.
- ❑ proportion of cases resolved informally compared to cases resolved by formal written determination.

#### **Goal 3**

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

#### **Performance Indicator**

- ❑ number of Information Commissioner's formal determinations that are overturned for legal error by the Supreme Court in judicial review proceedings.

#### **Performance against Goal 1**

- 2.10 During 1995/96, the target which I set for my professional staff was to resolve a minimum of 190 cases. This target took account of the effect of disruptions caused by a significant turnover of staff during the year, and the amount of time taken by new staff to become proficient in what is a highly specialised field. Ultimately, the Office was able to resolve 203 applications for review, which I regard as a good result. This represented an increase of 13% on the number of applications for review resolved in 1994/95. The number of cases resolved by formal decision in 1995/96 was 44 (compared to 43 in 1994/95).
- 2.11 The proportion of cases closed in 1995/96 which were resolved within 12 months of lodgment was 69% (a slight increase from 66% in 1994/95). This still represents a significant decline from the proportion of 92% achieved in 1993/94, but, as I explained in paragraph 3.5 of my second Annual Report, this figure was expected to decline due to the aging of the unexpectedly large number of cases (394) received in the first 18 months of operations, a substantial proportion of which it has proved impractical to resolve quickly. There was also a slight increase in the average time for finalisation of cases completed during the reporting period, from 286 days (i.e. approximately 41 weeks) in 1994/95 to 292 days (i.e. approximately 42 weeks) in 1995/96.

### **Performance against Goal 2**

- 2.12 The proportion of total cases assessed for investigation and review during 1995/96 in which informal dispute resolution methods were undertaken was, again, high at 93% (the figure was 91% in 1994/95). A total of 159 cases were resolved informally compared to 44 cases resolved by formal written determination, making a proportion of 78% resolved by informal methods (a slight increase on the 1994/95 figure of 76%). Again, I can report that it has been my experience that even if mediation and/or negotiation does not fully resolve a dispute it has, in nearly all cases, resulted in some significant progress towards narrowing and reducing the number of issues which must be the subject of formal determination.

### **Performance against Goal 3**

- 2.13 Since formal decisions represent a most significant part of the work undertaken by my Office during the reporting period, I have recorded, in Appendix 3 to this Report, some notes on what I consider to be the significant issues dealt with in each published formal decision issued in 1995/96. This may be of assistance as a check list or handy guide for FOI administrators. From my examination of agency decisions at primary and internal review level (in those cases which progress to the stage of external review), it is clear that most agencies continue to obtain assistance from my formal decisions, and refer to them to explain and justify to applicants the stance which an agency has taken in a particular case.
- 2.14 During the reporting period, three applications were made to the Supreme Court challenging decisions made by me under the FOI Act. One challenge was to my decision in *Re Murphy and Queensland Treasury and Others* (Decision No. 95023, 19 September 1995, unreported), that the names of agency officers were not exempt under the FOI Act. My decision was upheld by the Supreme Court in *State of Queensland v Albietz* [1996] 1 Qd R 215.
- 2.15 The other two challenges related to my decision in *Re English and Queensland Law Society Incorporated* (Decision No. 95022, 4 August 1995, unreported), that the Queensland Law Society is an "agency" for the purposes of the FOI Act. One challenge was directed to that decision, while the other concerned directions given in respect of another application for review involving the Queensland Law Society. The challenges were heard together and rejected by the Supreme Court: see *Queensland Law Society Incorporated v Albietz & Ors* QLR 27/7/96 (No. 638/95, Derrington J, 1 March 1996).

## GENERAL OBSERVATIONS ON THE FOI PROCESS IN QUEENSLAND

### **The place of Freedom of Information legislation in a representative democracy, and the goal of cultural change**

- 3.1 In January 1996, the report by the Australian Law Reform Commission and the Administrative Review Council on their joint review of the Commonwealth FOI Act, *Open government: a review of the federal Freedom of Information Act 1982* (the ALRC/ARC Report), was published. The product of careful research and wide consultation, it contains many worthwhile recommendations for the improvement of the Commonwealth FOI Act (on which the Queensland FOI Act was largely modelled) and for improved administration of the Commonwealth FOI Act. It is a report worthy of attention by the Queensland Parliament in assessing and monitoring whether the Queensland FOI Act, and its administration, are as effective as they could be for attaining the objects which Parliament intended to achieve through the enactment of the Queensland FOI Act.
- 3.2 The ALRC/ARC Report (at paragraphs 4.12 to 4.13) addressed the topic of agency culture as a key factor affecting the success of FOI legislation, and the goal of attaining a public sector that accepts and is committed to open government:

*4.12 The culture of an agency and the understanding and acceptance of the philosophy of FOI by individual officers can play a significant part in determining whether the Act achieves its objectives. A negative attitude, particularly on the part of senior management, can influence an agency's approach to FOI and seriously hinder the success of the Act in that agency.*

#### ***Still a certain level of discomfort***

*4.13 There are many officers in the federal public service who have a positive attitude to FOI and work hard to administer the Act in accordance with its spirit. Despite this high level of acceptance by many individual officers there still appears to be a certain level of discomfort within the bureaucracy with the concept of open government. Some observers consider it may well take a generational change before there is a good working relationship with the FOI Act in the public sector generally.*

It can fairly be said that much has been achieved in 12 years by government and bureaucrats in adapting to the new concepts and culture that FOI brought with it. Some areas of controversy still remain, and the balance between providing information and maintaining some secrecy is yet to be struck. As time goes by and a larger number of public servants grow up with FOI, the capacity of the public sector to live and work with FOI will increase.

[from J Cain 'Some reflections on FOI's early years' (1995) 58 FOI Review 54, 58]

*Others have a less optimistic view of the progress made to date.*

It is my sad conclusion ... that with few exceptions the agencies of government have taken the Act as a guide to where they should dig their trenches and build their ramparts.  
[from M Paterson, Submission 94]

*Whatever the extent of the problem, it is clear that the Act is not yet accepted universally throughout the bureaucracy as an integral part of the way democracy in Australia operates. The continuing resistance may relate to the increasingly direct accountability of public servants and their resultant loss of anonymity. ...*

- 3.3 Based on my experience to date of dealing with a significant sample of the more contentious and complex cases that have arisen under the FOI Act, my impression of the attitudes of Queensland public servants to the FOI Act is that they largely accord with the attitudes attributed to Commonwealth public servants, in the passage just quoted.
- 3.4 For the most part, the cadre of specialist FOI administrators (particularly those in the larger agencies which predominantly provide client services to members of the public) understand and embrace the objects of FOI legislation. However, to locate requested documents, and obtain initial views on whether their disclosure may be prejudicial, specialist FOI administrators are substantially dependent on the co-operation of the individual officers, work groups and line-managers who hold documents which are the subject of access requests, many of whom, it seems, regard FOI access applications at best as an unwelcome intrusion on, and distraction from, their 'real work'. Occasionally, examples are seen of clear hostility towards the FOI Act and its requirements, sometimes from quite senior officials.
- 3.5 It seems that the objects and philosophy of FOI legislation may be too subtle or intangible to arouse ready acceptance on the part of many public servants (who are themselves subject to additional work pressures in a climate of public sector cost-cutting, and exhortations to 'achieve more with less'). At a practical level, this should not matter, since the FOI Act is a law of the Parliament, and one of the most elementary duties of all public officials is to comply with the law. (To the extent that public officials seek to manipulate or circumvent a law like the FOI Act, or even manifest antipathy to it in their dealings with citizens, they tend to detract from the moral authority of the executive government to require compliance by citizens with laws enacted by the Parliament). Nevertheless, it seems opportune to restate the objects and philosophy of FOI legislation, and relate their significance to emerging trends in the judicial development of Australian law, the core concern of which is to accommodate the law to the efficacious working of our system of government based on representative democracy.

#### The objects of FOI legislation

- 3.6 The groundwork for FOI legislation in Australia was laid by the Commonwealth Parliament. In 1979, the Senate Standing Committee on Constitutional and Legal Affairs produced a lengthy report on the Bill which would eventually become the Commonwealth FOI Act. The *Report on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978* (which I will refer to as the "1979 Senate Report") contained the following comments on the justifications, and need, for FOI legislation in Australia:

*3.3 It seems to us that there are three quite specific justifications for having effective freedom of information legislation in Australia, each of which arises out of the principles upon which democratic government claims to be based. The first of these touches upon the issue of the rights of the individual. With certain national security exemptions to which we refer elsewhere, we believe that every individual has*

*a right to know what information is held in government records about him personally. We believe that the individual has the right to inspect files held about or relating to him, and, as we shall argue later, the right to have material which is inaccurate corrected on such a file. His file, after all, is accessible to other people (that is, to various public servants) and we see no reason why it should not be equally accessible to the person most directly concerned.*

**3.4** *Secondly, we believe that when government is more open to public scrutiny, it in fact becomes more accountable. As a result there is a greater need for it to be seen to be efficient and competent. The accountability of the government to the electorate, and indeed to each individual elector, is the corner-stone of democracy, and unless people are provided with sufficient information accountability disappears. The Prime Minister (Rt Hon. J.M. Fraser) has described the situation thus:*

The principle of responsibility - to the electorate and the Parliament - is a vital one which must be maintained and strengthened because it is the basis of popular control over the direction of government and the destiny of the nation. To the extent that it is eroded, the people themselves are weakened. If the people cannot call to account the maker of government policy they ultimately have no way of controlling public policy or the impact of that policy on their own lives ... But just as fundamental are two further requirements. First, people and Parliament must have the knowledge required to pass judgment on the government ... Too much secrecy inhibits people's capacity to judge the government's performance.

[J M Fraser, "Responsibility in Government", *Australian Journal of Public Administration*, 1 March 1978, at pp.1-2]

**3.5** *Thirdly, we believe that if people are adequately informed, and have access to information, this in turn will lead to an increasing level of public participation in the processes of policy making and government itself. Governments should be constantly in receipt of advice, not only from the professional public service but also from other sections of the community and from individual citizens and their members of Parliament. Unless information is available to people other than those professionally in the service of the government, then the idea of citizens participating in a significant and effective way in the process of policy making is set at naught. This participation is impossible without access to information.*

**3.6** *Thus we believe that, for reasons which touch both upon the rights of the individual and upon the public policy aspects of our system of government, an effective Freedom of Information Bill is clearly needed in Australia today.*

**3.7** Similar sentiments are to be found in the Minister's Second Reading Speech, and the preparatory 'legislative history' materials, for the Queensland FOI Act. Too frequently, however, the reality of the administration of FOI legislation fails to match the rhetoric of its introduction. To the extent that the problem can be attributed to a lack of sympathy or acceptance, by officials in the executive branch of government, for the legislation, the ALRC/ARC Report has recommended a possible counter-measure: see paragraph 3.20 below.

Open government and representative democracy

- 3.8 The objects and philosophy of FOI legislation fit neatly with emerging trends in the judicial development of Australian law. The High Court of Australia has recognised the existence of certain implied Constitutional freedoms necessary to ensure the proper working of a representative democracy (see *Australian Capital Television Pty Ltd v Commonwealth* (No. 2) (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104). These in turn were based on the recognition that sovereign power resides in the people: "*the powers of government belong to, and are derived from, ... the people*" (per Deane and Toohey JJ in *Nationwide News Pty Ltd v Wills* at p.72); "*... the sovereign power which resides in the people is exercised on their behalf by their representatives*" (per Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth* (No. 2) at p.137).
- 3.9 I first addressed the significance of this principle, and various statements by High Court judges as to the consequences of the principle, in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.83-86. The significance of this principle as a fundamental justification for open government principles was addressed in the ALRC/ARC Report at paragraphs 2.3 - 2.4.

### ***Information and representative democracy***

*2.3 Australia is a representative democracy. The Constitution gives the people ultimate control over the government, exercised through the election of the members of Parliament. The effective operation of representative democracy depends on the people being able to scrutinise, discuss and contribute to government decision making. To do this, they need information. While much material about government operations is provided voluntarily and legislation must be published, the FOI Act has an important role to play in enhancing the proper working of our representative democracy by giving individuals the right to demand that specific documents be disclosed. Such access to information permits the government to be assessed and enables people to participate more effectively in the policy and decision making processes of the government.*

Citizens in a representative democracy have the right to seek to participate in and influence the processes of government decision-making and policy formulation on any issue of concern to them . ... The importance of FOI legislation is that it provides the means for a person to have access to the knowledge and information that will assist a more meaningful and effective exercise of that right.

[from *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60, 86. The democratic basis of the Commonwealth FOI Act has also been accepted by the Commonwealth AAT: see, for example, *Re Cleary and Department of the Treasury* (1993) 31 ALD 214, 217-18.]

*Without information, people cannot adequately exercise their rights and responsibilities as citizens or make informed choices. Government information is a national resource. Its availability and dissemination are important for the economic and social well-being of society generally.*

Information is the currency that we all require to participate in the life and governance of our society. The greater the access we have to information, the greater will be the responsiveness of our governments to community needs, wants, ideas and creativity. Alternatively, the greater the restrictions that are placed on access, the greater the feeling of 'powerlessness' and alienation.

[from Cth Ombudsman, Annual Report 1994-95, p.33]

*Information enhances the accountability of government. It ensures that members of Parliament are aware of the activities of the Executive, which is especially important in light of the imbalance in power between them. Information is an important defence against corruption.*

...

### ***The High Court on representative democracy***

*2.4 The High Court in the 'free speech cases' [cited in paragraph 3.8 above] demonstrated the importance it places on ensuring the proper working of representative democracy. The Court determined that freedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege, but inherent in the idea of a representative democracy. It held that the Constitution contains an implied freedom of political speech and communications. Although the High Court did not go so far as to suggest that a right of access to government information is constitutionally guaranteed, the view of the Court indirectly supports FOI objectives and suggests that it is important for Australia that the FOI Act functions properly and is interpreted in a way that promotes the disclosure of information.*

### Public Office as a Public Trust

- 3.10 In two recent essays that are likely to be of seminal importance (P.D. Finn, "The Forgotten 'Trust': the People and the State", in M. Cope (ed), *Equity - Issues and Trends*, Federation Press, 1995, pp.131-151; P.D. Finn, "A Sovereign People, A Public Trust", in P.D. Finn (ed), *Essays on Law and Government*, Law Book Co., 1995, pp. 1-32), Professor Paul Finn (now His Honour Mr Justice Finn of the Federal Court of Australia) has related the significance of the High Court's recognition of the sovereignty of the people, to a line of longstanding common law authority which treated public officials as occupying offices of trust and confidence concerning the public, and commenced the task of exploring the incidents and possible consequences of what he describes as "... *the most fundamental fiduciary relationship in our society ... that which exists between the community (the people) and the state, its agencies and officials*" ("A Sovereign People, A Public Trust", cited above, at p.10). The principles which Professor Finn explores have wide-ranging significance, particularly with respect to integrity in government. Other principles of importance are touched on in the following passages from Professor Finn's essay "A Sovereign People, A Public Trust", but my main purpose has been to extract those segments which relate to the importance of 'open government' principles:

*... the core idea of trusteeship—that government exists to serve the interests of the people and that this has a limiting effect on what is lawfully allowable to government—has remained an undertone, if not more, in common law doctrine itself. The practical expression of this is often to be found in the link between the actions of government and the "public interest". The interests of government are not, as such, synonymous with the public interest. But this notwithstanding, as McHugh JA has observed, "governments ... are constitutionally required to act in the public interest." Doctrines taking this as their starting point are as diverse as that limiting the power of government to fetter its discretions, and the action for breach of confidence as it applies to governmental information. Beyond this again are bodies of law which are fiduciary in character, though not professing to be such in express terms. As Sir Anthony Mason has recently noted "modern administrative law ... from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers". And, perhaps the emerging doctrine of "proportionality" in and beyond*

*constitutional law provides yet another manifestation of a limitation on government which can be related to the core idea of trusteeship.*

*However we may wish to interpret such elements in our common law, we cannot now ignore the inexorable logic of popular sovereignty. If "the powers of government belong to and are derived from the people", can the donees of those powers under our constitutional arrangements properly be characterised in terms other than that they are the trustees, the fiduciaries, of those powers for the people? Though separated by more than two centuries, our answer should be that of the American colonists after the Revolution. I would formulate it in this way:*

The institutions of government, the officers and agencies of government exist for the people, to serve the interests of the people and, as such, are accountable to the people.

...

*Sovereignty and trust probably are best seen as expressions of intrinsic qualities of our democracy. In this, they properly can be described as "constitutional principles" [by which I mean principles which, though reflected in the law, provide fundamental assumptions of our system of government].*

...

*Much more important, I would suggest, is the impact they should have as constitutional principles on the structuring and practice of government under our Constitutions—on matters as diverse as our electoral systems, the responsibility of our parliaments vis-à-vis the executive and the administrative system, measures securing accountability to the public and so on. The most sustained elaboration of this dimension is to be found in the WA Inc Report, Part II. I would simply note in passing that the Royal Commission there observed of the trust principle in particular, that it "provides the 'architectural principle' of our institutions and a measure of judgment of their practices and procedures."*

...

*For quite understandable reasons we have tended to see the sources of our constitutional principles in the form of government we have adopted in this country and in what that form either presupposes or mandates. Consequently representative democracy, responsible government, federalism, the rule of law and an independent judiciary engage our attention, and properly so. An understanding of these is basic to an understanding of our system of government. But they in turn need now to be located in a wider set of principles—a set of principles that are fundamental to the very constitution of a system of government and one, moreover, that professes to derive its legitimacy and authority from the people. These have a distinct provenance. They are not inherent in our form of government as such; rather they follow from the public's "ownership" of government itself. They are an expression of that ownership. In this they can properly be described as "first order" principles.*

...

*Put in very general terms, one is here concerned with those expectations the people are entitled to have of the manner of their governing, in virtue of their sovereignty. Our chosen form of government, tradition and practice all bear on this, but not decisively, if only for the reason that the system of government itself can be, and on*

*occasion demonstrably has been, manipulated by our representatives (elected and appointed) in ways that diminish or deny what is due to the public. The fact that a system of government has been constituted by the people to serve their interests has its own imperatives. These, in my view, provide our constitutional bearings and are manifest in five core ideas.*

*They should be noted individually at the outset. The first is our conception of democracy itself and of its relationship to government. I noted earlier Sir Anthony Mason's description of the "evolving concept of a modern democracy" with its emphasis upon "the fundamental rights and dignity of the individual". This provides one dimension of what I will describe as the "democratic principle". The other dimension relates to how the democratic will is expressed in, and to, government.*

*The second expresses the idea that government is a trust: all who exercise the devolved power of the public do so as servants of the public. This, the "public servant" principle, provides the proper basis for characterising the fundamental role and responsibility of our officials of all stations. It is of particular moment today, as I will indicate, both for Public Service officers and for the members of statutory authorities and government business enterprises ... .*

*The third is a consequence of public service and relates to the standards to be expected both in the practices and procedures of government and in the conduct of our officials themselves [the "integrity principle"].*

*The fourth begins to bring government back to the people. It is the "open government principle", a relatively recent arrival in our constellation of principles, governments for much of our history being practitioners of that form of official secrecy which properly can be described as information paternalism.*

*The fifth idea is that of accountability to the public, and I emphasise "to the public". For many of our officials there is a variety of bases on which accountability may be exacted—as an employee and to the employing authority; as a professional and to the appropriate professional body; as a parliamentary representative of a political party and to that party; and as a servant of the public and to the public. Though often confused, and in ways that diminish the last of these, it is the last which expresses a basal principle of government itself.*

...

### ***The democratic principle***

[Discussion of this principle omitted]

### ***The public servant principle***

*It is surprising how resistant many of our officials are to the idea that in exercising, or in participating in the exercise of, public power, that in managing, or in utilising, publicly owned property, they are acting in the matter (whatever their particular role in the scheme of government) for and on behalf of the public. Concealing themselves behind the immediate source of the power they exercise (for example devolution from a minister), or behind the particular legal form used to conduct a particular governmental activity (for example a statutory or registered corporation), it is common for officials today to see the place of the public in the scheme of government of which those officials administer part, as being that of their "clients"; to see the obligation of their office as being to the immediate donor of their power—and claims*

*made in the name of the principle of ministerial responsibility and effects of the contract system for senior executives of our Public Services can exaggerate this—or to the corporation in which they serve, or else to their appointors to that corporation.*

*It is the case for all of our officials that the manner in which they discharge their particular function is circumscribed in varying degree by binding obligations and accepted conventions. [These can have varying sources - statute, employment regulation, political convention, professional requirements, etc.] Nonetheless, the all important matter for us must be, not the means of their service, but its end. Sufficient has been said earlier in this chapter on trusteeship to indicate that this can be to no other purpose than the service of the people. The advent of, or proposals for, "whistleblower" legislation in some jurisdictions can, at least, be seen as a limited, symbolic reaffirmation of this.*

*This is not the place to consider the practical ramifications of this principle for particular types of public official, whether members of parliament, public servants, members of statutory boards (nominee and elected) etc, other than to note that it has to accommodate itself both to the particular role and responsibility of the type of official concerned, as well as to phenomena and practices which are accepted as characteristic elements or features of our system of government. To illustrate this point, the nature of a parliamentarian's trusteeship has had to be reconciled in some degree with the fetter party discipline imposes on what, under classical formulations, is the "duty to act according to the deliberate results of [a member's] judgment and conscience uninfluenced, as far as possible, by other considerations".*

*It is appropriate, though, to note that some of the more acute dilemmas for public officials arise where the various obligations girding them, employment, professional, public service, etc, appear to diverge. It equally needs to be noted that, because the tug on officials of obligations (or "loyalties") other than that of public service tends often to be the more intense and immediate, that obligation remains the most vulnerable. Both the Fitzgerald and WA Inc Reports illustrate the risks to the community that can result from this. It is that vulnerability, moreover, which accentuates the importance of the three remaining principles to be considered in this chapter.*

### ***The integrity principle***

*The reason and essence of this principle were encapsulated by the WA Inc Report in the following terms:*

*"If the trust owed to the public by our institutions and officials is to be a practised reality, and if the public is to be able to place its confidence in those institutions and officials, reassurance beyond mere words is an imperative. There must be, and be seen to be, integrity in the processes and practices of government ... [T]here must be, and be seen to be, integrity in the conduct of public officials."*

*This, perhaps more so than any other of the principles considered here, is the one receiving the greatest address by governments today. Whether or not it evidences a perceived distrust of government itself need not be pursued here. In almost all jurisdictions codes of conduct are being produced for officials of all stations; public and private registers of pecuniary interests are being imposed on members of parliament and senior appointed officials; corruption laws are being modernised; "revolving door" procedures are engaging attention; political donations for electoral purposes are being subjected to regulation; a greater transparency in administrative*

*procedures is being conceded, often in response to criticisms made by review agencies such as parliamentary committees and Auditors-General; administrative review machinery is being bolstered; processes for maintaining the integrity of public records are being enhanced in the new generation of archives legislation; in New South Wales and Queensland anti-corruption and misconduct agencies have been established; and so on.*

*The twin burdens of the principle are:*

- (a) to exact standards both of practice and of conduct in the administration of government that conform to the injunction that government exists for the people to serve the interests of the people; and*
- (b) to ensure that government is structured and practised in ways that invite and retain public trust in government itself.*

...

### ***The open government principle***

*... this principle, in a fundamental sense, provides the key to the power of governments and to the power of the public over its system of government.*

*From the colonial period until the last decade, the Australian story has been one of executive governments retaining for themselves the power to control the public availability of official information, and of maintaining that control through stringent official secrecy regimes. Ministers apart, official secrecy was made the general norm to be adhered to by public officials. Its effect was to make the public the hostage of government, at least in its access to information about government and its operations.*

*The common law's bridgeheads into official secrecy came from two directions: the first, by limiting the availability to government of the action for breach of confidence:*

*"It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action";  
[Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39 at 52 per Mason J]*

*and secondly, by more narrowly circumscribing the grounds for admitting claims of public interest privilege in legal proceedings. The legislative incursion has come, in turn, from the progressive enactment of Freedom of Information legislation (FOI) originating in the Commonwealth's Act of 1982.*

...

*The practice of open government can properly be described as "a democratic imperative". As the Fitzgerald Report put it, "[i]nformation is the lynch-pin of the political process. Knowledge is, quite literally, power. If the public is not informed, it cannot take part in the political process with any real effect". Past and, for that matter, aspects of present practice provide no justification for the levels of secrecy still practised today. Openness is not an absolute value; neither is secrecy an instrument of government convenience. Of the two, in a polity based on popular sovereignty and practising representative democracy, openness must be accepted as*

*the predominant constitutional value with secrecy now only justifiable by clear and demonstrable need.*

...

### ***The accountability principle***

*In this principle the circle is closed on the power devolved on government. As indicated earlier in this chapter, it expresses what should be an inescapable consequence of sovereignty and trusteeship: accountability to the people is required of all who hold office of employment in, or who exercise public power in, our governmental system.*

(footnotes omitted)

- 3.11 The themes discussed above have also been addressed by His Honour Mr Justice Thomas of the High Court of New Zealand, in an essay titled "Secrecy and Open Government" (published in P.D. Finn (ed), *Essays on Law and Government*, Law Book Co., 1995 at pp.182-227):

*The primary foundation for insisting upon openness in government rests upon the sovereignty of the people. Under a democracy, parliament is "supreme", in the sense that term is used in the phrase "parliamentary supremacy", but the people remain sovereign. They enjoy the ultimate power which their sovereignty confers. But the people cannot undertake the machinery of government. That task is delegated to their elected representatives together with such powers as are necessary to carry it out. But sovereignty remains with the people, and the elected government remains answerable to the people for the exercise of its delegated powers. In this way the government can be perceived as the agent or fiduciary of the people, performing the task and exercising the powers of government which have been devolved to it in trust for the people.*

*On this view, the information held by the government is essentially the people's information being held on their behalf pursuant to this devolution of authority. Nothing in the concept of popular sovereignty suggests that the people have delegated to the government the power to carry out the task of government in secret. It does not matter much, therefore, whether the people's claim to official information is based on their ultimate ownership of the information, or whether it is perceived as a condition of the delegation of the power of government to its elected representatives, or as a trust in favour of the people arising out of that devolution of power. The people's sovereignty ultimately determines their right to insist upon openness in government.*

(at pp.191-192)

- 3.12 It is important for officials in the executive branch of government to understand the basis on which they hold, and undertake the exercise of, executive power, and the fact that they may owe wider duties and loyalties than those that are owed to their employer. Though it may be asking too much of human nature to expect public servants to warmly embrace a piece of legislation that has the potential to subject their actions in office to public scrutiny, one would like to see more widespread acceptance, by public servants and agencies, of the principles discussed in the material quoted above, and of FOI legislation as a legitimate buttress of our system of representative democracy.

### The backlash against FOI - objections on grounds of costs and efficiency

- 3.13 FOI legislation was not primarily intended to confer direct benefits on the executive branch of government (though a host of indirect benefits for the executive government are frequently claimed for it, by supporters of FOI legislation). It was enacted for the benefit of citizens, with a view to

fostering more responsive and accountable government, and a healthier, more robust and more participative democracy, by conferring legal rights on citizens that are enforceable against the executive branch of government. Unless these are no longer objects that the Queensland Parliament desires to achieve, claims from within the executive branch of government that the FOI Act, and similar Fitzgerald-inspired accountability mechanisms, have 'gone too far' and constitute an expensive and inefficient distraction from the performance of the main tasks of government, ought to be regarded by the Parliament with a healthy scepticism. In this regard, it is again apposite to quote from the essay by Mr Justice Thomas on "Secrecy and Open Government" (at pp.184-185):

*At the heart of the problem of secrecy in government is the question of power. Power and information are inextricably linked. Unequal access to information confers unequal power, so that the Executive, which possesses the information and the ability to make selective disclosure in the form and at a time to suit the government, continues to have an advantage over the public. The move towards open government can be perceived as an attempt to redress the imbalance in power by securing for the citizen greater access to official information. Open government, therefore, is essentially about a shift in power from the government to the people, so that the democratic sovereignty of the people is not diminished by being reflected imperfectly in the machinery of government. In essence, the sovereignty of the people is eroded to the extent that they are not privy to the information possessed by their elected representatives.*

*This perspective explains the drive for greater openness in government and reflects the people's desire to hold the government accountable for what it does in their name and on their behalf. The impulse of the governed for greater accountability ensures that the demand for a system in which government is truly open will be insistent. It tends to be more intense following the revelation of government maladministration which, it is thought, might have been avoided but for the secrecy which prevailed, or of unsuccessful attempts to cover up maladministration. Demand for more openness in government is also manifest in the wake of the discovery of corruption committed by government officials or agencies, the public's instinct correctly perceiving that public vice and impropriety are more likely to take root under the shelter of structures and procedures which are protected from the light of public scrutiny. Aware that undue secrecy allows politicians in government to pursue what is seen as their own ends without ostensible regard to the public interest, the public are alert to the fact that political expediency may favour an attempt to conceal mistakes or abuses.*

...

*Of equal concern to the government's stockpile of information is the fact that it is the government that controls the form in which information is released and the timing of its release. Exclusive possession of official information enables a government to determine when and how it will lift the veil of secrecy. The scope for the manipulation of information by presenting it in a limited or sanitised form, or delaying its release to further the government's interests, is plain to see.*

- 3.14 Cost and efficiency considerations, with respect to the impact of FOI legislation on government administration, offer the easiest means of attack for opponents of open government. Important as it is, however, accountability in terms of efficiency and economy should not be the first and last word when considering accountability for government administration.
- 3.15 There is no doubt that the administration of FOI legislation comes at a cost, and that it is capable of making sporadic intrusions on the time of public officials (generally engaged on other duties) who hold documents which are the subject of applications made under the FOI Act. However, within

reasonable limits (and the FOI Act makes provision in this regard - see, for example, s.28(2) of the FOI Act), democratic governments should be capable of tolerating a degree of inefficiency (as FOI Act requirements sporadically affect officers engaged in the administration of government programs), and should be prepared to accept the costs of administering a system for enhancing the accountability of the executive branch of government, as the price of honouring some of the democratic imperatives of a system of representative democracy.

- 3.16 Moreover, it is doubtful whether the cost of administering FOI legislation is any greater than the amounts of public money spent by governments of all political persuasions on government media officers, information units, public relations campaigns and the like. The legitimacy of the executive government spending substantial sums of public money on telling the community what it wants the community to know about government administration, initiatives and achievements is not frequently questioned from within government (though, on the potential for abuse, see the *Fitzgerald Report* at pp.141-142, and the Electoral and Administrative Review Commission's *Report on Review of Government Media and Information Services*, April 1993, No. 93/R1). There seems a certain elementary fairness and balance in having public funds subsidise the costs of the government responding to members of the public who seek to enforce the right conferred by the FOI Act to obtain government-held information which is of interest or concern to them.
- 3.17 In his essay, "Secrecy and Open Government", Mr Justice Thomas suggests an interesting perspective on this issue (at p.225):

*... democracy and open government go hand in glove. This nexus derives from the sovereignty of the people. Government is delegated with the authority and power to act on the people's behalf, and the official information it gathers and holds pursuant to that devolution of power is gathered and held on the people's behalf. For representative government to be responsible and accountable, it must make that information available to the people. They do have a "right to know". ... Other essential features of a democracy are implemented irrespective of the cost or burden they might impose. No-one suggests, for example, that free and regular elections should be dispensed with simply because they are enormously expensive. Nor is it contemplated that parliament as an institution should be curtailed in the interests of more efficient and inexpensive government. If greater openness in government is regarded as a democratic imperative, should not the same approach be applicable?*

#### The goal of cultural change

- 3.18 It is imperative that officials who hold information and power within the executive branch of government recognise that they do so on behalf of the people of Queensland, and tailor their management practices with respect to government information accordingly. The FOI Act does not purport to prevent or discourage disclosure of government information outside the framework of the FOI Act (see s.14 of the FOI Act). Perhaps there would be less emphasis on the FOI Act itself, if agencies were to reassess their approach to disclosure of information to members of the public, with a view to establishing agency policies which will encourage disclosure, except in cases where it is essential that disclosure be restricted.
- 3.19 The goal of cultural change is only likely to be achieved with strong leadership. In the Commonwealth sphere, Cabinet issued directions in June 1985 that agencies should not refuse access to non-contentious material only because there were technical grounds of exemption available under the Commonwealth FOI Act. Proper compliance with the spirit of the Commonwealth FOI Act (it was said), required that an agency first determine whether release of a document would have harmful consequences before considering whether a claim for exemption might be made out (see paragraph 2.6 of FOI Memorandum No. 19, issued by the Commonwealth Attorney-General's Department on 17

December 1993 - quoted in *Re Norman and Mulgrave Shire Council* (1994) 1 QAR 574 at pp.577-578).

- 3.20 It would be welcome to see a similar approach adopted in Queensland, and to see official manuals and guidelines issued to FOI decision-makers that acknowledge the constitutional importance, and promote the acceptance, of open government principles of the kind discussed in this Chapter. In addition, the following recommendation of the ALRC/ARC Report (at paragraph 4.16) should, in my view, be considered for implementation in Queensland:

*4.16 The Review considers that the cultural changes that will result from improved appreciation of the philosophy and purpose of the FOI Act would be more likely to occur if senior officers were given tangible incentives to pay greater attention to, and to improve, an agency's FOI practices and performance. Linking good public information, communication and FOI practices to performance appraisal would be likely to influence the attitude towards information access of the officers whose attitudes often influence those of the entire staff of an agency — the senior officers. The Review recommends that performance agreements of all senior officers should be required to impose a responsibility to ensure the efficient and effective handling of access to government-held information, including FOI requests, in the agency. Commitment to good information management and FOI practices should also be expressed in an agency's corporate plan. ...*

- 3.21 As a further measure to promote the achievement of cultural change, Parliament may wish to consider amending s.4 and s.5 of the FOI Act to provide a more explicit objects clause which (without detracting from the factors presently recognised in s.5(1)(b) and s.5(1)(c) of the FOI Act) explains that the major purpose of the FOI Act is to provide a legally enforceable right of access which will—
- enable people to more effectively participate in the policy development, decision-making, and accountability processes of government;
  - open government activities to scrutiny, discussion, comment and review; and
  - enhance the accountability of government and government officials;

and that Parliament's intention in providing that right is to underpin our systems of State and local government based on representative democracy. (In this regard, see paragraphs 4.1 to 4.7 of the ALRC/ARC Report).

#### **Matters raised in my third Annual Report**

- 3.22 In my third Annual Report (1994/95), I raised concerns about a number of legislative changes which I saw as marking a significant retreat from the principles of openness, accountability and responsibility which the FOI Act was intended to enshrine. I prefaced my remarks by acknowledging that Parliament is entitled to enact legislation which it considers necessary or desirable, but stated that I considered it appropriate that, as Information Commissioner, I express to Parliament any concerns I have with respect to the propriety of legislative changes, and ask the Parliament to consider my views.
- 3.23 No action has yet been taken in relation to the matters I raised, and I believe that it is worthwhile to briefly reiterate those points.

#### Cabinet matter/Executive Council matter exemptions

- 3.24 At paragraphs 3.4 to 3.49 of my third Annual Report, I discussed at length the rationale behind the Cabinet matter and Executive Council matter exemptions (s.36 and s.37 of the FOI Act, respectively), the history of amendments to those provisions, and the justifications given for the amendments.
- 3.25 I stated my view that, so wide is the reach of s.36 and s.37 (following amendments to those provisions in November 1993 and March 1995) that they can no longer be said to represent an appropriate balance between competing public interests favouring disclosure and non-disclosure of government information. They exceed the bounds of what is necessary to protect traditional concepts of collective Ministerial responsibility (and its corresponding need for Cabinet secrecy) to such an extent that they are antithetical to the achievement of the professed objects of the FOI Act in promoting openness, accountability and informed public participation in the processes of government. The centrepiece of the FOI Act, the conferral by s.21 of a legally enforceable right of access to documents of agencies and official documents of Ministers (subject only to limited exceptions designed to protect the private and business affairs of members of the community, and *essential* public interests: see s.5(2) of the FOI Act), has been reduced, in practical terms, to a right of access subject to Ministerial veto.
- 3.26 Of particular concern is the extent to which the 1993 and 1995 amendments to s.36 and s.37 derogate from the achievement of the accountability and public participation objects of the FOI Act (see paragraphs 3.28 to 3.34 of my third Annual Report). The prospect of public scrutiny should deter officials from impropriety and encourage the best possible performance of their functions. The equation here is straightforward (and to the benefit of the wider public interest): if public officials have sound reason to believe that an effective accountability measure is in place which affords an avenue for exposure of improper, unlawful or incompetent behaviour, their efforts are more likely to be directed to avoiding the occurrence of such behaviour or, if it occurs, to acknowledging it promptly, correcting it, and seeking to implement measures to prevent a re-occurrence, rather than seeking to avoid disclosure of such behaviour. However, the intended prophylactic effect of accountability measures of this kind is negated if there exists a certain method for evading scrutiny in the event of problems arising, by preventing the disclosure of embarrassing or damaging information.
- 3.27 In my third Annual Report, I recommended that Parliament amend the FOI Act to return s.36 to its original form (as first enacted in 1992), and preferably to repeal s.37, or else to return s.37 to its original form.
- 3.28 I consider that the basis in principle for making those recommendations was adequately explained in Chapter 3 of my third Annual Report, and I will not here expand on my previous comments, except to note that the ALRC/ARC Report has since made firm recommendations for amendments to the Commonwealth FOI Act—
- (a) to make abundantly clear that s.34(1)(a) (being the key element of the Cabinet exemption provision in the Commonwealth FOI Act) applies only to documents that have been brought into existence for the purpose of submission for consideration by Cabinet; and
  - (b) to repeal the exemption for Executive Council documents (s.35 of the Commonwealth FOI Act).

These recommendations (which accord with my recommendations for the amendment of the Queensland FOI Act) were based on considerations similar to those explained in Chapter 3 of my third Annual Report (see paragraphs 9.7 to 9.14 of the ALRC/ARC Report). The justification given in the ALRC/ARC Report (at paragraph 9.9) for recommendation (a) above was as follows:

*The proposal was intended to ensure that agencies cannot abuse the exemption by attaching documents to Cabinet submissions merely to avoid disclosure under the FOI Act. The Department of Prime Minister and Cabinet supports the proposal:*

The intention of the proposal is certainly consistent with the original understanding of the purposes of the words in s.34(1)(a).

*A number of other submissions also favour the proposal on the basis that as much government information as possible should be available. It is difficult to see how disclosure of documents that have not been brought into existence for the purpose of consideration by Cabinet could be detrimental to the Cabinet process.*

The convention of collective ministerial responsibility is undermined only by disclosure of documents which reveal Ministers' individual views or votes expressed in Cabinet. Documents not prepared for the purpose of submission to Cabinet do not, by definition, disclose such opinions.

[DC Pearce (ed) *Australian Administrative Law* Butterworths 1995, 2220.]

- 3.29 I consider that the amendments to s.36 and s.37 which I have recommended are necessary to restore the credibility and effectiveness of the FOI Act. I respectfully suggest that this is an issue which deserves the timely attention of the whole of the Parliament, given the Parliament's constitutional responsibility (as the representative institution of the electors) to ensure adequate and effective accountability measures in respect of the exercise of powers and functions committed to the executive branch of government, and the importance (to that end) of ensuring the existence of a meaningful right of access to government-held information.

#### Government-owned corporations

- 3.30 At paragraphs 3.50 to 3.73 of my third Annual Report, I raised two concerns relating to the exclusion of Government-owned corporations (GOCs) from the FOI Act, under s.11A of the FOI Act: firstly, whether the policy of excluding GOCs from the FOI Act was appropriate at all; and secondly, my concern that a major error of principle had occurred in the manner by which exclusions from the operation of the FOI Act were effected.
- 3.31 In respect of the first issue, I referred to the considerations relied on to support the position espoused by the ALRC/ARC review in its interim position paper (Discussion Paper 59), which was that the Commonwealth FOI Act should apply to Commonwealth government business enterprises (GBEs). It is appropriate, therefore, that I note that there was a partial retreat from that position in the final ALRC/ARC Report. In essence, the final ALRC/ARC Report recommended that GBEs that are engaged predominantly in commercial activities in a competitive market should not be subject to the FOI Act, and that this should be effected by excluding them from the definition of bodies that are subject to the Commonwealth FOI Act. It is also recommended that other GBEs, not predominantly engaged in competitive commercial activities, should be subject to the Commonwealth FOI Act.
- 3.32 The Commonwealth Ombudsman (a member of the ARC) recorded her disagreement with this recommendation, and her view that all GBEs should be subject to the Commonwealth FOI Act. In her view, the question goes beyond a test of the operation of the marketplace (assuming it is competitive). Other considerations (related to Community Service obligations, the public interest, accountability for the exercise of statutory powers and management of public assets) require that the principles of transparency and accountability should apply to GBEs, though they should have the right to claim exemption for commercial and competitive documents under the provisions of the Commonwealth FOI Act.

- 3.33 My view remains in accord with that expressed by the Commonwealth Ombudsman. I consider that GOCs should be subject to the Queensland FOI Act, and that their commercial interests are adequately protected by the exemptions available to agencies which are subject to the Queensland FOI Act. I note in this regard that the principles discussed in paragraphs 3.10 and 3.11 above are applicable in theory to any agency in the executive branch of government, notwithstanding that the executive may choose to conduct certain functions through the medium of a government-owned corporation.
- 3.34 My second concern is the inappropriate manner in which s.11A of the FOI Act operates (as explained at paragraphs 3.56 to 3.64 of my third Annual Report) to give the GOCs covered by it a special position of privilege with respect to the operation of the FOI Act. In effect, s.11A erects a class of documents to which the FOI Act does not apply, whether they are in the possession of a GOC, or, for example, a Minister exercising a supervisory function over the GOC, or even a law enforcement or regulatory body exercising law enforcement or regulatory functions which affect the GOC. In doing so, it gives GOCs which are subject to s.11A a more privileged position with respect to the application of the FOI Act than all private sector business operators, and a more privileged position than those government-owned commercial bodies whose exclusion or part-exclusion from the FOI Act is dealt with in a different manner (and with more sensible consequences) under s.11(1), or in regulations made under s.11(1)(q), of the FOI Act.
- 3.35 A review application made during the reporting year illustrates the point. A freelance journalist applied to the Queensland Transmission and Supply Corporation (the QTSC) for access to documents relating to the "Eastlink" electric power supply project. The journalist was refused access to all documents by the QTSC on the basis that they were excluded from the application of the FOI Act by s.11A, read in conjunction with s.256 of the *Electricity Act 1994*, because they were documents received or brought into existence in carrying out activities of the QTSC conducted on a commercial basis. The QTSC claimed entitlement to refuse access to documents on this basis, without regard to whether disclosure might assist in the discussion of a matter of considerable public interest and significance.
- 3.36 What is even more alarming, however, is that if the QTSC's characterisation of the requested documents was correct, then it is strongly arguable that, under the wording of s.11A, the exclusion from the application of the FOI Act would extend even to copies in the possession of the responsible Minister, or of a government regulatory agency charged with administering laws (passed by Parliament for the benefit or protection of the public) which govern some aspect of the operations of the QTSC, e.g., fair trading laws, laws regulating pollution, laws regulating public health and safety.
- 3.37 A significant proportion of the activities of government involve the regulation of private sector business activity in the interest of the greater public good, with regulatory agencies necessarily acquiring information about the operations of many businesses. The avowed objects of the FOI Act of "enhancing government's accountability and keeping the community informed of government operations" (see s.5(1)(a) and s.5(1)(b) of the FOI Act) must also logically extend to facilitating an appropriate level of scrutiny of how well these functions of government are performed in the interests of the public. Information about the business operations of any private sector business, or indeed any government-owned commercial entity not covered by s.11A of the FOI Act, which is in the possession of a Minister or an agency subject to the application of the FOI Act, is capable of being accessed under the FOI Act, subject to the protection of legitimate commercial interests afforded by the exemptions in the FOI Act.
- 3.38 Section 11A of the FOI Act, however, manages to accord privileged treatment to the GOCs covered by it (the antithesis of the "level playing field" rationale for not subjecting publicly owned bodies which conduct commercial activities in a competitive market to public sector accountability mechanisms) at the same time as it imposes an unnecessarily wide restriction on the accountability

(through access to information that would permit public scrutiny and debate on issues of public importance) of those GOCs, to their ultimate owners, the people of Queensland.

- 3.39 Irrespective of whether the views I have expressed in paragraph 3.33 above, or the more moderate position espoused in the final ALRC/ARC Report (see paragraph 3.31 above) are considered worthy of further attention by the Parliament, I respectfully suggest that legislative amendments are warranted to remove the anomalies caused by s.11A of the FOI Act, and I refer to the suggestions which I made, in that regard, in paragraphs 3.64, 3.72, and 3.73 of my third Annual Report.
- 3.40 My concerns about the effect of s.11A have been heightened by the *Transport Infrastructure (Rail) Regulation 1996*, which further widens the scope of the exclusion enjoyed by one GOC, Queensland Rail. Section 199(1) of the *Transport Infrastructure Act 1994* provides that the FOI Act "does not apply to a document received or brought into existence by a transport GOC in carrying out its excluded activities". The term "excluded activities" means "commercial activities" and "community service obligations prescribed under a regulation". Section 5(1) of the *Transport Infrastructure (Rail) Regulation 1996* provides that any activity of Queensland Rail, other than an activity performed under its community service obligations, is an activity conducted on a commercial basis, i.e., a "commercial activity". This section (assuming it is a valid exercise of the power to make a regulation under the *Transport Infrastructure Act*) renders redundant any attempt to consider whether a particular activity of Queensland Rail is, or is not, in fact, conducted on a commercial basis. In essence, it removes from the scope of the FOI Act all documents received or brought into existence by Queensland Rail in carrying out any activities other than its "community service obligation" activities. If valid, it takes Queensland Rail even further outside the scope of the FOI Act, and provides it with still greater protection than that afforded to private sector competitors.
- 3.41 It is of concern that such important changes to the way in which the FOI Act operates should be made by way of regulation (and that such amendments can be initiated by Departments which are not charged with the administration of the FOI Act), rather than amendment to the FOI Act itself, which would draw the attention of the public to the significance of the change.

#### Aggregate student data

- 3.42 In 1995, amendments to the *FOI Regulation 1992 Qld* excluded, from the operation of the FOI Act, documents relating to school student data about core skills tests, junior and senior certificates and tertiary entrance statements. In my third Annual Report (paragraphs 3.74 to 3.82), I noted that there was no need for such an amendment in relation to individual student data, as it would no doubt have been exempt under s.44(1) of the FOI Act (the personal affairs exemption). I went on to question the basis on which aggregate data relating to schools was excluded from the operation of the FOI Act.
- 3.43 I queried why, rather than accepting that the free flow of information and ideas, and public debate on aspects of education policy and performance, is a good thing in a democratic society, the proponents of this amendment were no longer prepared to engage in public debate about the appropriate interpretation of information which media organisations have (since long before the advent of the FOI Act) perceived to be of interest to the public, but had decided instead to block access to information of that kind. I wondered what other areas of government might be subjected to an information embargo because government officials do not like the way in which media organisations interpret the available information.
- 3.44 The amendment prompted a lengthy public debate in the media, principally in the "Perspectives" pages of the *Courier-Mail*. This exemplifies the kind of useful debate that access to government information should foster. (It would be welcome to see similar public debate on a range of issues relevant to public administration.) There was much discussion of the uses which could be made of aggregate figures for schools. This was, in my view, a good example of informed community debate on a question of public interest to many Queenslanders. Unfortunately, it was informed, not because access was granted to the most recent figures under the FOI Act, but because figures had been

released in earlier years without the need for recourse to the FOI Act. The amended *FOI Regulation* ensures that the Education Department has the power to stifle future public debate based on up-to-date figures.

- 3.45 One of the more disturbing aspects of this matter is that the motivation for the amendment appears to have been the concerns held by some as to the use and commentary made by a particular news outlet, of raw factual data about the performance of bodies which are either government-operated or heavily subsidised by taxpayers. Presumably, there would have been no objection if the raw factual data had been used in a way which the proponents of the amendment deemed acceptable. This is tantamount to censorship. Any interested member of the community is now denied access to raw data about aspects of the performance of government, and hence the right to make their own evaluations of its significance, because of concerns held in some quarters about alleged "misuse" of the factual data. The amendment represents an overreaction, and a dangerous precedent, which ought to be rescinded.

### **Inter-departmental Working Group Report**

- 3.46 In my third Annual Report (paragraph 3.2), I referred to a proposed review of the FOI Act by an Inter-departmental Working Group. I noted that the Working Group, which was due to report by February 1996, did not propose to invite the general public and users of the FOI Act to participate by way of submission, although government agencies and local authorities were invited to make submissions. I indicated that I had made a detailed submission to the Working Group on numerous issues, which include problems with the drafting of certain provisions of the FOI Act, which in my view warrant clarification through amendment.
- 3.47 I understand that the Working Group made its report to the Minister for Justice and Attorney-General in late February 1996, but that no action has yet been taken on it. I am aware that the present Minister for Justice and Attorney-General, was, as Opposition shadow Minister, critical of this review - in particular of the fact that interested citizens or groups outside government were not invited to participate in a review of a piece of legislation that was designed to give the public rights of access to information, enforceable against the executive government, in the interests of greater accountability of the executive government to the community. I am concerned, however, that the work carried out by my office, other FOI administrators and the Working Group (aimed at identifying problem areas in the FOI Act and its administration, and suggesting solutions) should not go to waste. It may be appropriate, for instance, to edit the report of the Working Group for publication as a Green Paper, while also publishing the submissions to the Working Group, and inviting submissions in response from interested organisations and members of the public. This would give an additional and valuable perspective on matters that require attention by the government and the Parliament, in assessing whether the FOI Act, and its administration, are as effective as they could be for attaining the objects which Parliament intended to achieve through the enactment of the FOI Act.

### **Use of the FOI Act by the community**

- 3.48 The cases described in Appendix 3 to this Annual Report, and other cases that I presently have on hand, illustrate the fact that members of the public are becoming increasingly aware of the FOI Act as a means of assisting them in dealings with government agencies. Several of the formal decisions published in the reporting period were cases where a public interest group sought to use the FOI Act for the purpose of obtaining information in relation to an issue which it perceived to be of public importance (see *Re De La Salle Brothers*, *Re Beanland*, *Re Olsson*, *Re Australian Rainforest Conservation Society*).
- 3.49 Individual applicants are also becoming aware of their rights under the FOI Act to obtain information concerning action by the government which particularly impacts on them as individuals, for example, cases where land may be compulsorily acquired from a citizen by a government agency (see *Re*

*Hopkins and Re Little*), or where the applicant's employment had been terminated by a government agency (see *Re Coventry*).

- 3.50 It appears that the FOI Act is becoming increasingly established as a useful feature in the landscape of dealings between government and citizen.

**APPENDIX 1**

**Applications For External Review Received During 1995/96,  
By Category (As Per S.71 Of The FOI Act)**

<b>STATEMENT OF AFFAIRS (PART 2)</b>	
<input type="checkbox"/> Refusal to publish, or to ensure compliance with Part 2	0
<input type="checkbox"/> Deemed refusal	0
<b>ACCESS TO DOCUMENTS (PART 3)</b>	
<input type="checkbox"/> Refusal to grant access	83
<input type="checkbox"/> Deletion of exempt matter	19
<input type="checkbox"/> Combination - refusal to grant access/deletion of exempt matter	15
<input type="checkbox"/> Deemed refusal to grant access	42
<input type="checkbox"/> Deferred access	0
<input type="checkbox"/> Charges	13
<input type="checkbox"/> Combination - refusal to grant access/charges	0
<input type="checkbox"/> Third party consulted; objects to disclosure	31
<input type="checkbox"/> Third party not consulted; objects to disclosure	0
<b>AMENDMENT OF RECORDS (PART 4)</b>	
<input type="checkbox"/> Refusal to amend	3
<input type="checkbox"/> Deemed refusal to amend	0
<b>ISSUANCE OF CONCLUSIVE CERTIFICATE</b>	
<input type="checkbox"/> Cabinet matter	0
<input type="checkbox"/> Executive Council matter	0
<input type="checkbox"/> Law enforcement/Public safety matter	0
<b>MISCELLANEOUS</b>	
<input type="checkbox"/> Misconceived applications	3
<b>TOTAL</b>	<b>209</b>

## APPENDIX 2

### Applications For External Review Received During 1995/96, By Respondent Agency Or Minister\*

<u>Agency</u>	<u>No.</u>		<u>No.</u>
Queensland Police Service	38		
Department of Education	18	<b><u>Health agencies</u></b>	
Queensland Corrective Services Commission	11	Department of Health	6
Department of Families, Youth and Community Care	8	Regional Health Authorities	
University of Queensland	8	—Brisbane South	5
Department of Emergency Services	7	—Northern	3
Building Services Authority	5	—Sunshine Coast	3
Department of Justice	5	—Darling Downs	2
Department of Transport	5	—Central	1
Queensland Treasury	5	—Peninsula and Torres Strait	1
Department of Natural Resources	4	—South Coast	1
Department of Primary Industries, Fisheries and Forests	4	—West Moreton	1
Office of Consumer Affairs	4	—Wide Bay	1
Office of the Lay Observer	3	Health Rights Commission	4
Austa Electric	2	Queensland Nursing Council	2
Department of Mines and Energy	2	Medical Board of Qld	1
Department of Tourism, Small Business and Industry	2		
Department of Training and Industrial Relations	2	<b><u>Local authorities</u></b>	
Griffith University	2	Gold Coast City Council	3
Island Co-ordinating Council, Thursday Island	2	Brisbane City Council	2
Public Trustee of Queensland	2	Bundaberg City Council	2
Criminal Justice Commission	1	Caloundra City Council	2
Department of Administrative Services	1	Ipswich City Council	2
Department of Economic Development and Trade	1	Beaudesert Shire Council	1
Department of Public Works and Housing	1	Burnett Shire Council	1
Director of Public Prosecutions	1	Cairns City Council	1
Greyhound Racing Control Board of Queensland	1	Calliope Shire Council	1
Intellectually Disabled Citizens Council of Qld	1	Cook Shire Council	1
Parliamentary Commissioner for Admin. Investigations	1	Logan City Council	1
Port of Brisbane Corporation	1	Redcliffe City Council	1
Public Sector Management Commission	1	Redland Shire Council	1
Queensland Law Society Incorporated	1	Townsville City Council	1
Queensland Office of Financial Supervision	1		
Queensland Rail	1		
Queensland Rural Adjustment Authority	1		
Queensland Transmission and Supply Corporation	1		
Surveyors Board of Queensland	1		
Torres Strait Regional Authority	1		
University of Southern Queensland	1		
Workers' Compensation Board of Queensland	1		

\* The names and functions of a number of departments have changed during the reporting year. Where possible, applications have been assigned to the department which had the carriage of the matter at 30 June 1996 or, if the matter was finalised prior to that date, the date of finalisation.

## APPENDIX 3

### NOTES ON SIGNIFICANT ISSUES DEALT WITH IN FORMAL DECISIONS PUBLISHED BY THE INFORMATION COMMISSIONER IN 1995/96

#### Re English and Queensland Law Society Inc (Decision No. 95022, 4 August 1995, unreported)

- ❑ This case involved a consideration of whether the Queensland Law Society is an "agency" for the purposes of the FOI Act and, in particular, whether the Society falls within the definition of a "public authority" in s.9(1)(a)(i) of the FOI Act; i.e., "*a body (whether or not incorporated) which is established for a public purpose by an enactment*". Mr English sought access to copies of the Society's Statement of Affairs (required of all agencies under s.18), and to documents concerning himself and two companies of which he was a principal, but the Society contended that it was not an "agency" subject to the FOI Act.
- ❑ My decision addressed the preliminary question of my jurisdiction to entertain the application for external review. I stated that, consistently with the position I had taken in *Re Christie and Queensland Industry Development Corporation* (1993) 1 QAR 1, the jurisdictional question could be summarised as follows. If the Society is not an "agency" within the meaning of the FOI Act, then the FOI Act would have no application to the Society, and I would have no jurisdiction to investigate and review the Society's decision to refuse the access application. If, on the other hand, the Society is an "agency" within the meaning of the FOI Act, then the access application would be valid, and would enliven Mr English's rights of internal and external review in respect of the matter to which he had been refused access. I decided that the question of whether the Society is or is not an "agency" for the purposes of the FOI Act was determinative of Mr English's rights, and that the determination of that issue was a matter falling within my jurisdiction under Part 5 of the FOI Act.
- ❑ After considering evidence concerning the history of the Society prior to its incorporation in 1927, and relevant provisions of the statute by which the Society was incorporated (*Queensland Law Society Act 1927*), I examined in some detail each of the constituent elements of the relevant definition of "public authority" in s.9(1)(a)(i), with reference to cases decided under analogous provisions in the FOI legislation of Victoria (*Richards v Law Institute of Victoria* (Vic County Court, 13 August 1984, unreported) and *Dixon v Law Institute of Victoria* (1994) 6 VAR 227), and the ACT (*Brennan v ACT Law Society* (1984) 6 ALD 428).
- ❑ I decided that the Society is a body corporate which owes its existence (as a body corporate) to the *Queensland Law Society Act 1927*, and hence is a body "established" by that enactment. On the question of whether the Society is established "for a public purpose", I held that the correct test to employ is whether at least one of the major purposes for the body's establishment is a public purpose. The Society submitted that the primary or dominant purposes for its incorporation were fundamentally private in nature, and emphasised the desirability of maintaining the profession's independence of government. While I acknowledged that the Society may well have private purposes, I held that the major purpose, indeed the "primary or fundamental" purpose, for the Society's incorporation in 1927, was to bring into existence a statutory framework for the effective regulation of the solicitors' side of the legal profession in Queensland, for the ultimate benefit of the people of Queensland, or at least for that sector of the public having dealings with members of the solicitors' side of the profession, or with persons holding themselves out to be practitioners. I found that this was a "public purpose" within the meaning of s.9(1)(a) of the FOI Act, and that the Society is therefore a "public authority", and so an "agency", under the FOI Act.
- ❑ The Society sought judicial review of my decision in the Supreme Court of Queensland. In dismissing that application, Derrington J held that "*the overwhelming weight of factors indicated that the Society does come within the description of a 'public authority' within the meaning of the*

*definition [in s.9(1)(a)(i) of the FOI Act] so that the provisions of the Act apply to it." (see Queensland Law Society Incorporated v Albietz QLR 27/7/96 (No. 638/95, Derrington J, 1 March 1996)).*

**Re Murphy and Queensland Treasury (Decision No. 95023, 19 September 1995, unreported)**

- ❑ Mr Murphy sought access to documents held by the respondent (specifically, the Office of State Revenue) concerning his land tax affairs. In its response to Mr Murphy's access application, the respondent refused to grant access to the names of individual officers of the Office of State Revenue, appearing on the requested documents, claiming that the names were exempt matter under s.40(a), s.40(c), s.40(d), s.42(1)(c) and s.44(1) of the FOI Act.
- ❑ With regard to s.44(1) (the personal affairs exemption), I held that the names of officers, recorded in connection with the performance of their work duties, were not "personal affairs" information within the meaning of that provision, and therefore did not qualify for exemption on that basis.
- ❑ With respect to s.42(1)(c) (danger to a person's life or physical safety), I canvassed numerous decisions from other jurisdictions dealing with corresponding exemption provisions. I stated that the question of whether disclosure of certain matter could reasonably be expected to endanger a person's life or physical safety is to be objectively judged in the light of all relevant evidence, including any evidence obtained from or about the claimed source of danger, and not simply on the basis of what evidence is known to persons claiming to be at risk of endangerment, or their subjective view of the matter.

I found that evidence of Mr Murphy's verbal abuse and aggressive telephone manner towards agency staff in sporadic contacts over a period of four years, was insufficient to establish a reasonable expectation that disclosure could endanger a person's life or physical safety. There was also evidence that Mr Murphy had claimed that he kept a list of public servants whom he considered had acted inappropriately towards him, and that he had foreshadowed that he would, one day, take action against those listed. I found that the threats of action did not relate to any threat to the life or physical safety of those listed but rather to future legal action which Mr Murphy would take in the event that the law changed in the manner he hoped.

I also discussed the relevance of claims of potential "harassment" to the application of s.42(1)(c), indicating that only harassment which could reasonably be expected to endanger a person's life or physical safety would justify exemption, having regard to the terms in which s.42(1)(c) is framed. I stated that a threat to take legal action, or even the commencement of legal action, would not amount to harassment which could reasonably be expected to endanger a person's life or physical safety. I concluded that, viewed objectively, disclosure of the officers' names could not reasonably be expected to endanger the life or physical safety of any person, and that the matter in issue was not exempt matter under s.42(1)(c).

- ❑ I dismissed the respondent's claim for exemption under s.40(a) (prejudice to the effectiveness of a method or procedure for the conduct of audits by an agency). I held that the respondent had failed to identify a method or procedure for the conduct of land tax audits that could reasonably be expected to be affected by disclosure of the matter in issue.
- ❑ With respect to s.40(c) (substantial adverse effect on the management or assessment of the agency's personnel), I held that the respondent's evidence concerning its officers' expectations of fear of harassment, or endangerment to life or physical safety, was not sufficient to establish a substantial adverse effect on staff morale or productivity, particularly in light of the respondent's written policy of requiring staff to identify themselves in their dealings with members of the

public. I held that the public interest in the respondent's officers being accountable to the public for their actions outweighed any interests favouring non-disclosure of the matter in issue.

- ❑ Concerning s.40(d) (substantial adverse effect on the conduct of industrial relations by an agency), I stated that the expected substantial adverse effect must be on the conduct by an agency of industrial relations, rather than the management by an agency of its personnel (which is covered by s.40(c)). I held that I was not satisfied that there was a reasonable basis for an expectation that disclosure of the matter in issue would have a substantial adverse effect on the conduct of industrial relations by the respondent.
- ❑ The respondent subsequently mounted an unsuccessful challenge to my decision in the Supreme Court of Queensland (see *State of Queensland v Albietz* [1996] 1 Qd R 215). In his decision, de Jersey J dealt with the three issues raised by the respondent.

First, the respondent argued that, in making my determination on the applicability of s.40(a), I had failed to afford it procedural fairness. The respondent contended that I had made findings concerning a particular assertion by the respondent, based on submissions from Mr Murphy on the issue which referred to the contents of the relevant land tax audit file held by the respondent, and on my independent examination of that file, without giving the respondent an opportunity to comment. Mr Justice de Jersey rejected this aspect of the respondent's challenge, noting that the respondent had been provided with Mr Murphy's submissions on the point, which referred to the file in question, but had made no response on the point. Mr Justice de Jersey held that the respondent had notice that its assertion was challenged by Mr Murphy, and of the basis for that challenge, and therefore had not been treated unfairly. His Honour further held that I was entitled to examine the file in question to test the competing claims of the parties.

Secondly, the respondent argued that I had erred in my interpretation of the words "could reasonably be expected to" in s.42(1)(c) of the FOI Act, particularly by taking undue account of matters probably outside the knowledge of the relevant departmental officers. Mr Justice de Jersey rejected this aspect of the respondent's application, stating that the relevant test in s.42(1)(c) required an objective assessment on my part of all relevant factors, rather than an assessment "*through the eyes of someone who does not know all the facts*".

Finally, the respondent challenged my finding, under s.44(1) of the FOI Act, that the names of departmental officers, in the context of the performance of their work duties, were ordinarily incapable of being properly characterised as information concerning the 'personal affairs' of those persons. Mr Justice de Jersey stated his agreement with the approach adopted by the New South Wales Court of Appeal decision in *Commissioner of Police v Perrin* (1993) 31 NSWLR 606. His Honour indicated that the name by which a person is known would not ordinarily form part of that person's 'personal affairs'. He noted that I had examined the documents in issue, and held that my conclusion that disclosure of the names of the respondents' officers would disclose information "*which merely concerns the performance by a government employee of his or her employment duties*" must therefore be accepted as a finding of fact I was entitled to make. This, Mr Justice de Jersey held, led to the natural next step of concluding that exemption under s.44(1) was unavailable to such matter.

#### **Re Fotheringham and Queensland Health (Decision No. 95024, 19 October 1995, unreported)**

- ❑ This case involved the application of s.44(1) to the medical records of the deceased wife of Australian author, Arthur Hoey Davis (Steele Rudd), who wrote the 'Dad and Dave' series. The author had divorced his wife in 1934 on the grounds of her "unsoundness of mind". The applicant was a literary scholar preparing a biography of Mr Davis, and considered that information in the medical records of Mrs Davis may throw light on aspects of Mr Davis' life and writings. Mrs

Davis died in 1952 after having spent almost all of the last 33 years of her life in institutions controlled by the respondent. My staff contacted her closest living relative, a grandchild, who objected to disclosure. The applicant did not dispute that the records in question concerned Mrs Davis' personal affairs, but contended that public interest considerations in this case favoured disclosure.

- ❑ I stated that the purpose of an agency obtaining the views of the closest living relative of a deceased person is not to permit the closest living relative a right to veto access. Rather, it is relevant for an agency decision-maker to take into account the views of the closest relative in deciding whether to claim an exemption. According to the circumstances of a particular case, the views of the closest relative may be afforded some weight in the application of the public interest balancing test incorporated in s.44(1).
- ❑ I stated that the 'public interest' question for my determination involved a difficult value judgment, i.e., whether disclosure of information in Mrs Davis' medical records would, on balance, be in the public interest because of the significance of her life and circumstances to the life and work of Mr Davis, a major figure in Queensland's literary/cultural history. While I recognised a public interest in facilitating historical and cultural research which can contribute to a society's understanding and identification of itself, I stated that it was pitted against public interest considerations favouring non-disclosure of the matter in issue which are universally recognised in our community as carrying substantial weight, namely, privacy considerations and the preservation of confidentiality of a person's medical records.

I found that the age of the documents in issue was a relevant factor, as privacy concerns in respect of deceased persons may lose their potency with the passage of time. I also recognised that some aspects of the life of Mrs Davis were matters of public record, but noted that the details of her specific illness, and initial diagnosis and treatment, which comprised the matter in issue, were not in the public domain. After analysing all of the relevant factors raised for my consideration, I concluded that the public interest considerations favouring disclosure, which had been identified by the applicant, were not sufficiently strong to justify intrusion into the medical records of Mrs Davis, and that I was not satisfied that disclosure of any of the matter in issue would, on balance, be in the public interest. Accordingly, I held that the matter in issue was exempt matter under s.44(1).

#### **Re Morris and Queensland Treasury (Decision No. 95025, 19 October 1995, unreported)**

- ❑ This case concerned an FOI access application made by the applicants for documents held by Queensland Treasury, relating to the applicants' business of selling Australian lotto and lottery-type products overseas. It involved the application of s.44(1), s.46(1)(b) and s.38(b) of the FOI Act.
- ❑ The first category of documents I considered was correspondence involving general inquiries about the applicants' business, complaints concerning the applicants and the provision of information by the Golden Casket Art Union Office (GCAUO) about its Direct Mail Club and the applicants. These documents had been released to the applicants, subject to the deletion of matter which would enable the identities of the authors or complainants named in the documents to be ascertained. I considered that disclosure of this matter would disclose information concerning the personal affairs of the individuals named, on either or both of two bases:
  - ❑ it would disclose that an identifiable person had engaged, or had made inquiries with a view to engaging, in gambling (on lotto or lottery-type products); and/or

- ❑ it would disclose that an identifiable person had sought to make a complaint to a government agency believed to be the appropriate regulatory authority in respect of Australian lotto or lottery-type products, which the person had seen advertised in a foreign country, or to which the person subscribed.

In considering the public interest balancing test contained in s.44(1), I noted that the applicants had had access to edited versions of the documents and that the regulatory authority did not propose to take action against the applicants in respect of a particular complaint of wrongdoing. I was unable to accept that there was any public interest factor that may exist in the applicants having access to the matter in issue, which was of sufficient strength to outweigh the public interest in non-disclosure which was inherent in the satisfaction of the *prima facie* test for exemption under s.44(1). Accordingly, I found the matter in issue in relation to the first category of documents to be exempt matter under s.44(1).

- ❑ The second category of documents involved correspondence between the GCAUO and its solicitors, which enclosed reports from a private detection agency employed by the GCAUO's solicitors on its behalf to investigate the activities of the applicants. The documents had been released to the applicants, subject to the deletion of matter which would enable the identity of the detection agency's source of information to be ascertained.

This category of documents involved the application of s.46(1)(b) and the principles discussed in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279. I considered that, having regard to the general content of the detection agency reports, both the detection agency and the GCAUO's solicitors would have understood that they were under a duty to their client to keep the reports confidential, but that it would have been the client's right (except in special circumstances) to deal with the reports as they wished. I considered one possible exceptional circumstance was the communication by the detection agency of information of such sensitivity or value to the detection agency that the recipient must have understood that it was expected to keep the information confidential. I accepted that, in this case, the identity of the detection agency's source of information was understood by both the detection agency and the GCAUO to have continuing sensitivity and value, and that there were mutual expectations that the identity of the source of information would be treated in confidence. I also found that the other elements of s.46(1)(b) had been made out by the respondent and that I was unable to identify any public interest consideration favouring disclosure of the identity of the detection agency's source, which would displace the public interest in non-disclosure inherent in the satisfaction of the test for *prima facie* exemption under s.46(1)(b). Hence, I found the matter in issue in the second category of documents to be exempt matter under s.46(1)(b).

- ❑ The third category of documents involved correspondence between a NSW government agency and the GCAUO, which included a copy of correspondence with a third party. Consideration of these documents involved the application of s.38(b). I considered that when s.38(b) is contrasted with s.46(1)(b), its key elements are, in essence, identical to the first and second requirements of s.46(1)(b), save that the relevant communication must be made by or on behalf of another government agency. I noted that s.38(b) contains no equivalent to the third element of s.46(1)(b), but, like that section, s.38(b) is qualified by a public interest balancing test. Having had regard to the evidence lodged on behalf of the respondent, I found that information conveyed in the correspondence between the NSW government agency and the GCAUO comprised information communicated in confidence by or on behalf of another government for the purpose of s.38(b). I then considered two public interest factors favouring disclosure of the correspondence but decided they were not of sufficient weight to outweigh the public interest in non-disclosure established by the satisfaction of the first two elements of s.38(b). I found the correspondence between the government agencies to be exempt under s.38(b), but decided that the enclosure to that correspondence was not exempt under s.38(b). I did, however, determine that matter in the

enclosure which would identify its author, was exempt matter under s.44(1), on the same basis as for the first category of documents.

**Re Beanland and Department of Justice and Attorney-General, and other cases (Decision No. 95026, 14 November 1995, unreported)**

- ❑ This decision was made in relation to six applications for external review. The documents in issue were many hundreds of pages of ministerial briefing notes prepared prior to the hearings of Budget Estimates Committees of the Queensland Parliament in 1994. Each applicant sought access to briefing notes for a different department or organisation. Shortly after some of the initial FOI access applications had been made, all ministerial briefing notes for the 1994 hearings of Budget Estimates Committees were collected and placed before a Cabinet meeting.
- ❑ The cases involved consideration of s.36(1) (the Cabinet matter exemption). The section was amended during the course of the external review and the amendments were expressed to have retrospective effect. I found that the amending legislation made it clear that I must consider the law as it stood at the time of my decision. I further determined that I must consider the facts (including whether or not the documents in issue had been submitted to Cabinet) as they stood at the time of my decision, rather than at the time the initial FOI access applications were made.
- ❑ A number of issues raised by the applicants, which were arguable on the wording of the s.36(1) exemption provision as it stood prior to amendment, were clearly disposed of by the amendments. I determined that all documents in issue were exempt under s.36(1)(a), as they had been 'submitted' (as that term is defined in the amended s.36(4)) to Cabinet. As none of the documents had been "officially published by decision of Cabinet" (see s.36(2)), I found that even documents which had previously been supplied to one of the applicants were exempt matter.
- ❑ I criticised the unnecessarily wide scope of the s.36 and s.37 exemptions, following the amendments made to those provisions in November 1993 and March 1995. I stated that, in my opinion, these provisions could no longer be said to represent an appropriate balance between competing public interests favouring disclosure and non-disclosure of government information, and that they exceeded the bounds of what was necessary to protect the traditional concept of collective Ministerial responsibility (and its corresponding need for Cabinet secrecy) to such an extent that they were antithetical to the achievement of the professed objects of the FOI Act. I also discussed the potential for abuse of the accountability objects of the FOI Act inherent in the amended provisions.

**Re GSA Industries (Aust) Pty Ltd and Brisbane City Council (respondent) and GS Technology Pty Ltd (third party) (Decision No. 95027, 20 November 1995, unreported)**

- ❑ This is the second decision published in respect of this external review application. The first decision, *Re GSA Industries (Aust) Pty Ltd and Brisbane City Council* (1994) 2 QAR 49, concerned documents held by the Council concerning alleged infringements of certain patent rights and copyrights to which the third party claimed entitlement.
- ❑ This case illustrates the approach taken when the respondent agency presses no objection to disclosure of a document; and the practical evidentiary burden to establish a case for exemption then falls upon a third party who maintains an objection to disclosure. The third party had initially

raised an objection to disclosure of documents concerning communications between it and the Council in connection with a tender which the third party had lodged with the Council. During the course of the external review, the third party withdrew its objection to disclosure of some of those documents and I authorised the Council to disclose them. The respondent subsequently agreed that a further document, referred to in one of the documents disclosed, but which had not been dealt with in the respondent's initial response to the applicant's FOI access application, fell within the terms of the initial FOI access application. This document recorded a discussion between a Director of the third party and representatives of the Council, clarifying details of the third party's tender. The respondent raised no objection to its disclosure. The third party objected to its disclosure, but in its submission, did not nominate any exemption provision said to be applicable.

- ❑ I found that the document in issue fell within the terms of the applicant's initial FOI access application; and that none of the submissions of the third party, in support of its objection to disclosure of the document, contained any evidence or argument relevant to the application of the exemption provisions of the FOI Act. I briefly considered the possible application of s.44(1), s.45(1)(a), s.45(1)(b), s.45(1)(c) and s.46(1) of the FOI Act before concluding that the document was not exempt matter.

#### **Re Hopkins and Department of Transport (Decision No. 95028, 28 November 1995, unreported)**

- ❑ This case involved the application of s.46(1)(a) (disclosure which would found an action for breach of confidence) and the principles set out in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279. Two sets of applicants sought access to valuations obtained by the Department of Transport for the purposes of the partial resumption of the applicants' land, for road-widening purposes. In the course of the external review, the Department agreed to give the applicants access to valuations obtained by the Department from one firm of valuers, but continued its refusal to give access to valuations from a second firm of valuers. This second set of valuations was claimed to be exempt under s.46(1)(a), on the basis that the Department was obliged not to disclose the valuation without the consent of the valuers (notwithstanding that it was the Department, as a client, which had paid the valuers a fee for the preparation and supply of the valuations).
- ❑ I rejected the Department's contention that there was an equitable obligation of confidence owed by the Department to the valuers. I considered that, in the usual case, a valuation prepared for a client by a valuer becomes the property of the client who has paid for it, and that the client may do with the valuation what the client pleases. I noted that an obligation of confidence owed by a professional person to his or her client is a recognised incident of relationships between many kinds of professional persons (in this case, a valuer) and their clients, but that the relationship does not ordinarily give rise to an obligation of confidence owed by a client to the professional. I also considered that s.6 of the *Valuers Registration Regulation 1992* Qld is consistent with my view that it is the right of the client (rather than the valuer) to control the use and dissemination of a valuation that the client has paid to obtain. I found nothing unusual in the circumstances of the case, nor any information of special value to the valuers, which took the case outside the ordinary incidents of the relationship of valuer and client.
- ❑ I considered that a number of disclaimer clauses contained in the valuation reports did not alter the position. Those disclaimer clauses implicitly acknowledged the possibility of further dissemination by the client of the valuation reports it had paid to obtain (and sought to limit any professional liability of the valuers to losses sustained by its client, rather than any third parties who may use or rely on the valuation reports). I acknowledged that it was possible that one disclaimer clause was intended to permit the valuers to have some control of the manner and form in which its valuations could be further disclosed by the Department, but found that, if this was the

intention of the clause, the provisions of the FOI Act would override any contractual reservation made by the clause: the forms by which access may be obtained to documents of an agency being prescribed by s.30.

**Re Bennett and Queensland Corrective Services Commission (Decision No. 95029, 1 December 1995, unreported)**

- ❑ The applicant sought access to the parole conditions of a prisoner whom he alleged had engaged in fraudulent activity while on parole. The applicant sought to establish whether the parolee's conduct breached the parole conditions. The parolee was invited to participate in the external review, but did not respond. The applicant did not wish to obtain access to the standard conditions imposed under the *Corrective Services Act 1988* Qld, but only to special conditions imposed on the individual parolee. I examined the legislative system concerning parole orders, noting that parole orders are not made public but are only distributed on a limited basis within the corrective services system. I concluded that the special parole conditions were exempt under s.44(1) (the personal affairs exemption), as they concerned the personal affairs of the parolee and, in this case, the public interest in disclosure of the conditions did not outweigh the *prima facie* public interest in protection of the parolee's privacy.
- ❑ I noted that there may be instances where the public interest in disclosure of particular parole conditions would outweigh the *prima facie* exempt status of such matter. I gave as a possible example, a case where a victim of crime is fearful of the perpetrator's release from prison, and wishes to establish what, if any, parole conditions have been made affecting the perpetrator's potential contact with the victim.
- ❑ I noted that there is a public interest favouring disclosure of parole conditions in order to enhance the accountability of Community Corrections Boards for decisions relating to parole conditions. However, I determined that disclosure of the conditions in issue in this case would not significantly enhance that accountability. In addition to the public interest in protecting the privacy of the parolee, I referred to the public interest in achieving the objectives of the parole system, i.e., to foster the rehabilitation of prisoners without unnecessary or demeaning exposure of the prisoner's status as a parolee. I determined that the balance of the public interest lay in favour of non-disclosure. I noted that if the applicant was concerned that the parolee may have breached parole conditions, he could make a complaint to the police or the parole authorities.

**Re Raby Bay Ratepayers Association Inc. and Redland Shire Council (respondent) and Civic Projects (Raby Bay) Pty Ltd (third party) (Decision No. 95030, 1 December 1995, unreported)**

- ❑ This was a 'reverse FOI' application in which the Ratepayers Association challenged the Council's decision to give the third party access to correspondence between the Association and the Council, relating to a number of matters of concern to the Association. I determined that the documents were not exempt under s.43(1), as they were not communications of a kind to which legal professional privilege might adhere. They were representations from a civic interest group to a local authority concerning civic affairs, and replies to those representations.
- ❑ Applying the principles set out in *Re "B"*, I decided that the documents were not exempt under s.46(1)(a) as disclosure would not found an action for breach of confidence. In relation to one letter, marked "confidential", I determined that, if action were to be taken by the Council in respect of the matter complained about, the Association must have expected that the information contained in the letter might be communicated to the third party (which was the developer of the Raby Bay Estate). I found that a court would not regard disclosure to the third party as an unconscionable use of the information. As to the other correspondence sent to the Council, I found that there was

nothing before me which suggested it was communicated in confidence. Nor was there anything in the letters from the Council to the Association which a court would protect in an action for breach of confidence.

- ❑ In relation to s.46(1)(b), I determined that there was no evidence of a mutual understanding between the authors of the correspondence and officers of the Council, that any of the documents was communicated in confidence. I further determined that disclosure of the documents could not reasonably be expected to prejudice the future supply of like information to the Council by civic interest groups.

**Re O'Dwyer and Workers' Compensation Board of Queensland (Decision No. 95031, 18 December 1995, unreported)**

- ❑ The case involved the application of the principles set out in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, in relation to s.45(1)(c) (the business, commercial, and financial affairs exemption). The document in issue was a computer generated report, comprising information on annual totals of claims and premiums recorded for the insurance business of the Board over a number of years, listed by occupation code. I determined that the matter in issue comprised information concerning the business, commercial or financial affairs of the Board. I considered, and rejected, three claimed adverse effects of disclosure on the business affairs of the Board. I also determined that the balance of the public interest weighed in favour of disclosure, in order to enhance the accountability of government and to promote informed community participation in government decision-making. I found that the report conveyed information about the Board's performance in respect of its core functions, which would add to public understanding of the Board's role and performance and which would be of value in informing public debate concerning the future direction of arrangements for the provision of workers' compensation insurance in Queensland.
- ❑ I also rejected a contention by the Board that the report was exempt under s.45(3) (the research exemption). I discussed the meaning of the word "research" in the context of s.45(3), concluding that the provision was not intended to extend to the business accounts, or commonly kept business records, of an organisation. I determined that the report was more akin to the business records or accounts of the Board than to the results of a research project undertaken to discover facts or principles.

**Re Shaw and University of Queensland: Re L'Estrange and University of Queensland (Decision No. 95032, 18 December 1995, unreported)**

- ❑ These proceedings, which were dealt with and decided together, involved documents held by the University concerning the University's handling of a workplace dispute which had arisen within the University's Faculty of Dentistry at a time when both Dr Shaw and Associate Professor L'Estrange were members of the staff of that Faculty. In her application for external review, Dr Shaw sought a review of the University's decision to refuse her access to one document prepared by Associate Professor L'Estrange, and provided to the University. In his 'reverse FOI' application, Associate Professor L'Estrange challenged the University's decision to grant Dr Shaw access to certain other documents concerning the workplace dispute.
- ❑ The document to which Dr Shaw had been refused access by the University was a memorandum prepared to record the collective opinion of three members of staff of the Faculty (including Associate Professor L'Estrange) as to certain difficulties in the working relationship between those

staff members and Dr Shaw. The evidence before me was that the document had been prepared by Associate Professor L'Estrange in contemplation of a meeting attended by the three members of staff whose opinions it recorded, as well as Dr Shaw, and that the text of the document had been read out at that meeting.

Professor L'Estrange contended that Dr Shaw, like all persons present at that meeting, had agreed to preconditions binding those present at the meeting to an obligation of confidence in respect of the information conveyed at the meeting. On that basis, Associate Professor L'Estrange contended that the document was exempt matter under s.46(1)(a), in that disclosure of the document would found an action for breach of confidence. I held that in the particular circumstances of the case, where the contents of the document in question had been read out in Dr Shaw's presence, the matter in issue was not confidential *vis-à-vis* Dr Shaw, and that its disclosure to Dr Shaw would not, therefore, constitute an unconscionable use of the information on the part of the University. On that basis, I held that the document was not exempt from disclosure to Dr Shaw, under s.46(1)(a).

Associate Professor L'Estrange also contended that the document in question was exempt under s.40(c) of the FOI Act, on the basis that its disclosure could reasonably be expected to discourage staff from expressing frank and honest opinions in defence of allegations against them, and to compromise the University's system of confidential mediation, thereby having a substantial adverse effect on the University's management or assessment of its personnel. I was not satisfied that there was a reasonable expectation that disclosure would cause any of the anticipated adverse effects contended for by Associate Professor L'Estrange, and found that the document in issue was not exempt from disclosure to Dr Shaw under s.40(c).

- ❑ The remaining issues for my determination concerned documents which the University proposed to release to Dr Shaw, but which Associate Professor L'Estrange contended were exempt from disclosure. Again, I rejected Associate Professor L'Estrange's claims that those documents were exempt under s.40(c) (which claims were put on the same basis noted in the preceding paragraph).
- ❑ Associate Professor L'Estrange contended that one of these documents was also exempt under s.41(1) (the deliberative process exemption). It comprised a letter from Associate Professor L'Estrange and two other Faculty members to the Dean of the Faculty, expressing their views on the expected adverse effects of Dr Shaw's return to work in the Faculty after a period of study leave, and a letter from the Head of Department to the Vice-Chancellor (forwarding the first-mentioned letter, with additional comments).

I found that Associate Professor L'Estrange, and his co-authors of the letter to the Dean, must have intended, hoped and expected that the letter would influence the University's deliberative process with respect to its personnel management functions, and that they could not reasonably have expected that a decision adverse to Dr Shaw's interests could properly have been taken without informing her of the substance of the allegations made in that letter. Further, I found that most of the content of that letter was, in essence, the same as information contained in documents already disclosed to Dr Shaw. In the circumstances, I was not satisfied that disclosure of the letters to Dr Shaw would, on balance, be contrary to the public interest, and found that they were not exempt under s.41(1).

- ❑ Associate Professor L'Estrange contended that one document was also exempt under s.46(1)(a). It comprised notes from a meeting held between Associate Professor L'Estrange and the Registrar of the University, attended by their respective legal advisers. There was conflicting evidence from Associate Professor L'Estrange and his legal representative, on the one hand, and the University Registrar and Legal Officer, on the other, as to the nature of their discussions concerning the confidentiality of the matters discussed at their meeting. After considering all of the relevant evidence, I determined that I was not satisfied that there had been an express undertaking or

implicit agreement by the Registrar (on behalf of the University) as to confidentiality of information provided by Associate Professor L'Estrange at the meeting in question. The circumstances and purpose of the meeting, and duties owed by Associate Professor L'Estrange (as an employee with managerial responsibilities) to his employer, were in my view inconsistent with the information recorded in the document in question being subject to an obligation of confidence owed by the University to Associate Professor L'Estrange. Accordingly, I held that the document in issue did not satisfy the requirements of s.46(1)(a).

- ❑ Associate Professor L'Estrange contended that the final document in issue was also exempt, under s.44(1) and s.46(1)(a). It was a letter from Associate Professor L'Estrange to the Vice-Chancellor of the University, containing his perceptions of the allegations/complaints raised by Dr Shaw, his views on the University's handling of the situation, and an outline of the consequent effects on him, both personally and professionally.

In relation to s.44(1), I determined that, with the exception of parts of the document no longer in issue, the letter must properly be characterised as containing information which concerned Associate Professor L'Estrange in his employment as an officer of the University, and not as personal affairs information falling within s.44(1) of the FOI Act: see *Re Pope and Queensland Health* (1994) 1 QAR 616 at pp.658-660.

In relation to s.46(1)(a), I found that the document was prepared by Associate Professor L'Estrange in the course of, or for the purposes of, the deliberative processes involved in the personnel management functions of the University. I noted that, when the matter in issue is of this type (i.e., matter of a kind mentioned in s.41(1)(a)), s.46(2) precludes the application of s.46(1) unless it can be established that disclosure would found an action for breach of confidence owed to a person other than a person in the capacity of, *inter alia*, an officer of an agency. I determined that the letter had been written by Associate Professor L'Estrange in his capacity as an officer of the University, and that therefore the letter could not be exempt under s.46(1)(a).

Given my finding in relation to s.46(1)(a), I also considered the possible application of s.41(1) to the letter. I acknowledged that there may be, in appropriate circumstances, a public interest in an employee being able to raise with the chief executive of an agency issues of concern as to his or her treatment, without unnecessary further disclosure. However, I also recognised that, in a case where the employee wishes to have action taken on his or her concerns, a degree of further disclosure will ordinarily be necessary. I found exempt under s.41(1), a small part of the letter which dealt solely with the effect on Associate Professor L'Estrange of the University's handling of the dispute - the disclosure of which would not have assisted Dr Shaw's understanding of the University's handling of the dispute, or otherwise served the public interest in accountability for performance by the University of its functions. I found that disclosure of the balance of the letter would not be contrary to the public interest.

**Re Sexton Trading Company Pty Ltd and South Coast Regional Health Authority (respondent) and T K Crow Furnishings Pty Ltd (third party) (Decision No. 95033, 18 December 1995, unreported)**

- ❑ This case involved application of s.45(1)(c)(ii), and principles set out in *Re Cannon*, to the prices quoted by the successful tenderer (the third party) for a contract to supply curtains and blinds to the Authority. The Authority initially contended that disclosure of the prices could reasonably be expected to have an adverse effect on the affairs of the third party or to prejudice the future supply of such information to government, and that disclosure would not, on balance, be in the public interest. In the course of the external review, the Authority withdrew its objection to disclosure but the third party maintained its objection.

- ❑ I noted that the Queensland government's State Purchasing Policy required that the names of successful tenderers, a brief description of the goods/services offered, and the contract value, be published in the Government Procurement Gazette, and supplied to an applicant on request. However, the third party contended that it had responded to a tender document which omitted reference to that policy, and was therefore entitled to contest the disclosure of what it regarded as sensitive commercial information (despite evidence that it would have been aware of the purchasing policy from other successful tenders).
- ❑ I rejected the third party's claim that disclosure could reasonably be expected to have an adverse effect on its business or commercial affairs. I found that the matter in issue recorded the total prices tendered by the third party for the supply of specific items, and did not disclose component elements of the tender prices, profit margins, or costs at which the third party could obtain materials from its suppliers. Having regard to the effluxion of time since the tender was lodged, I was not satisfied that disclosure of the total prices tendered by the third party for specific items, could reasonably be expected to have an adverse effect on the business or commercial affairs of the third party.
- ❑ I also concluded that there was no reasonable basis for an expectation that disclosure of the matter in issue would prejudice the future supply of such information to government, noting that there was no shortage of firms willing to compete for government contracts in accordance with the conditions as to disclosure of details of successful tenders set out in the State Purchasing Policy. As neither limb of the requirement set out in s.45(1)(c)(ii) was satisfied, I found that the matter in issue was not exempt under s.45(1)(c).

**Re Olsson and Department of Transport (Decision No. 95034, 19 December 1995, unreported)**

- ❑ This case involved a consideration of the Cabinet matter exemption, in particular, s.36(1)(b) and s.36(1)(f). The matter in issue was portions of a draft Cabinet submission relating to Russell Island. The draft was prepared in 1989 and sent to the Commissioner for Main Roads for comment. As matters transpired, no final submission was presented to Cabinet.
- ❑ Section 36 was amended during the course of this review, and I decided (as I had in *Re Beanland*) that the amending legislation was so worded that the amended s.36 had retrospective effect. It was therefore necessary for me to apply the law as it stood at the time I came to make my decision, even though the initial FOI access application had been made prior to the amendment. I found that a Minister had, at one time, intended that a submission based on the draft submission be put to Cabinet. I therefore determined that the document was a draft of matter mentioned in s.36(1)(b), and that the parts still in issue were exempt under s.36(1)(f).
- ❑ An unusual aspect of the case was the fact that the applicant had previously been given access to the document by way of inspection. The Department contended that this was done inadvertently in the course of the inspection by the applicant of a large number of documents. The applicant argued that by disclosing the document the Department had waived its right to claim that the document was exempt. I indicated that for many exemptions (eg. exemptions containing a public interest test or those where the confidential nature of information is a requirement), prior publication or grant of access would be relevant in determining the status of the document. However, I indicated that s.36(1) was not a provision of this type, and that, except in the limited circumstances set out in s.36(2), prior publication or grant of access would not be relevant.
- ❑ The applicant also argued that once it had given access in one form, the Department could not deny further access in that form or any other form, and further that he had a contractual right to access. In response, I referred to s.88(2), which bars me from directing that access be given to exempt matter. I indicated that once I have determined that matter is exempt, I am not in a position to direct an agency to give access to it. In relation to both claims, I explained that my

review powers are limited to those spelled out in the FOI Act, and that if he wished to pursue the claims he would have to do so in another forum, as the issues raised were beyond my power to determine.

- ❑ Finally, I referred to the discretion which agencies hold to give access to matter which is technically exempt (see s.28(1)). I ventured the opinion that this was an appropriate case for the Department to exercise its discretion in favour of disclosure.

**Re Bolton and Department of Transport (Decision No. 95035, 20 December 1995, unreported)**

This case involved a challenge to the Department's decision to require a \$30.00 application fee from an applicant seeking to obtain access to documents relating to certain roadworks. I applied the principles concerning the interpretation of the term "personal affairs", set out in *Re Stewart and Department of Transport* (1993) 1 QAR 227 and *Re Ryder and Department of Employment, Vocational Education, Training & Industrial Relations* (1994) 2 QAR 150. I determined that the applicant was required to pay the application fee. I discussed the meaning of the word "concerning" and its relevant variations, i.e. "concern", and "concerns". I found that, when used in conjunction with the phrase "personal affairs of a person" in the FOI Act and FOI Regulation, the word "concerning" means "about" or "regarding". The documents in issue were about roadworks, and did not contain information about the personal affairs of the applicant. I decided that the fact that the applicant had incurred a speeding charge in the vicinity of the roadworks (and hoped to use the documents to contest that charge) did not transform the documents in issue into documents concerning his personal affairs.

**Re Marie Byrnes and Public Trustee of Queensland and Matthew Byrnes (third party): Re Vandenburg and Public Trustee of Queensland and Matthew Byrnes (third party) (Decision No. 96001, 23 February 1996, unreported)**

- ❑ These two cases involved the application of s.46(1)(b), and principles set out in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279. Since the applications involved identical documents and common issues, they were dealt with together. The applicant in each case sought access to a letter to the respondent from the third party (document 1) which attached a copy of another letter which the third party had previously forwarded to another government agency (document 2). The information contained in the documents had been provided by the third party to the respondent to assist the respondent in the investigation of a possible abuse of a power of attorney.
- ❑ I found that document 1 comprised information of a confidential nature and that it was communicated in confidence. I contrasted the relationship of the complainant to the relevant regulatory authority in this case, with that considered in my decision in *Re McMahon and Department of Consumer Affairs* (1994) 1 QAR 377. I considered that the third party's relationship to the respondent in this case was more akin to the position of the complainant to the Medical Board in *Re McEnery and Medical Board of Queensland* (1994) 1 QAR 349, in that any material adverse to the applicants could have been put to the applicants without any need to refer to document 1 or its source.

In respect of document 2, it was clear that the respondent was not being asked to investigate matters raised in document 2. I considered that it was clear from the contents of document 2, and the purpose for which the third party forwarded it to another government agency, that the respondent must have understood that the respondent was to treat document 2 in confidence.

In deciding these points, I determined that, although in this instance the respondent ultimately found that it did not technically have statutory authority to investigate the particular matters raised by the third party, it had been reasonable for the third party to regard the respondent as an appropriate regulatory authority to investigate a possible abuse of a power of attorney. I expressed the view that a person who supplies confidential information to an apparently appropriate regulatory authority, under an express or implied undertaking of confidence, should not be denied protection against disclosure merely because it transpires that the regulatory authority technically lacks jurisdiction to investigate the confidential information conveyed. I considered that such an approach would not serve the public interest which s.46(1)(b) seeks to advance.

- ❑ I also found that, in the circumstances of these cases, disclosure of the information contained in the documents in issue could reasonably be expected to prejudice the future supply of information to the respondent. I stated that where confidential information has been voluntarily supplied by a member of the public to an appropriate regulatory authority, under a clear mutual understanding of confidentiality, which was reasonably held in all the circumstances, disclosure of the information to the subject of the investigation at a time when the information remains confidential, could reasonably be expected to prejudice the future supply of such information from a substantial number of available sources.
- ❑ In respect of the public interest balancing test, the applicants argued that they should have an opportunity to correct false information about them that was held on government files. While I acknowledged that correction of personal affairs information is a major object of the FOI Act, I also referred to the importance which Australian and English law places on safeguarding the free flow of information to law enforcement and regulatory authorities. I noted that, in these cases, no action had been taken, or was proposed to be taken, by the respondent as a result of the information supplied by the third party. Therefore, there was no detriment or threat of detriment to the applicants' interests which might justify a finding that the public interest in the fair treatment of individuals according to law, warranted disclosure to the applicants of the documents in issue.

I further determined that the general public interest in the accountability of government agencies, had been largely satisfied in these cases, as the respondent had explained what it had done with the information and why. I decided that there were no public interest considerations of sufficient weight to displace the *prima facie* exempt status of the matter in issue.

- ❑ I therefore found that the documents in issue were exempt matter under s.46(1)(b). In passing, I suggested, given that the respondent had determined it had no power to act on the information in the documents, that the interests of the applicants and the respondent might be best served by the lawful destruction of the documents. However, I noted that this was entirely a matter for the consideration of the respondent.

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

- ❑ This decision involved, *inter alia*, the interpretation and application of s.36 (Cabinet matter exemption) and s.37 (Executive Council matter exemption) in the form they took after amendment in March 1995. The case is illustrative of a willingness of some agencies to attempt to rely on the broad terms of those provisions, even in circumstances where disclosure would not cause harm to the Cabinet/Executive Council process.
- ❑ The applicants sought access to valuations prepared within the Department of Natural Resources (formerly the Department of Lands) in respect of the applicants' land in north Queensland. The State wished to acquire that land in order to build a school. The Department initially determined that the valuations were exempt under s.41(1) (deliberative process exemption), and s.49 (State

financial/property interests exemption). In the course of the external review, the Department agreed to release factual matter contained in the valuation, but not matter which would show the methodology used in arriving at the valuation, the valuation figure, or certain observations as to how the Department might acquire the subject land. After s.36(1)(c) and s.37(1)(c) were amended in March 1995, the Department claimed that the matter in issue was also exempt under those provisions (which were given retrospective effect by the amending legislation).

❑ The Department's case in relation to s.36 and s.37 was that—

- the valuation was prepared for briefing a Minister or chief executive in relation to a matter that was proposed to be submitted to Cabinet by a Minister, and hence exempt under s.36(1)(c); and
- the valuation was prepared for briefing, or the use of, the Governor, a Minister, or a chief executive in relation to a matter proposed to be submitted to Executive Council by a Minister, and hence exempt under s.37(1)(c).

The Department's case was put on the basis that the subject land would be acquired under the *Acquisition of Land Act 1967* Qld, and that it was therefore inevitable that such a valuation would be provided to the Minister for Lands, and to Executive Council, in order that a proclamation could be made, acquiring the land.

I discussed the purposive requirement inherent in the words "prepared for briefing, or the use of, ...". I considered that the most appropriate meaning to be ascribed to those words is that, in order to qualify for exemption, the qualifying purpose must be the dominant purpose for preparation of the matter in issue. I stated that the word dominant in this sense, means "ruling, prevailing, most influential". In circumstances where there were multiple purposes for the preparation of the matter in issue, not all of which were qualifying purposes under s.36(1)(c) or s.37(1)(c), the application of those provisions would require a finding on an ultimate question of fact, to be determined by an objective examination of the relevant primary facts and circumstances, as to whether or not the dominant purpose for the preparation of the matter in issue was one of the qualifying purposes for exemption under s.36(1)(c) or s.37(1)(c). Where a specific and direct purpose for the preparation of the matter in issue can be identified from the relevant primary facts and circumstances, that will ordinarily be the most reliable indicator of the dominant purpose for which the matter in issue was prepared.

I also expressed the view that the words "by a Minister" in s.36(1)(c)(ii) and s.37(1)(c)(ii) qualify the word "proposed", rather than the word "submitted", so that an agency seeking to establish exemption must show that a Minister proposed that the relevant matter go to Cabinet or Executive Council.

I found that the Department had failed to establish the material facts that would attract the application of either s.36(1)(c) or s.37(1)(c). The dominant purpose for the preparation of the valuation report in issue was that of negotiating with the applicants to acquire their land at an agreed fair price.

❑ I also rejected the claim of the Department that the matter in issue was exempt under s.41(1). I determined that the matter remaining in issue could be properly characterised as "deliberative process" matter for the purposes of s.41(1)(a) but concluded that disclosure would not be contrary to the public interest. The Department contended that disclosure of the matter in issue would be contrary to the public interest for two reasons.

First, it claimed disclosure would prejudice the financial or property interests of the State, as the public interest was served by the State maximising its negotiating advantage against a property owner trying to "maximise his benefit". The Department contended that disclosure would cause

"procedural unfairness" to it, since the land owner would have the Department's valuation but the Department would not have the landowner's valuation. I rejected these arguments. Acquisition of a citizen's property for public purposes is one of the most intrusive powers which a government is able to exercise against the citizen. I noted that it is a fundamental principle of Australia's system of law and government that, in the absence of exceptional circumstances, the State should not compulsorily acquire the property of a citizen on other than just terms. I stated my opinion that the balance of the public interest lies in ensuring that the process of acquisition is as transparent as possible for the affected citizen, who should be permitted access to information which would assist the assessment of what is fair compensation of the property acquired. I commented that although the Department was attempting to acquire the applicants' land through an "open market" transaction, an agency with power to resume land, such as the Department, will ordinarily be in a superior bargaining position by virtue of its ability to resort to compulsory acquisition if a sale cannot be achieved by negotiation.

Secondly, the Department contended that disclosure would be contrary to the public interest because disclosure by a valuer (in this case the Valuer-General's Office) would amount to a breach of the statutory duty of confidence owed by a registered valuer to a client. I rejected this submission for two reasons. First, as I explained in *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 at pp.731-732 (paragraphs 175-180), I do not consider that the relevant statutory provision (*Valuers' Registration Regulation 1992*, s.6) applies to valuers employed as officers of the Department when carrying out their duties of office. Secondly, even if that provision did apply to the valuation in issue, I determined that the valuation was held by the Department in its capacity as client of the valuer who prepared the valuation. A client in possession of a valuation report prepared for the client's purposes ordinarily owes no duty of confidence to the valuer in respect of the valuation (see *Re Hopkins and Department of Transport* above).

Although it was not necessary for my decision, I also found that most, if not all, of the matter in issue was not eligible for exemption under s.41(1), by virtue of s.41(2)(c), because it merely consisted of expert opinion or analysis by an expert valuer.

- ❑ Finally, I rejected the Department's claim that the matter was exempt under s.49, because I was not satisfied that there were real and substantial grounds for expecting that disclosure of the matter would have any adverse effect on the financial or property interests of the State, let alone a "substantial" adverse effect on those interests.

#### **Re Coventry and Cairns City Council (Decision No. 96003, 3 April 1996, unreported)**

- ❑ The applicant (a former Director of the Cairns Regional Gallery) sought access to a letter written on behalf of a firm of consultants which had just completed a feasibility study, assessing the potential fundraising capacity of the Gallery. The letter was addressed to the then Mayor of Cairns who was *ex officio* a member of the Board of the Gallery and, at that time, Chairman of the Board. The letter repeated adverse comments about the applicant which had been made to the consultants in the course of the study. The letter did not identify the sources of the adverse comments. At a meeting of the Board at which the information in the letter was made available to Board members, the Board decided to recommend that the office of Gallery Director be made redundant. The applicant lost his position when the City Council acted on this recommendation.
- ❑ This case involved a consideration of the application of s.46(1)(a) and the principles set out in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279. Referring to my statement in *Re "B"* that publication of confidential information to a limited number of persons on a confidential basis will not necessarily destroy the confidential nature of the information, I found

that disclosure of the letter to closed meetings of the Gallery Board and the City Council did not affect its confidential nature.

I also rejected the applicant's submission that, since he had seen the letter, there could be no breach of confidence in giving him further access to it. I was satisfied on the material before me that the applicant did not know the detail of the contents of the letter. I found that the matter in issue remained confidential *vis-à-vis* the applicant.

However, in the circumstances of the case, I found that the respondent had decided to take action to declare the applicant's office redundant, at least in part, on the basis of the letter. I considered that procedural fairness would have required that the substance of the adverse material be conveyed to the applicant and that he be given a reasonable opportunity to respond to it. I considered that the scope of the equitable obligation of confidence owed by the respondent in respect of the letter could not have extended to prevent disclosure of the letter to the applicant, at least from the time at which it was decided on behalf of the respondent to take action that might result in the applicant's office being declared redundant. What conscientious conduct required of the Council in its use of the letter in issue must, in these circumstances, have been tempered by its legal duty to accord procedural fairness to the applicant. I therefore found that disclosure of the letter to the applicant would not be an unconscionable use by the respondent of the letter in issue. I determined that the letter was not exempt matter under s.46(1)(a).

- ❑ I also considered the requirements of s.46(1)(b) as explained in *Re "B"*. I found that the third requirement, i.e. whether disclosure of the information in issue could reasonably be expected to prejudice future supply of such information, was not satisfied. No reasonable basis had been established for such an expectation and the letter was therefore not exempt matter under s.46(1)(b).

While it was unnecessary for me to consider the public interest balancing test incorporated in s.46(1)(b), I ventured the opinion that, had that been necessary, the public interest in the fair treatment of an individual according to law would, in all the circumstances of this case, have carried determinative weight against the competing public interest considerations identified in the respondent's submissions, so as to favour disclosure to the applicant of the letter in issue.

**Re Trustees of the de la Salle Brothers and Queensland Corrective Services Commission (Decision No. 96004, 4 April 1996, unreported)**

- ❑ The applicant sought access to documents concerning Goodspell Park, a half-way house for young male offenders. Goodspell Park was operated by the applicants under contract with the QCSC. The external review was based on a deemed refusal of access by the QCSC, as it failed to make a decision within the prescribed time. Although some 2000 folios were initially in issue, this was reduced to a handful of documents over the course of a lengthy negotiation process facilitated by my office.
- ❑ I determined that some of the documents in issue were exempt under s.43(1), as they would be privileged from production in legal proceedings on the ground of legal professional privilege. These documents comprised legal advice given by, and draft documents prepared by, the QCSC's 'in-house' solicitor. I determined that the independence of the solicitor's position was such that advice given by her was capable of attracting the protection afforded by legal professional privilege. However, I found that some matter was not exempt under s.43(1), as legal professional privilege had been waived when legal advice, given by the QCSC's solicitor to another officer of the QCSC, was disclosed to the QCSC's opponent in litigation concerning Goodspell Park.

- ❑ I rejected the QCSC's claim that other documents, comprising intra-agency memoranda, QCSC Board Papers, and briefing notes for the relevant Minister, were exempt under s.41(1) (the deliberative process exemption). Large parts of the documents comprised merely factual or statistical matter, and were therefore not eligible for exemption under s.41(1) by virtue of s.41(2)(b). I was satisfied that the remainder of the matter was deliberative process matter within the terms of s.41(1)(a).

The QCSC submitted that disclosure of this matter would be contrary to the public interest because disclosure would have the effect of impeding the proper flow of information between public servants and the Minister. This was essentially a 'candour and frankness' claim, of the kind falling within the third '*Howard* criterion', which I critically analysed in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60. The QCSC's case on the public interest balancing test was vague and unsubstantiated by evidence. Examination of the matter itself revealed nothing of particular sensitivity, and no information which, if disclosed, could harm the public interest. I determined that disclosure would not, on balance, be contrary to the public interest in terms of s.41(1)(b).

**Australian Rainforest Conservation Society Inc. and Queensland Treasury (Decision No. 96005, 9 April 1996, unreported)**

- ❑ This case involved the application of the principles discussed in *Re Eccleston* and *Re Trustees of the De La Salle Brothers*, regarding s.41(1) (the deliberative process exemption). The matter in issue consisted of parts of formal minutes of meetings of a Charter Preparation Committee (CPC) established under the *Government Owned Corporations Act 1993*, and handwritten notes made in the course of the meetings. (The balance of the minutes and handwritten notes had already been released to the applicant.) The CPC was established to prepare a draft Corporatisation Charter for the Forest Service of the Department of Primary Industries. It consisted of 5 government representatives, an industry representative and an external consultant. I found that all the matter in issue fell within the terms of s.41(1)(a), so that exemption turned on whether, under s.41(1)(b), disclosure of any of the matter would be contrary to the public interest.
- ❑ I rejected the contention of Queensland Treasury that disclosure could be expected to reduce the candour and frankness of input from public servants and non-government members of the CPC. I found that it had not established the particular factual basis for a claim that candour and frankness could be inhibited by (or shown any tangible harm to the public interest which might flow from) disclosure of the advice and opinions given by the professional public servants who were members of the CPC (see paragraph 132 of *Re Eccleston*). I also concluded that there was no evidence which would show that disclosure could be expected to result in any significant number of community representatives or paid consultants, being less likely to seek positions on similar committees in the future, or being less likely to provide full and frank comments to similar committees in the future.

I further referred to the significant public interest factors favouring disclosure, in terms of enhancing the accountability of government by disclosing the methods and deliberations of the CPC and government members of the CPC, and in terms of promoting informed community debate by providing valuable insights into issues relating to conservation, use and management of forests in Queensland. I decided that disclosure of the matter in issue would not be contrary to the public interest.

**Re Steinback and Ipswich City Council (Decision No. 96006, 9 April 1996, unreported)**

This case involved a challenge to the Council's decision to require a \$30.00 application fee from an applicant seeking to obtain access to documents relating to complaints made concerning a property owned by the applicant, and leased to tenants. Some of the documents related to a period of time before the applicant had acquired the property. This case raised similar issues to those considered in *Re Bolton and Department of Transport* above. Again, I found that, although the applicant claimed to need the documents for a matter involving his personal affairs, several of the documents in issue contained no information about the applicant's personal affairs, and hence the \$30 application fee was properly payable.

**Re "E" and Legal Aid Office (Queensland) (Decision No. 96007, 24 April 1996, unreported)**

- The applicant had been refused access to parts of a "Merit Assessment Report" prepared for the respondent agency by a social worker in private practice, with a view to assisting the respondent's assessment of whether it should grant the applicant legal aid to seek court orders concerning the custody of his children. The respondent contended that the matter in issue was exempt matter under either s.46(1) or s.41(1), and that part of the matter in issue was also exempt under s.44(1).
- I first considered whether s.46(2) operated to exclude the matter in issue from the application of s.46(1). I found that the matter in issue was matter of the kind mentioned in s.41(1)(a), as it comprised opinions and recommendations prepared, and consultations that had taken place, for the purpose of one of the deliberative functions of government, namely, consideration by the respondent of whether or not to grant legal aid to the applicant. As the matter was communicated by the social worker, who was not a person or body of the kind mentioned in s.46(2)(a) or (b), I found that the matter could still qualify for exemption under s.46(1)(a), provided that its disclosure would found an action for breach of confidence owed to the social worker.
- The balance of the case involved the application of s.46(1)(a) and the principles explained in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279. On the evidence before me, I was satisfied that it was made clear to the applicant, before he agreed to participate in the process which led to the preparation of the report in issue, that the report was to be a confidential report, and only the conclusions of the report would be made available to him. Some parts of the report contained information that was not confidential *vis-à-vis* the applicant, and he was given access to them. However, I was satisfied that the balance of the report was communicated in circumstances which imported an obligation of confidence binding on the respondent not to use or disclose the report in a manner that was not implicitly or expressly authorised by the social worker. As I was also satisfied that the other criteria to found an action for breach of confidence had been made out, I found that the matter remaining in issue in the report was exempt matter under s.46(1)(a).

**Re Baldwin and Department of Education (Decision No. 96008, 10 May 1996, unreported)**

- The matter in issue in this case related to the selection process which followed the advertising of a Senior Executive Service position within the Department of Education. The documents comprised

the *pro forma* application forms and *curricula vitae* of the shortlisted candidates, as well as other documents relating to the selection process. The respondent contended that the matter in issue was exempt matter under s.44(1) and s.46(1)(a).

- ❑ In considering the application of s.44(1), I noted that the documents essentially comprised assessments, or self-assessments, of the work performance, capacity and suitability for appointment of the applicants for the position and thus, on their face, would not appear to answer the description of information concerning the personal affairs of the applicants. However, I considered that the fact that a person has applied for a position of employment is information which concerns that person's personal affairs. I also noted that if an applicant was successful, the person's employment in the new position would become a matter in the public domain, and the fact that the person had applied for the position could no longer be regarded as information about a private aspect of the person's life.

In considering the public interest balancing test, I agreed with the submissions of the applicant that there was a public interest in accountability for adherence to the merit principle in the public sector selection process, that such accountability extended to the shortlisting process, and that, for senior executive service positions, the public interest in accountability is high. Notwithstanding these public interest considerations being of substantial weight, I was not satisfied that they were sufficiently strong to outweigh the public interest in protecting the identities of unsuccessful applicants for employment. I therefore found that the respondent was entitled to delete from the documents in issue, any matter which would enable the identities of the unsuccessful applicants for the position to be ascertained, as the matter was exempt matter under s.44(1). In view of my decision in this regard, consideration of s.46(1)(a) was unnecessary.

**Re Hansen and Queensland Industry Development Corporation (Decision No. 96009, 14 June 1996, unreported)**

- ❑ This decision dealt solely with the jurisdictional point of whether documents falling within the terms of an FOI access application were excluded from the application of the FOI Act by s.11A of the FOI Act and s.35(2) of the *Queensland Industry Development Corporation Act 1994*. Those provisions have the effect that the FOI Act does not apply to a document received or brought into existence by the QIDC in carrying out its activities conducted on a commercial basis.
- ❑ The applicant was a former employee of the QIDC. He had been dismissed following his refusal to accept a transfer, and sought a review of his dismissal pursuant to s.18(5) of the *Queensland Industry Development Corporation Act 1985*. He subsequently sought access under the FOI Act to documents relating to the review of his dismissal, but the QIDC contended that the FOI Act did not apply to documents falling within the terms of his application because of the above provisions.
- ❑ I discussed the meaning of "commercial" and rejected an argument by the QIDC that all of its activities were conducted on a commercial basis. I determined that the termination of the applicant's employment on the basis that he would not accept a transfer, and the subsequent review of that termination under s.18(5) of the *Queensland Industry Development Corporation Act 1985*, were not activities conducted on a commercial basis. I therefore determined that the documents falling within the terms of the initial FOI access application were not excluded from the operation of the FOI Act and that I had jurisdiction to consider the application for external review.

**Re Rees and Queensland Generation Corporation t/a Austa Electric (Decision No. 96010, 14 June 1996, unreported)**

- ❑ In this case I determined that documents concerning negotiations leading up to the settlement, and setting out the terms of settlement, of proceedings commenced by a third party against the

respondent in the Human Rights and Equal Opportunity Commission (the Commission) under the *Racial Discrimination Act 1975* Cth, were exempt matter under the personal affairs exemption provision (s.44(1)). The third party's complaints of racial discrimination related to workplace incidents arising from his employment with the respondent. The applicant was primarily concerned with complaints made against him by the third party, but those complaints represented only a small part of a much broader dispute, and the documents in issue did not address the detail or merits of the third party's complaints against the applicant.

- ❑ I reiterated my view that information which merely concerns the performance by an employee of a government agency of his or her employment duties is ordinarily incapable of being properly characterised as information concerning the employee's personal affairs. However, in this case, I found that the commencement and conduct by the third party of his proceedings in the Commission against the respondent must properly be characterised as a personal affair of the third party. I found that, in the commencement and conduct of those proceedings, he acted in a purely personal capacity and not as an agent or representative of his employer. I pointed out however, that this finding should not be taken to mean that any involvement by an individual in litigation, or the pursuit of a legal remedy, is necessarily a personal affair of the individual. Nor should it be thought that where litigation is properly characterised as being an individual's personal affair, any document or information connected with the litigation is necessarily matter concerning the individual's personal affairs.

I found that the matter in issue concerned the settlement of the proceedings in the Commission, brought by the third party, in a purely personal capacity, to pursue a legal remedy, including the third party's choices as to the basis on which he was prepared to compromise his rights to pursue that legal remedy to the full extent permitted by the law. I considered that the documents in issue comprised information which was properly to be characterised as information concerning the personal affairs of the third party, and which was therefore *prima facie* exempt from disclosure under s.44(1).

- ❑ On the question of the public interest, I acknowledged the public interest in promoting the fair treatment of the individual. However, in this case, the documents in issue did not contain information which, if disclosed, would be capable of answering any of the concerns raised by the applicant's submissions, apart from his express desire to know the actual terms of settlement. Disclosure of the documents in issue would not further the applicant's understanding of the details of the third party's complaints against the applicant (which were a small part of a much wider dispute between the respondent and the third party), or of the views that were held by the respondent or the Commission in respect of them.

I also considered the general public interest in the accountability of government agencies for the conduct of their operations and the expenditure of their funds. However, I found that the public interest in the accountability of the respondent for its conduct and settlement of the proceedings brought by the third party in the Commission, was outweighed, in this instance, by the public interest in assisting to secure lasting settlement of a sensitive dispute (in circumstances where settlement involved the continuation of the employer-employee relationship between the previous disputants) by respecting the agreement of the respondent and the third party that the terms of settlement remain confidential.

**Re McPhillimy and Queensland Treasury (respondent) and Gold Coast Motor Events Co. (third party) (Decision No. 96011, 28 June 1996, unreported)**

- ❑ Mr McPhillimy operated a security services company at the Gold Coast. His company was awarded the contract for provision of security services at the 1992 Gold Coast Indy Car Grand Prix, but the contract was later terminated by the promoter of the Grand Prix, the Gold Coast Motor Events Co. (the GCMEC). The only document in issue by the time of my decision was a

comparison of tenders for the provision of security services for the 1992 Grand Prix. Queensland Treasury had possession of a copy of that document.

- ❑ After consultations, each of the security firms which had lodged tenders for the contract, had consented to disclosure of the information in the document in issue which concerned them. However, the GCMEC objected to disclosure of any part of the document. I found that, given its age, and the consent to its disclosure by the respective security firms which had submitted tenders, the matter in issue had no commercial value which could be diminished by its disclosure, and hence was not exempt matter under s.45(1)(b) of the FOI Act.
- ❑ I rejected the GCMEC's claim that the document was exempt under s.45(1)(c) of the FOI Act. I found that the document concerned the business or commercial affairs of the GCMEC, and the business, commercial or financial affairs of the security firms. But, given the consent to disclosure by the security firms, I found that no adverse effect on the relevant affairs of the security firms could reasonably be expected to arise from disclosure of the document to the applicant. For a number of reasons, including the age of the document itself, I also found that there was no reasonable basis for expecting that disclosure of the document could have an adverse effect on the business or commercial affairs of the GCMEC.
- ❑ The GCMEC also claimed the document was exempt under s.46(1)(a), as the security firms had provided the information recorded in the document in confidence, and would be entitled to protect that information by bringing an action for breach of confidence. Referring to my previous comment in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, that an obligation of confidence may be released by the express or implied consent of the person to whom it is owed, I concluded that, as each of the security firms had consented to release of the relevant information, the document was not exempt under s.46(1)(a).
- ❑ For the same reason, I concluded that the matter was not exempt under s.46(1)(b). In addition, I was not persuaded that disclosure could be expected to prejudice the future supply of such information to government.

**Criminal Justice Commission and Director of Public Prosecutions (respondent) and Harris (third party) (Decision No. 96012, 28 June 1996, unreported)**

- ❑ This was a 'reverse FOI' application by the CJC, challenging the decision of the DPP to disclose two documents to the third party. One document consisted of a copy of a document created by the third party, attached to a covering page. The covering page was addressed to an officer of the QPS and requested that the attachment be passed on to the CJC for the purposes of an investigation being undertaken into the actions of the third party. I rejected the CJC's claim that the document was exempt under s.41(1), deciding that it did not contain "deliberative process" material within the terms of s.41(1)(a).
- ❑ I also rejected the claim of the CJC that the document was exempt under s.46(1)(b). I found that, while there may have been an understanding that the author's identity would be kept confidential at the time the information was supplied, it had been overridden by the passage of time and the subsequent disclosure of information in relation to the CJC investigation. I further determined that, given the particular circumstances of the case, release of the document could not reasonably be expected to prejudice the future supply of information to the CJC by informants. (I also discussed the relevance of statutory secrecy provisions like s.132 of the *Criminal Justice Act 1989*, in determining whether an understanding of confidentiality should be implied in a particular case.)

- ❑ The other document in issue was a draft public statement, prepared for the Chairman of the CJC by an unnamed officer, which the CJC contended was exempt under s.41(1). A public statement had been made by the Chairman of the CJC which was virtually identical to the draft (the final two paragraphs of the draft did not appear in the public statement). I concluded that disclosure of that part of the draft which had been incorporated into the public statement, could not be regarded as being contrary to the public interest.
- ❑ I rejected the contention of the CJC that the rationale for s.41(1) is that it does not assist members of the public to know what opinions and advice were considered and rejected by an agency in coming to a decision. I referred to *Re Eccleston* where I had stated that a finding that matter is of a type described in s.41(1)(a) does not raise any presumption that disclosure would be contrary to the public interest. I indicated that in each case it is a matter for the agency claiming exemption to establish that disclosure of the particular matter in issue would be contrary to the public interest.
- ❑ With regard to the two paragraphs not included in the public statement, I applied the principles expounded in *Re Eccleston* and *Re Trustees of the De La Salle Brothers*. I accepted that the document fell within the terms of s.41(1)(a) but concluded that the CJC had not established that detriment would flow from release of the two paragraphs. I again questioned the validity of the 'fourth *Howard* criterion' relating to "*confusion and unnecessary debate resulting from disclosure of possibilities considered*", which I had criticised in *Re Eccleston*. I expressed confidence in the ability of members of the public to distinguish between the significance of draft documents and final expressions of agency policy, and I discussed the public interest in members of the community having access to material which would enable an understanding of the decision-making processes of agencies. I determined that disclosure of the two paragraphs would not be contrary to the public interest.

## APPENDIX 4

### Summaries Of Decisions Issued In 1995/96 By Means Of Letters To The Participants

#### **Kay and Workers' Compensation Board of Queensland** (S 19/95, 20 November 1995)

I considered the sufficiency of search conducted for documents held by the Board, in accordance with the principles set out in *Re Shepherd and Department of Housing, Local Government & Planning* (1994) 1 QAR 464. In the case of some claims of the applicant, I found that there were no reasonable grounds to believe that documents existed and were held by the agency. In relation to all claims, I found that the searches undertaken by the agency to locate documents falling within the terms of the initial FOI access application had been reasonable in all the circumstances of the case.

#### **"BIR" and West Moreton Regional Health Authority** (S 167/93, 28 November 1995)

The matter in issue was information contained on the applicant's medical records. Referring to my decisions in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 and *Re "F" and West Moreton Regional Health Authority* (1994) 2 QAR 176, I found that the names and details of other patients, and a residential address, were exempt matter under s.44(1). I also found that matter which could reasonably be expected to enable the applicant to identify a person who swore an information which was the basis for the issue of a warrant under s.25 of the *Mental Health Act 1974*, was exempt matter under s.42(1)(b), s.42(1)(h), s.46(1)(a) and s.46(1)(b).

#### **Smith and Thuringowa City Council** (L 14/93, 29 April 1996)

The matter in issue was parts of two letters of complaint concerning toilet facilities at an airpark operated by the applicant. Applying the principles set out in *Re McEniery and Medical Board of Queensland* (1994) 1 QAR 349, I found that the matter in issue was exempt under s.42(1)(b) (confidential source of information). I found that the Council was in a position to investigate the complaint without disclosure of the information in the complaint and that, in the circumstances of the case, there was a common implicit understanding that the author's identity would be kept confidential. I found that the information communicated by the author related to the enforcement or administration of the law (the *Sanitary Conveniences and Nightsoil Disposal Regulations 1976*) and that disclosure of the matter in issue could be expected to identify the source.

#### **Hastie and Department of Transport** (S 20/96, 1 May 1996)

The matter in issue was the name and telephone number of a person who had expressed concerns to the Department about the safety of a bus. As in the above case, I found that the matter in issue was exempt under s.42(1)(b). I found that there was a common implicit understanding that the complainant's identity was to be kept confidential, that the information communicated by the complainant related to the enforcement or administration of the law (the *Motor Vehicle Safety Act 1980* and related Acts), and that disclosure of the matter in issue could be expected to identify the source.

#### **"CHU" and Brisbane South Regional Health Authority** (S 90/94, 13 May 1996)

The matter in issue was information contained in the applicant's hospital record. I determined that some of the matter in issue was exempt under s.44(1), as it related to the medical treatment and personal details of other persons and there was no public interest factor of sufficient strength to outweigh the public interest in protecting the privacy of the other persons. The balance of the matter in issue was information supplied by third parties to the hospital. Applying the principles set out in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 and further discussed in *Re*

*"P" and Brisbane South Regional Health Authority* (1994) 2 QAR 159 and *Re "M" and Brisbane South Regional Health Authority* (Decision No. 94029, 18 November 1994, unreported), I determined that it was exempt matter under s.46(1)(a) and s.46(1)(b).

**Lourigan and Brisbane City Council** (L 1/95, 14 May 1996)

In this 'reverse FOI' case, I affirmed the decision of the Council that the initial access applicant should have access to a complaint made by Mr Lourigan about the initial access applicant (a fellow employee of the Council). The letter had been disclosed by the Council to the initial access applicant, in the course of dealing with the complaint. I found that the letter was not exempt under s.46(1)(a) or s.46(1)(b), as it was no longer confidential information *vis-a-vis* the initial access applicant (although I noted that those exemptions might still be available in the case of a different access applicant). Applying the principles set out in *Re Pemberton and The University of Queensland* (Decision No. 94032, 5 December 1994, unreported), I determined that the letter was not exempt under s.40(c) (substantial adverse effect on management or assessment of agency personnel), as public interest considerations favoured disclosure to the initial access applicant.

**Copley and Beaudesert Shire Council** (L 16/95, 14 May 1996)

This was a 'reverse FOI' case, in which Councillor Copley objected to the Council's decision to give a ratepayer access to documents relating to complaints passed on by Councillor Copley to the Council, in respect of activities being conducted on a property owned by the ratepayer. I considered claims by Councillor Copley (unsupported by formal evidence) that the matter in issue was exempt matter under s.42(1)(a), s.42(1)(b), s.42(1)(e), s.42(1)(h) and s.46(1)(b), but found that none of those exemption claims could be established on the material before me.

**"HAM" and Department of Justice** (S 127/93, 24 May 1996)

The matter in issue was part of an information sworn by a doctor for the purpose of issuing a warrant under s.25(1) of the *Mental Health Act*. It comprised an opinion about the applicant supplied to the doctor by a third party. I determined that the matter was exempt under s.46(1)(a). I rejected claims that a "public interest defence" and a defence of "unclean hands", would apply to an action for breach of confidence in this case. There was no evidence of any crime or wrongdoing committed in the context of issue of the warrant. Nor was there evidence that the opinion conveyed was not honestly held by the third party.

**Uren and Queensland Police Service** (S 42/96, 3 June 1996)

The decision related solely to the question of whether the applicant was required to pay a \$30 application fee. Applying the interpretation of "personal affairs" explained in *Re Stewart and Department of Transport* (1993) 1 QAR 227, I found that, as at least one of the documents falling within the terms of his initial FOI access application did not concern his personal affairs, the applicant was required to pay a \$30 application fee.

**Smith and North Queensland Electricity Board** (S 81/93, 4 June 1996)

The documents in issue related to the supply of electricity to an airpark operated by the applicant. I found that the applicant was required to pay a \$30 application fee and appropriate photocopying charges, as some of the documents falling within the terms of his initial FOI access application did not concern his personal affairs. I determined that a number of documents, relating to the business, commercial or financial affairs of other NORQEB customers, were exempt under s.45(1)(c). Disclosure of a customer's bad debt, or the fact that they were required to pay a substantial security deposit, could reasonably be expected to damage business reputation, and there was no public interest factor favouring disclosure which was of sufficient weight to warrant disclosure. I also found that

matter which would identify a person who complained to NORQEB about allegedly unsafe wiring at the airpark (which might represent a breach of the *Electricity Act 1976*), was exempt under s.42(1)(b).

**Gonzalez-Barbosa and Department of Education (S 160/95, 7 June 1996)**

This was a 'reverse-FOI' case. The documents in issue were letters from the solicitors for a teacher who had been involved in an altercation with a student. The letters concerned the possibility of temporary suspension of the teacher, and the possibility of disciplinary action against the teacher. I found that the letters were not exempt under s.44(1) as disclosure would not disclose information concerning the personal affairs of the teacher. Throughout the altercation, the teacher was acting as an officer of the school, attempting to regulate the behaviour of the child. The letters were properly characterised as relating to the teacher's employment rather than being of a private character.

**Faint and Wide Bay Regional Health Authority (S 163/95, 12 June 1996)**

I considered the sufficiency of search conducted for documents relating to the applicant, in accordance with the principles set out in *Re Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464. I found that there were reasonable grounds to believe that a medical file relating to the applicant had, at least at one time, been held by the Bundaberg Base Hospital. I concluded that it was most likely that the applicant's file had been destroyed after being contaminated with asbestos in 1986. In any event, I found that, given the extensive searches undertaken by the Authority, its search efforts had been reasonable in all the circumstances.





