OFFICE OF THE INFORMATION COMMISSIONER (QLD)	**)** **)**	S 129 of 1994; S 137 of 1994; S 138 of 1994; S 139 of 1994; S 148 of 1994; S 153 of 1994 (Decision No. 95026)

Participants:

S 129 of 1994

DENVER EDWARD BEANLAND
Applicant

- and -

DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL
Respondent

S 137 of 1994

THOMAS JOHN GEORGE GILMORE
Applicant

- and -

DEPARTMENT OF MINERALS AND ENERGY
Respondent

S 138 of 1994

ROBERT EDWARD BORBIDGE
Applicant

- and -

DEPARTMENT OF THE PREMIER, ECONOMIC AND TRADE DEVELOPMENT
Respondent

S 139 of 1994

DAVID JEFFREY FAGAN
Applicant

- and -

DEPARTMENT OF FAMILY SERVICES AND ABORIGINAL AND ISLANDER AFFAIRS
Respondent

S 148 of 1994

THEO RUSSELL COOPER
Applicant

- and -

QUEENSLAND POLICE SERVICE
Respondent

S 153 of 1994

THEO RUSSELL COOPER
Applicant

- and -

QUEENSLAND CORRECTIVE SERVICES COMMISSION
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents in issue comprising briefing papers prepared by the respondent agencies to brief their respective Ministers for appearances before budget estimates committees of the Queensland Parliament - documents in issue placed before Cabinet after lodgement of the FOI access applications - whether documents in issue exempt under s.36(1)(a) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.11(1)(b), s.28(1), s.36(1)(a), s.36(1)(d), s.36(1)(e), s.36(2), s.36(4), s.50(c)(i), s.79(1), s.81, s.85, s.86, s.87, s.88(2), s.92, s.93, s.110
Freedom of Information Amendment Act 1993 Qld
Freedom of Information Amendment Act 1995 Qld
Acts Interpretation Act 1954 Qld s.4, s.14B(1), s.14B(2), s.14B(3), s.20
Parliamentary Papers Act 1992 Qld s.3

Manly v Ministry of Premier and Cabinet, Supreme Court of Western Australia, No. SJA 1143 of 1994, Owen J, 15 June 1995, unreported
Woodyatt and Minister for Corrective Services, Re (Information Commissioner Qld, Decision No. 95001, 13 February 1995, unreported)

DECISION

1. In each of the applications for review, I set aside the decisions under review, and in substitution for them, I decide that the matter in issue in each case is exempt matter under s.36(1)(a) of the *Freedom of Information Act 1992* Qld, as in force following its amendment in March 1995.

2. In respect of the application for review numbered S 137 of 1994, I note that the matter in issue for the purposes of this decision does not include the ten pages referred to in paragraph 2 of my reasons for decision.

Date of Decision: 14 November 1995

.....

F N ALBIETZ
INFORMATION COMMISSIONER

TABLE OF CONTENTS

Page

OFFICE OF THE INFORMATION COMMISSIONER (QLD)	**)** **)**	S 129 of 1994; S 137 of 1994; S 138 of 1994; S 139 of 1994; S 148 of 1994; S 153 of 1994 (Decision No. 95026)

Participants:

S 129 of 1994

DENVER EDWARD BEANLAND
Applicant

- and -

DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL
Respondent

S 137 of 1994

THOMAS JOHN GEORGE GILMORE
Applicant

- and -

DEPARTMENT OF MINERALS AND ENERGY
Respondent

S 138 of 1994

ROBERT EDWARD BORBIDGE
Applicant

- and -

DEPARTMENT OF THE PREMIER, ECONOMIC AND TRADE DEVELOPMENT
Respondent

S 139 of 1994

DAVID JEFFREY FAGAN
Applicant

- and -

DEPARTMENT OF FAMILY SERVICES AND ABORIGINAL AND ISLANDER AFFAIRS
Respondent

S 148 of 1994

THEO RUSSELL COOPER
Applicant

- and -

QUEENSLAND POLICE SERVICE
Respondent

S 153 of 1994

THEO RUSSELL COOPER
Applicant

- and -

QUEENSLAND CORRECTIVE SERVICES COMMISSION
Respondent

REASONS FOR DECISION

Background

1. The applicants in these matters seek review of decisions refusing them access to documents created by the respective respondent agencies in connection with the budget approval process of the Queensland Parliament, in particular, for the purpose of briefing their respective Ministers for appearances before budget estimates committees of the Queensland Parliament in June 1994. It appears that the documents prepared for that purpose were later provided to a meeting of Cabinet, and on that basis the respondents claim that the documents are exempt under s.36(1)(a) of the *Freedom of Information Act 1992* Qld (the FOI Act).

2. The issues to be dealt with in each of these applications for review coincide to such an extent that I consider it appropriate to deal with them together in these reasons for decision. This decision will deal with all documents in issue in five of the six applications for review, and all but ten pages of the documents in issue in the other application for review (that of Mr Gilmore, No. S 137 of 1994). Those ten pages (being the whole of document 16 and the attachments to documents 9, 10 and 17) do not form part of the documents in issue dealt with in these reasons for decision. I shall deal with them in a later decision if that proves necessary.

3. On 28 April 1994, the Legislative Assembly varied its procedures for consideration of the annual budget of the State by approving Sessional Orders for the establishment of six budget estimates committees. Prior to 1994, the annual budget papers had been subjected to the scrutiny of a committee of the whole Legislative Assembly. I understand that, in the past, only a limited number of Ministerial portfolios had been subject to scrutiny in any year but that, more recently, a process had been adopted whereby questions could be asked of any Minister concerning the budget estimates of a Department or agency within his or her portfolio.

4. The new process assigned the scrutiny of several portfolios to each budget estimates committee. For example, Estimates Committee C was allocated the portfolios of the Minister for Education, the Minister for Health and the Minister for Employment, Training and Industrial Relations. Each committee, comprising four government members and three opposition members, held hearings for one day in June 1994 and thereupon provided reports to the Legislative Assembly on the budget estimates for relevant portfolios. The budget was then debated by the Legislative Assembly and passed.

5. In the course of the hearings before the estimates committees, each Minister appeared and was questioned by committee members about matters relating to his or her portfolio. In order to better prepare Ministers to attend these hearings, various Departments prepared briefing papers for their respective Ministers. While there are variations in content between the briefing papers of different Departments, they generally contain summaries of the functioning of various units and programs for which the relevant Minister has responsibility, details of past, projected and proposed expenditure for units and programs, details of significant operational issues, and information on questions which might arise during the hearings before the relevant estimates committee. The documents prepared by the six respondent agencies for briefing their respective Ministers are the documents in issue in these reviews. I will refer to them as the budget estimates documents, or the documents in issue.

6. Between 4 July 1994 and 25 July 1994, each of the applicants applied to the relevant respondent agency for access, under the FOI Act, to its budget estimates documents. Material before me indicates that a number of other applications for access to budget estimates documents were made by other persons, one being made as early as 23 June 1994, but the six now under consideration are the only ones which have been pursued to external review. The four applicants who are Members of the Legislative Assembly (the "MLA applicants") applied for budget estimates documents relating to their shadow portfolios. Mr Fagan, a journalist, applied for the budget estimates documents of the Department of Family Services and Aboriginal and Islander Affairs (and of some other agencies, but he has not pursued his applications to other agencies through to the stage of external review).

7. Initial decisions of the respondent agencies were provided to all applicants, other than Mr Fagan, between 22 July and 6 September 1994. No decision had been provided to Mr Fagan by 16 September 1994, when he made his application for external review under Part 5 of the FOI Act on the basis of a deemed refusal of access (see s.79(1) of the FOI Act).

8. Each respondent determined that the documents in issue were exempt under s.36(1) of the FOI Act (as worded prior to its amendment in March 1995 - see paragraph 15 below) with particular reference to s.36(1)(a). For example, Ms L Barratt, Freedom of Information Co-ordinator of the Department of Justice and Attorney-General, found that the budget estimates documents of that Department were exempt under s.36(1)(a) of the FOI Act, stating:

> *All the documents you request have been submitted to Cabinet for its consideration. I have perused the confidential Cabinet minute evidencing this. I consider that all the documents are exempt in accordance with s.36(1) of the Act, and accordingly, access to them is refused.*

9. In addition to s.36(1)(a), initial decision-makers in other respondent agencies determined that some or all of their budget estimates documents were also exempt under s.36(1)(d) and s.36(1)(g) (which was amended in March 1995 and redesignated as s.36(1)(e)).

10. The MLA applicants then each applied for internal review on dates ranging between 26 July and 21 September 1994. Internal review decisions were given on dates ranging between 11 August and 29 September 1994: in each case the initial decision was affirmed.

11. Each of the applicants applied to the Information Commissioner for review under Part 5 of the FOI Act, on dates ranging between 15 August and 21 October 1994. In their applications for external review, three of the applicants raised specific arguments as to why they considered that the documents in issue were not exempt under s.36(1). In his application for review dated 15 August 1994, Mr Beanland stated:

> *I now write to ask you to review this decision. Enclosed please find copy of speech which I recently made in Parliament on 5 August on this issue, the particularly relevant section being on page 8903* [of Hansard, 5 August 1994]. *It is apparent to me from information that I have been given that these matters were referred to the Cabinet retrospectively, that is after the Estimates Committee hearings and in this instance also following my request to the Attorney-General on 15 July 1994. Further, the Attorney-General's failure to state on ABC radio when challenged or to have the courage to debate me on ABC television confirms in my mind that this did indeed occur.*
>
> *You would be well aware of the changes the Government made last November to broaden the Cabinet exemption provisions to enable them to be able to claim a wide body of material as Cabinet exempt.*
>
> *However, nowhere within the exemption definition does the word "retrospective" appear nor is there any inference that matters can be referred after the event to Cabinet in order to protect the Minister.*
>
> *In my application to you to review this matter, I ask that you carefully look at the legal aspects of the issue, and whether the Minister can in fact claim Cabinet exemption after the event. If so, of course, it makes an even greater mockery of what has become useless and farcical legislation, where non-personal and sensitive issues involving the Government are concerned.*

12. Mr Gilmore, in his application for review dated 13 September 1994, stated:

> *My application for a review was based on my belief that the decision not to allow me access to the subject documents was clearly against the spirit of the* Freedom of Information Act*, and the many statements which have been made by Ministers of the Crown, since its introduction. It appears to me that the tabling of the documents applied for at the country Cabinet meeting in Mount Isa was a ploy, designed to circumvent the provisions of the* Freedom of Information Act. *It is also my view that the documents were not tabled for the deliberation of Cabinet, and, in fact, were never looked at by Cabinet Ministers.*
>
> *It is, therefore, in my view, likely that the mere tabling of the documentation was insufficient action by the Cabinet to create exemption for the documents under the Act.*

13. In his application for review dated 15 September 1994, Mr Borbidge made the following submissions:

> *1. The documents in issue did not in fact form a submission to Cabinet as they did not comply with the requirements of the Queensland Cabinet Handbook (1992) in that they were not a Policy Submission, an Authority to Introduce a Bill or an Authority to Forward Significant Subordinate Legislation and access to the documents in issue should be provided because they are not exempt matter for the purpose of s.36(1)(a);*
>
> *Alternately,*

The documents in issue were submitted to Cabinet but not for the purpose of "its consideration". The documents did not receive any consideration by the Cabinet and access to the documents should be provided because they are not exempt matter for the purposes of s.36(1)(a).

2. The disclosure of the documents in issue would not disclose deliberations or decisions of Cabinet which have not been officially published by decision of Cabinet.

The Information Commissioner in Hudson v Department of the Premier, Economic and Trade Development (1993) 1 QAR 123 approved of the meaning ascribed to the term "deliberation of Cabinet" by the AAT in Re Porter and Department of Community Services and Health (1988) ALD 403 and noted "It is only documents created contemporaneously with, or subsequent to, active discussion and debate within Cabinet, that in my opinion are capable of disclosing any deliberation of Cabinet."

Thus the documents in issue are not exempt matter for the purposes of s.36(1)(g) as they are incapable of disclosing any deliberation or decision of Cabinet as the documents in issue were not created contemporaneously with, or subsequent to, active discussion and debate within the Cabinet.

The documents in issue therefore do not disclose any deliberation of Cabinet. Furthermore it can not be assumed that there were any deliberations of Cabinet in respect of matter contained in a document simply because that document was before Cabinet.

3. Section 36(2) provides that matter is not exempt under subsection (1) if it is merely statistical, scientific or technical matter. I would submit that the process of identifying matter in the Folios which "could be characterised as 'merely', 'purely' or 'simply' statistical in nature" (paragraph (3) and (4) of [the relevant internal review decision made by Mr E J Bigby on behalf of the] *Department of the Premier, Economic and Trade Development, dated 13th September 1994) is sufficient to identify material which is excepted from exemption by s.36(2) and which can be excised.*

The fact that the material can be so identified means that it is not so inter-woven that it can not be excised. It is therefore practicable to do so in accordance with s.32(b) and access should be provided to a copy of the document from which the exempt matter has been deleted.

4. The phrase "it is practicable to give access" (s.32(b)) should not be qualified by reference to the nature and extent of the work involved and the resources available in deciding the deletions necessary. (Re Carver and the Department of the Prime Minister and Cabinet (1987) 6 AAR 317). Mr Bigby's refusal to permit access is based upon such a consideration.

The external review process

14. For ease of understanding, it is appropriate that I divide discussion of the external review process into two parts. I will first describe the external review process in respect of the claim that the documents in issue are exempt under s.36(1)(a) of the FOI Act, before dealing with the external review process in respect of other exemption claims.

Section 36(1)(a)

15. The main provision in contention in these external reviews was s.36(1)(a) of the FOI Act. Section 36 was amended during the course of the review. Prior to its amendment, which took effect from 23 March 1995, s.36 of the FOI Act was in the following terms:

> ***36.(1)*** *Matter is exempt matter if-*
>
> *(a) it has been submitted to Cabinet for its consideration; or*
>
> *(b) it was prepared for submission to Cabinet for its consideration and is proposed, or has at any time been proposed, by a Minister to be submitted to Cabinet for its consideration; or*
>
> *(c) it was prepared for briefing a Minister about an issue proposed, or that has at any time been proposed, to be considered by Cabinet; or*
>
> *(d) it forms part of an official record of Cabinet; or*
>
> *(e) it is a draft of matter mentioned in paragraph (a), (b), (c), or (d); or*
>
> *(f) it is a copy of, or contains an extract from, matter or a draft of matter mentioned in paragraph (a), (b), (c) or (d); or*
>
> *(g) its disclosure would involve the disclosure of any deliberation or decision of Cabinet, other than matter that has been officially published by decision of Cabinet;*
>
> ***(2)*** *Matter is not exempt under subsection (1) if it is merely statistical, scientific or technical matter unless-*
>
> *(a) the disclosure of the matter under this Act would involve the disclosure of any deliberation or decision of Cabinet; and*
>
> *(b) the fact of the deliberation or decision has not been officially published by decision of Cabinet.*
>
> ***(3)*** *For the purposes of this Act, a certificate signed by the Minister certifying that matter is of a kind mentioned in subsection (1), but not of a kind mentioned in subsection (2), establishes, subject to Part 5, that it is exempt matter.*
>
> ***(4)*** *In this section -*
>
> *"**Cabinet**" includes a Cabinet committee.*
>
> *"**matter**" includes matter that was prepared before the commencement of the Freedom of Information Amendment Act 1993.*

16. Following amendments made by the *Freedom of Information Amendment Act 1995* (which took effect from 23 March 1995 and were expressed to have retrospective effect), s.36 now provides:

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

(a) it has been submitted to Cabinet; or

(b) it was prepared for submission to Cabinet and is proposed, or has at any time been proposed, by a Minister to be submitted to Cabinet; or

(c) it was prepared for briefing, or the use of, a Minister or chief executive in relation to a matter -

(i) submitted to Cabinet; or

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

(d) it is, or forms part of, an official record of Cabinet; or

(e) its disclosure would involve the disclosure of any consideration of Cabinet or could otherwise prejudice the confidentiality of Cabinet considerations or operations; or

(f) it is a draft of matter mentioned in paragraphs (a) to (e); or

(g) it is a copy of or extract from, or part of a copy of or extract from, matter mentioned in paragraphs (a) to (f).

(2) *Subsection (1) does not apply to matter officially published by decision of Cabinet.*

(3) *A certificate signed by the Minister stating that specified matter would, if it existed, be exempt matter mentioned in subsection (1), but not matter mentioned in subsection (2), establishes, subject to part 5, that, if the matter exists, it is exempt matter under this section.*

(4) *In this section -*

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

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

*"**consideration**" includes -*

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

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

*"**draft**" includes a preliminary or working draft.*

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

*"**submit**" matter to Cabinet includes bring the matter to Cabinet, irrespective of the*

purpose of submitting the matter to Cabinet, the nature of the matter or the way in which Cabinet deals with the matter.

17. From the initial submissions made by three of the applicants (see paragraphs 11-13 above), I identified four arguments contending that s.36(1)(a) (as in force prior to 23 March 1995) was either inapplicable in the case of the documents in issue, or only partly applicable to those documents. I summarise these arguments below:

(a) Time at which material facts are to be considered

In respect of FOI access applications lodged before the date of the Cabinet meeting at which the budget estimates documents were present, it was argued that the facts as they stood at the time of lodgement of the FOI access application should be the relevant facts for determination of whether the requested documents are exempt. It was argued that if requested documents were not exempt at the time of lodgment of the FOI access application, they could not be made exempt by later submission to Cabinet.

(b) No real submission to Cabinet

It was also suggested that the submission to Cabinet of the budget estimates documents did not fit within any of the categories of submission recognised by the Queensland Cabinet Handbook, and the budget estimates documents could not therefore be said to have been formally "submitted" to Cabinet. This claim was, of course, made without the applicants having the opportunity (available to me) of examining the relevant Cabinet submission.

(c) A purposive requirement

It was argued that the words "for its consideration" in s.36(1)(a) meant that any submission of documents to Cabinet had to be for the purpose of their consideration by Cabinet and that merely placing documents in the Cabinet room without the intention that they be "considered" by Cabinet would not be sufficient to meet the test for exemption under s.36(1)(a). This claim raised two issues. The first was a question of interpretation of s.36(1)(a), namely, whether the words "for its consideration" added a purposive requirement to the verb "submitted". The second was a question of fact: if there was a purposive requirement, was that requirement satisfied in the particular circumstances of these reviews, i.e. was the matter in issue submitted to Cabinet for its consideration? I formed the view that the first issue was sufficiently arguable to warrant a concurrent investigation of both issues.

(d) Merely statistical matter

It was also argued that at least part of the matter in the documents in issue was "merely" statistical matter and that, by virtue of s.36(2) of the FOI Act, it did not qualify for exemption under s.36(1). It was clear from my own examination of the documents in issue that they contained some matter which arguably fell within the terms of s.36(2) of the FOI Act (as worded prior to its amendment in March 1995).

Initial investigations

18. In letters dated between 23 September and 28 October 1994, I asked each of the respondent

agencies to provide me with copies of the documents in issue. I also alerted the relevant respondent agencies to some of the points raised by Messrs Beanland, Gilmore and Borbidge, in their applications for review. In addition, I indicated to each agency that the onus lay on it to establish that the documents in issue comprised exempt matter (see s.81 of the FOI Act), and invited each to provide evidence to establish the material facts which would attract the application of the exemption provisions relied upon. For example, after quoting a part of Mr Borbidge's application for external review in a letter to the Department of the Premier, Economic and Trade Development (the Premier's Department), I stated:

> *It seems therefore that evidence will have to be obtained from someone with personal knowledge of the relevant facts, to establish that the documents in issue have been submitted to Cabinet, for consideration by Cabinet. The relevant witness or witnesses will need to be available for cross examination, if necessary, on any evidence which is lodged.*
>
> *Evidence should be lodged in the form of sworn affidavits or statutory declarations, which annex as exhibits any relevant documentary evidence.*

19. In each case, the documents in issue were obtained and examined. The volume of documents was substantial, the smallest bundle comprising approximately 100 pages, while the largest set of agency briefing papers comprised more than 800 pages. By letter dated 28 October 1994 from the Premier's Department, I was provided with a statutory declaration made on the same date by Peter John Stanley, a Cabinet Officer. I was later advised by each of the respondents that they relied on the evidence in this statutory declaration to establish their contentions that the documents in issue were exempt under s.36(1)(a) of the FOI Act. Mr Stanley declared:

> *On Friday 15 July 1994, I supervised the preparation, for transport to Mt Isa, of documents which were prepared by Departments for the purpose of briefing their respective Ministers during the June 1994 Parliamentary Estimates Committee Hearings.*
>
> *The documents formed part of a Submission which appeared on the Cabinet Business List for 18 July 1994.*
>
> *On Monday 18 July 1994, I placed the documents in the Mt Isa City Council Chambers which were being used as the Cabinet room on that day, and I removed them after the Cabinet meeting had finished. I am aware that a Cabinet meeting took place in the room.*

20. Following examination of the documents in issue and Mr Stanley's statutory declaration, I requested (by letter dated 2 November 1994 to the Crown Solicitor, who ultimately acted on behalf of all respondents) copies of the Cabinet submission referred to in Mr Stanley's statutory declaration, any official record of Cabinet relating to that Cabinet submission, and any decision of Cabinet relating to Cabinet's consideration of that Cabinet submission; these documents being relevant to my consideration of the claims for exemption under s.36(1)(a) and s.36(1)(g) (now s.36(1)(e)) of the FOI Act. The requested documents were subsequently provided to me under cover of a letter dated 14 November 1994.

21. On or about 18 January 1995, I wrote to each of the applicants, advising them, *inter alia*, of the arguments which I had identified as having been raised by the applicants in support of their contentions that the documents in issue were not exempt. I indicated my preliminary view that the first and second arguments set out at paragraph 17 above would not prove successful, and asked the applicants to confirm in writing if they accepted my preliminary views on those points. I have

received no such confirmation, so I have briefly dealt with those arguments at paragraphs 57-59 below.

22. Also on or about 18 January 1995, I wrote to each of the respondents advising them of my preliminary views in relation to several claims for exemption that had been raised, and inviting them to lodge further evidence and written submissions in support of their contentions that the documents in issue were exempt. As to argument (d) listed at paragraph 17 above, I conveyed to the respondents my preliminary view that there was a considerable amount of matter which could be described as "merely statistical", and outlined my suggested approach as to how the extent of such matter might be assessed. In relation to argument (c) listed at paragraph 17 above, I made the following comments:

> *9. ... it is apparent that the applicants wish to argue that the submission of the Budget Estimates documents to Cabinet was a sham, in that they were not submitted for Cabinet's consideration, but only for the purpose of giving a colourable pretext to claim exemption under s.36(1) of the FOI Act, after the receipt (or foreshadowed receipt) of FOI access applications for the briefing documents prepared for certain Ministers.*
>
> *10. Reliance on s.36(1)(a) requires that it be established not only that documents have been submitted to Cabinet, but that they have been submitted to Cabinet for consideration by Cabinet. The words "for its consideration" add a purposive requirement to the verb "submitted".*
>
> *11. To date, you have provided me with a statutory declaration of Peter John Stanley dated 28 October 1994 (on which five agencies are relying) and a copy of Cabinet Submission No. 03758 (and some associated records of Cabinet). Mr Stanley states that the Budget Estimates documents formed part of a Submission (which I take to be Cabinet Submission No. 03758) on the Cabinet business list for 18 July 1994. Clearly, however, they were not circulated to Ministers beforehand, as an attachment to Cabinet Submission No. 03758. That submission recommends ... . There may be an issue of substance as to whether "noting" certain documents is materially different in nature and degree from "considering" certain documents.*
>
> *12. Mr Stanley's declaration establishes that the Budget Estimates documents were present in the Cabinet room during the course of the Cabinet meeting on 18 July 1994. It is also apparent, however, (from the number of documents provided to me from just six agencies) that the Budget Estimates documents must have comprised many thousands of pages. In my preliminary view, it will be difficult to draw the inference that such a volume of documents could seriously have been submitted for consideration by Cabinet, in connection with one submission on a Cabinet Business List of some two and a half pages in length.*
>
> *13. The application of s.36(1)(a) is obviously one of the crucial issues in these cases, and I consider that it requires further investigation on my part. To this end, I request that you provide me with complete copies of all files ... which relate to the preparation, and placement before Cabinet, of Cabinet Submission No. 03758. I request that copies of those files be produced to my Office (at Level 25, Jetset Centre, 288 Edward Street, Brisbane) on or before **Tuesday, 31 January 1995**. The copies will be used only for the purposes of my investigation and review under Part 5 of the FOI Act, and will be*

returned to you on its completion.

Objection to provision of further documents

23. An objection was raised to the provision of the documents I requested at paragraph 13 of my letter dated 18 January 1995. In a letter dated 6 February 1995, the Crown Solicitor insisted that I withdraw my request, stating:

> *To arrive at a proper construction of s.36(1)(a) of the FOI Act, it is legitimate to have regard to the relevant explanatory notes which accompanied the amending Bill* [which became the *Freedom of Information Amendment Act 1993*, which I shall refer to in these reasons for decision as the 1993 Amendment Act] *(see s.14B of the Acts Interpretation Act 1954).*
>
> *The explanatory notes, where relevant, provided as follows:-*
>
> > *"**Reasons for the Bill***
> >
> > *The amendments concerning the Cabinet and Executive Council exemptions are necessary to ensure the preservation of the conventions of collective and individual Ministerial responsibility. These conventions are fundamental to a democratic government based on the Westminster system. The purpose of collective Ministerial responsibility is to ensure that Cabinet is responsible to the Parliament and, through the Parliament, to the electorate. Part of that convention requires that Cabinet papers are confidential.*
> >
> > *It was never the intention of the legislature to compromise the fundamental convention of collective Ministerial responsibility by allowing the accessibility of a significant amount of Cabinet material under the Freedom of Information Act. In particular, it was never the legislature's intention to permit the release of expressions of opinion of the sponsoring Minister or implicitly reveal the particular position adopted by a Minister or Ministers.*
> >
> > *Ensuring the preservation of the important conventions of collective and Ministerial responsibility is consonant with the reasons of the Act as stated in s.5. Subsection 5(2) expressly recognises that there are often competing interests in that disclosure of particular information could be contrary to the public interest because disclosure would have an adverse effect on essential public interests. The section finally declares that the aim of the Act is to strike a balance between those competing public interests. The aim of the amendments to the Cabinet and Executive Council exemptions is to confirm the original intention of exempting Cabinet and Executive Council material in such a way as to preserve the conventions of collective and individual Ministerial responsibility."*
>
> *In my view, it was plainly not the intention of Parliament that in order to satisfy the requirements of s.36(1)(a) of the FOI Act it is necessary to obtain evidence from within the Cabinet as to whether the Cabinet actually considered the relevant documents. Such a construction would be contrary to the language of the section and inconsistent with the reasons underlying the amendments as outlined in the relevant explanatory notes.*
>
> *The proper construction of s.36(1) of the FOI Act is that, if the documents in*

question were submitted to Cabinet for its consideration, then the exemption is satisfied. There is simply no warrant to proceed further in an attempt to discover what actually happened at the Cabinet meeting.

In relation to the claim for exemption under s.36(1)(a) of the FOI Act you have before you the following documents:-

> *(a) A statutory declaration from Peter John Stanley which deposes to the fact that the relevant documents were part of a Cabinet submission and further that the relevant documents were placed within the Cabinet room prior to the Cabinet meeting;*
>
> *(b) A Cabinet submission ...*
>
> *(c) A Cabinet minute ...*

This material, on any reasonable view, establishes the application of s.36(1)(a) of the FOI Act.

In view of the proper construction of s.36(1)(a) of the FOI Act and the factual material already before you, I am instructed to object to the production to you of the documents in question.

In order to be properly amenable to production under s.85 of the FOI Act the document must be "relevant to a review under this Division" [external review].

In view of the evidence already before you, the documentation that has been requested is not relevant in terms of this review.

In particular, I am instructed to take issue with you regarding your assertions made in paragraph 12 of your letter. There, you remark as follows:-

> "...it will be difficult to draw the inference that such a volume of documents [many thousands of pages] could seriously have been submitted for consideration by Cabinet...".

On my instructions, Cabinet often considers large amounts of material submitted to it. Whether, and to what extent, particular reference is made to particular information depends on the exigencies of the matter for consideration. It is wrong, and as I have said irrelevant, to speculate as to what occurred in Cabinet simply by reference to the size of the material submitted.

To adopt such an approach would lead to the opening up of the debate as to what actually happened inside the Cabinet room. This, in my view, would clearly be inappropriate and lead to this review proceeding down an erroneous path having regard to the proper construction and meaning of s.36(1)(a) of the FOI Act.

Finally, it seems with respect that in this review you are attempting to investigate an issue that is simply not open on a plain reading of material presently before you.

The Cabinet documents before you are unambiguous in their terms. There is no justification whatsoever in the Cabinet material before you to support an allegation that the submission of the Estimates briefing notes in question to Cabinet was a

> *sham. The material before you clearly shows that there was a genuine submission of the documents in question to Cabinet for its consideration.*
>
> *In these circumstances, I suggest with respect that any further inquiry in this regard is simply not justified.*

24. I note that the respondents could have avoided the necessity for any inquiry by my office which they consider may have intruded into "the Cabinet room", by exercising the discretion each had, under s.28(1) of the FOI Act, to release documents even if they considered them to be technically exempt (an option which I had suggested in my letters to the respondents dated 18 January 1995: see paragraph 67 below). The applicants in this case were not seeking to intrude into "the Cabinet Room". The documents to which they sought access had no connection with the Cabinet process, until one was created by the actions of the respondents. The documents were prepared for the benefit of Ministers appearing before budget estimates committees of the Parliament, and the purpose for their creation had been satisfied before the first of the FOI access applications for budget estimates documents was lodged. The documents could have been disclosed at first instance in the exercise of the discretion conferred by s.28(1) of the FOI Act, without any indication that they had been sent to Cabinet. It is only the fact that the respondent agencies decided to claim exemptions under s.36(1) of the FOI Act that has alerted the applicants to the fact that the documents in issue were ever placed before Cabinet.

25. Even now the release of the documents in issue would shed no light on the reason why they were presented to Cabinet, nor disclose any deliberation or decision of Cabinet arising from Cabinet's consideration of Cabinet Submission No. 03758. The continued withholding of these documents cannot logically have anything to do with protecting the secrecy of discussions in Cabinet or the views of individual Ministers on issues submitted to Cabinet, with respect to Cabinet Submission No. 03758: disclosure of their contents would involve no intrusion into "the Cabinet room". (In so saying, I do not discount the possibility that some of the matter in issue may be exempt under exemption provisions other than s.36, or even that, in isolated instances, some of the matter in issue might be exempt under s.36 because it had been submitted to Cabinet for its consideration, or would disclose deliberations of Cabinet which occurred, prior to the use of that matter for briefing a Minister for an appearance before a budget estimates committee. However, no case has been put to me on that basis.)

26. I responded to the Crown Solicitor by letter dated 16 February 1995, repeating my request for copies of documents, and stating by way of explanation:

> [There is a] *mistaken assumption in your letter of 6 February 1995 (especially at pp.3-4) ... that I regard it* as *"necessary to obtain evidence from within the Cabinet as to whether the Cabinet actually considered the relevant documents" or that I am attempting "to discover what actually happened at the Cabinet meeting".*
>
> *As should be clear from paragraphs 7(a) and 10 of my letter to the respondent dated 18 January 1995, I am well aware that s.36(1)(a) of the FOI Act focuses on the purpose of submission of documents or matter to Cabinet. To the extent that what transpired in Cabinet (after the documents in issue were submitted to Cabinet) is relevant to that issue, I do not for the moment (subject to anything raised in the applicants' evidence and submissions) see any need to go beyond the material which the respondent has already provided to me.*
>
> *The request in my letter of 18 January 1995 was for files relating to the preparation, and placement before Cabinet, of Cabinet Submission No. 03758. In making that request I did not seek to obtain copies of material that indicates what happened in*

the Cabinet room. My particular concern was to obtain copies of documents leading up to the placement before Cabinet of the submission, including all documents relating to the development of the submission and the collection and collation of all the documents in issue in this review. In my view, such documents are clearly relevant to the question of the purpose for which documents were submitted to Cabinet, this being a proper question for investigation under s.36(1)(a) of the FOI Act.

The applicant has raised the issue of whether or not the submission to Cabinet, of the Departmental briefings given to Ministers appearing before Estimates Committees, was a sham. It can hardly be irrelevant for me to investigate whether or not there is any substance in the allegation. My ultimate findings may well be in accordance with what you assert in your letter. On the other hand, the material so far provided to me may not tell the whole story with respect to that issue.

The assertion implicit in your letter of 6 February 1995 is that I am obliged to accept that the material so far provided to me by the respondent forecloses any finding other than the affirmation of the respondent's decision under review, that any further documents which I may seek are therefore necessarily irrelevant, and that I therefore have no power to seek any further documents. With respect, that is insupportable. I am entitled to seek access to documents which are relevant because they relate to an issue that is in controversy between the participants, even though the documents may ultimately only confirm that one participant's contentions have no substance.

I remain of the view that the documents I have requested are relevant to my review. I therefore renew my request... . So that there are no misunderstandings, let me make it quite clear that my request seeks only copies of documents which were created prior to the commencement of the meeting of Cabinet held on 18 July 1994.

27. As can be seen from the Crown Solicitor's letter dated 6 February 1995, the submission of the respondents was that the wording of s.36(1)(a), when read in conjunction with the explanatory note which accompanied the 1993 Amendment Act, made it clear beyond doubt that s.36(1)(a) (as worded prior to its amendment in March 1995) applied to the documents in issue. However, I was then, and still remain, of the view that the correct interpretation of s.36(1)(a) prior to its amendment in March 1995 was as set out in paragraph 10 of my letter quoted at paragraph 22 above.

28. Notwithstanding the submissions made by the Crown Solicitor in his letter dated 6 February 1995 and the assertions attributed (in a subsequent letter) to the then Minister for Justice and Attorney-General as to the intentions of Parliament (see paragraph 40 below), it is my obligation to interpret legislation made by Parliament according to accepted canons of statutory interpretation developed by the courts, and principles laid down in the *Acts Interpretation Act 1954* Qld. There is a statutory basis for referring to extrinsic materials in the interpretation of legislation, which is set out in the *Acts Interpretation Act 1954.* Section 14B(3) of that Act provides a definition of "extrinsic material" which includes an explanatory note or memorandum to a Bill. Section 14B(1) and s.14B(2) provide:

> ***14B.(1)*** *Subject to subsection (2), in the interpretation of a provision of an Act, consideration may be given to extrinsic material capable of assisting in the interpretation -*
>
> *(a) if the provision is ambiguous or obscure - to provide an interpretation of it; or*

> *(b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable - to provide an interpretation that avoids such a result; or*
>
> *(c) in any other case - to confirm the interpretation conveyed by the ordinary meaning of the provision.*
>
> ***(2)** In determining whether consideration should be given to extrinsic material, and in determining the weight to be given to extrinsic material, regard is to be had to -*
>
> *(a) the desirability of a provision being interpreted as having its ordinary meaning; and*
>
> *(b) the undesirability of prolonging proceedings without compensating advantage; and*
>
> *(c) other relevant matters.*

29. In my view, there is a strong argument that the meaning of s.36(1)(a) (as in force prior to 23 March 1995) was plain on its face. I could not readily identify any ambiguity or obscurity in the provision. None was brought to my attention by the respondents. It is a basic canon of statutory interpretation that all words in a statutory provision must, *prima facie*, be given some meaning and effect: see D C Pearce and R S Geddes, Statutory Interpretation in Australia, 3rd ed, 1988, at p.18, paragraph 2.7, and the cases there cited. To give meaning and effect to the words "for its consideration" within the context of s.36(1)(a), the natural interpretation is that they add a purposive element to the verb "submitted". Thus, to qualify for the exemption, it was necessary to establish that matter had been submitted to Cabinet for a purpose, i.e. for Cabinet's consideration. It would be necessary, therefore, to inquire into the purpose for which the matter in issue had been submitted to Cabinet, and to establish that the matter in issue was submitted to Cabinet for its consideration. Interpretation of s.36(1)(a) in that manner would not have led to a manifestly absurd or unreasonable result, so arguably there was no warrant for resort to extrinsic material as an aid in the interpretation of the provision.

30. Nor am I convinced that the wording of the explanatory note (if it were permissible that it be taken into account) would have precluded interpretation of s.36(1)(a) as requiring a purposive element. On the introduction of the FOI Act in 1992, s.36(1)(a) had read:

> ***36.(1)** Matter is exempt matter if -*
>
> *(a) it has been submitted, or is proposed by a Minister to be submitted, to Cabinet for its consideration and was brought into existence for the purpose of submission for consideration by Cabinet; ...*

31. In addition to the general "Reasons for the Bill" quoted in the Crown Solicitor's letter (see paragraph 23 above), the explanatory note to the 1993 Amendment Act went on to explain the 1993 amendment to s.36(1)(a) in these terms:

> *New paragraph (a) means that all documents which actually come before Cabinet will automatically fall within the exemption. This means that a purposive test (i.e. that the Cabinet document was created for the sole purpose of submission to Cabinet) is not required in relation to documents that are actually submitted to Cabinet.*

32. In the original s.36(1)(a) there were, in my view, two purposive elements: the first that matter be submitted or proposed to be submitted to Cabinet for its consideration; and the second that the matter was brought into existence for the purpose of submission for consideration by Cabinet. There is no doubt that the 1993 Amendment Act did remove a purposive test, i.e. the second one referred to in this paragraph, being the purposive test identified in the extract from the explanatory note quoted above. However, the same wording which, in my view, gave rise to the first purposive element identified in this paragraph, remained in s.36(1)(a) following its amendment by the 1993 Amendment Act.

33. There was, therefore, a substantive argument before me that for exemption under s.36(1)(a) to be established, I must be satisfied that the purpose of the submission of the matter in issue to Cabinet was for its consideration by Cabinet. I was certainly not in a position to ignore the claims of the applicants in that regard, solely on the basis of the respondents' assertions to the contrary (*cf. Manly v Ministry of Premier and Cabinet*, Supreme Court of Western Australia, No. SJA 1143 of 1994, Owen J, 15 June 1995, unreported, at pp.27-28).

Ministerial briefing notes and respondent's submission

34. The Crown Solicitor responded to my letter dated 16 February 1995 (see paragraph 26 above) by forwarding copies of the documents I had requested, under cover of a letter dated 23 February 1995. Those documents, which originated within the Department of the Minister who ultimately took Cabinet Submission No. 03758 to Cabinet, were:

(a) Ministerial submission dated 1 July 1994;

(b) Ministerial submission dated 8 July 1994 with annexure (being a letter dated 8 July 1994 from the Acting Clerk of the Parliament);

(c) Ministerial submission dated 15 July 1994 with annexure (being a legal opinion dated 15 July 1994);

(d) Cabinet briefing paper dated 15 July 1994; and

(e) Ministerial submission dated 15 July 1994.

35. The documents produced to me (in particular, the issues canvassed in documents (a), (b) and (c) above) afforded evidence which, in my opinion, was capable of supporting a finding that the matter in issue was not submitted to Cabinet for its consideration, but was submitted to Cabinet for the purpose of enabling exemption to be claimed under s.36(1)(a) of the FOI Act.

36. Sworn evidence which put a different complexion on events was, however, subsequently provided to me by a senior officer within the Department of the Minister who ultimately took Cabinet Submission No. 03758 to Cabinet. In a statutory declaration dated 10 March 1995 (a heavily edited copy of which has been supplied to the applicants), that senior officer deposes to certain matters, the effect of which I must paraphrase in these terms -

> that his Minister had instructed him, at a time several months before the holding of the Estimates Committee hearings, that a Cabinet submission, dealing with the subject ultimately dealt with in Cabinet Submission No. 03758, was to go before Cabinet.
>
> that his Minister's intention to have Cabinet Submission No. 03758 go before Cabinet was not provoked, or influenced, by the lodgement of FOI access

applications for the budget estimates documents.

37. As I have said, the documents referred to in paragraph 34 above, looked at in isolation, are capable of supporting a different finding. Indeed, accepting the truth of the facts deposed to in the senior officer's statutory declaration, the timing of the documents referred to in paragraph 34 above and the issues they canvass, relative to the timing of the preparation of Cabinet Submission No. 03758 for consideration at a Cabinet meeting on 18 July 1994, are nevertheless capable of supporting a finding that, even if the subject of Cabinet Submission No. 03758 had long been intended for submission to Cabinet, the timing of its submission was accelerated for the purpose of allowing the budget estimates documents to be forwarded to Cabinet (as background/reference material to its consideration of Cabinet Submission No. 03758) in order to be rendered 'Cabinet exempt' within the statutory time frame for responding to the FOI access applications which had been lodged, seeking access to the budget estimates documents.

38. I cannot disclose the subject-matter of Cabinet Submission No. 03758, other than to say it concerns a fairly routine matter of internal government "housekeeping", and that it was not irrelevant to have the budget estimates documents available as background/reference material to its consideration. While it was also, arguably, unnecessary to have the budget estimates documents available, I did not regard s.36(1)(a) (as in force prior to the March 1995 amendments) as warranting any inquiry as to what material Cabinet regards as necessary or desirable to assist its deliberations, provided I was satisfied that the material had been submitted to Cabinet for the purpose of its consideration by Cabinet. In this regard, I remained troubled (especially in the light of the contents of the documents referred to in paragraph 34 above) about whether several thousand folios of budget estimates documents could seriously have been submitted to Cabinet for the purpose of their consideration by Cabinet.

39. I was in the course of considering what further procedural steps would be necessary to test the evidence then before me (e.g. convening an oral hearing to allow cross-examination of the respondents' deponents, or arranging to question other relevant witnesses), when the government introduced amendments to s.36 of the FOI Act which made further consideration of the issue redundant: see the *Freedom of Information Amendment Act 19*95 Qld (the 1995 Amendment Act).

Amending legislation

40. On 22 March 1995, I received a letter from the Crown Solicitor in the following terms:

> *I am instructed by the Honourable the Attorney-General to advise you as follows.*
>
> *The Freedom of Information Amendment Bill 1995 was introduced into the House last night. The Bill contains amendments to sections 36 and 37 of the Freedom of Information Act 1992 Qld (the Act). I attach a copy of the Bill, Explanatory Notes and Second Reading Speech.*
>
> *I am instructed to inform you of the Government's reasons for the amendments contained in the Bill.*
>
> *As you are aware, sections 36 and 37 were amended in 1993. I am instructed that the Parliament's intention at that time was to remove the purposive element in those sections and exempt all matter that came before Cabinet. This is made abundantly clear in the Explanatory Notes, which state:*
>
> > *"New paragraph (a) means that all documents which actually come before the Cabinet will automatically fall within the exemption. This means that a*

> *purposive test (i.e. that the Cabinet document was created for the sole purpose of submission to Cabinet) is not required in relation to documents that are actually submitted to Cabinet".*
>
> *Recently, you have provided a preliminary view on an existing review regarding Cabinet documents. You have indicated that the words "for its consideration" add a purposive element to s.36(1)(a). I am instructed to inform you that Parliament's intention in 1993 was to remove this purposive element. These amendments will put Parliament's intention into effect. For this reason I am instructed that the Government has decided that the amendments will have a retrospective effect.*
>
> *I am further instructed to inform you that the Government does not consider it appropriate that the Act be used as a means of inquiring into the Cabinet Room or the reason that a matter was brought to the attention of Cabinet. In the Government's view it is not appropriate for the Government to have to enter into extended debate as to the nature or extent of Cabinet deliberations or the reasons it was considered necessary for Cabinet to consider issues placed before it, and that such inquiries are contrary to the very purpose of the Cabinet exemption, which is to protect the confidentiality and integrity of the Cabinet process.*
>
> *Accordingly, I am instructed to inform you that the Government is strongly of the view that it is in the public interest to maintain the confidentiality and integrity of the Cabinet process, and that Cabinet must have the ability to discuss matters without the threat of access to documents, or parts of documents, under the Act. To provide certainty, and the requisite security to the Cabinet process, the amendments are intended by the Government to ensure the Queensland* Freedom of Information Act *will operate so that all documents and matter, including statistical, scientific and technical matter, brought to Cabinet will be exempt from access under the Act. It is in the Government's view clearly a matter for Cabinet itself as to whether and to what extent it considers the material before it.*

41. The fourth and fifth paragraphs quoted above essentially mirror the arguments put forward in the Crown Solicitor's letter of 6 February 1995. As I indicated above (see paragraphs 28-33), it is necessary for me to interpret the provisions of the FOI Act according to accepted methods of statutory interpretation.

42. It is somewhat ambiguous as to whether the second last paragraph quoted above is directed to my investigative process in the course of this review, or to the uses that applicants may seek to make of the FOI Act. Certainly, the applicants in this case were not seeking to inquire into the Cabinet room or into the nature or extent of Cabinet deliberations. The documents to which they sought access had no connection with the Cabinet process, until one was created by the actions of the respondents. Even now, disclosure of the budget estimates documents would have no impact on the "confidentiality and integrity of the Cabinet process", as I have explained at paragraphs 24-25 above.

43. If the comments in the second last paragraph quoted above were directed to me, I merely observe that if my duties under Part 5 of the FOI Act require me to inquire into deliberations and decisions of Cabinet, to ensure that the provisions of the FOI Act have been properly applied in a particular case, then I must do so. Inquiries into whether exemption provisions such as s.36(1)(d) or 36(1)(e) of the FOI Act have been properly applied will from time to time require me to do so (as they have done in the past with little demur from relevant agencies). It is necessary, in order to guarantee the credibility of the administration of the FOI Act, that the independent external review authority have

power to make such investigations and inquiries (as is implicitly recognised in s.85, s.86 and, particularly, s.92 of the FOI Act), subject to appropriate safeguards, which are afforded by s.87 and s.93 of the FOI Act.

44. The 1995 Amendment Act was passed on 22 March 1995, having been before the Parliament for a period of less than 24 hours: a step which is contrary to usual parliamentary procedure requiring that proposed legislation should lie on the table of Parliament for at least seven days before it is debated (see debate on the motion to suspend Standing Orders and Sessional Orders, at Hansard, 22 March 1995, pp.11244-8). The 1995 Amendment Act received the Royal assent, and came into force, on the following day, 23 March 1995. The 1995 Amendment Act made significant changes to the FOI Act and to the course of these reviews. It removed the words "for its consideration" from s.36(1)(a), which had been pivotal to the applicants' third argument described at paragraph 17 above. It also inserted in s.36 a definition of "submit" which made it clear that no purposive element qualifies that verb in the context of s.36(1). It further removed the exception relating to "merely statistical" matter, which had been contained in s.36(2) and which in my preliminary view would have excepted a significant amount of the matter in issue from exemption under s.36(1) in its previous form. The 1995 Amendment Act also contained a provision which made it clear that the amendments were to have retrospective effect - applying to all FOI access applications whether they had been made before or after the 1995 Amendment Act came into force.

45. The Crown Solicitor had written to me on 13 March 1995, forwarding a written submission on behalf of the respondents (as well as the statutory declaration referred to in paragraph 36 above) which maintained the claim that the budget estimates documents were exempt under s.36(1)(a), as in force prior to the 1995 Amendment Act. By letters dated 23 March 1995, I provided edited copies of the respondents' submissions and evidence to the applicants and drew their attention to the amendments contained in the 1995 Amendment Act. I invited the applicants to provide evidence or submissions in support of their case for disclosure of the documents in issue. The only written response I have received is a letter from Mr Cooper dated 27 March 1995. In that letter Mr Cooper stated:

> *... I would be grateful if you could advise me what stages your reviews of these two matters have reached and, specifically in this regard, if amendments to the* Freedom of Information Act - *forced through Parliament last night by the Government - have effectively closed off any hope I might have had that you could have found that I had a right of access to all or any of the identified documents.*
>
> *In this regard, you may be interested to know that Mr G W Taylor, General Manager, Finance and Administration, of the Corrective Services Commission and the person who undertook the internal review of the Commission's initial decision to refuse my request for access, advised me in a letter dated 29 September 1994, that, of the 300 pages of Commission documents identified as relevant to my request, "approximately 100 pages" are copies of the budget papers and Departmental Estimates Statement which were previously provided to members of the Estimates Committee.*
>
> *I would be interested to know on what basis the Corrective Services Commission could deny me F.O.I. access to documents which I had already been supplied as a member of the relevant Estimates Committee and, in fact, if the above-mentioned amendments have actually given these documents a retrospective exempt status as Cabinet documents.*

46. The applicants have not supplied any further submissions. Given the comprehensive way in which the amended s.36 has removed any statutory language which tended to support the contentions

raised by the applicants, it is difficult to conceive of anything further that the applicants could have usefully contributed in respect of the application of s.36(1)(a).

47. I note that until the time that the 1995 Amendment Act took effect, I had accorded these reviews a high priority, aiming to complete them before the 1995 hearings by budget estimates committees. However, after the March 1995 amendments came into force, it was clear that there could realistically be only one outcome to this review, and not one that would establish a right to disclosure of additional information under the FOI Act, so priorities were reassessed and attention was transferred to earlier applications for review.

Other exemptions claimed

48. In addition to s.36(1)(a), it was suggested by various respondents that s.36(1)(d) and (g) (as in force before the 1995 Amendment Act - they are set out at paragraph 15 above) were of relevance, as well as s.11(1)(b) and s.50(c) of the FOI Act, which provide:

> ***11.(1)*** *This Act does not apply to -*
>
> *...*
>
> *(b) the Legislative Assembly, a member of the Legislative Assembly, a committee of the Legislative Assembly, a member of a committee of the Legislative Assembly, a parliamentary commission of inquiry or a member of a parliamentary commission of inquiry; ... .*
>
> *...*
>
> ***50.*** *Matter is exempt matter if its public disclosure would, apart from this Act and any immunity of the Crown -*
>
> *...*
>
> *(c) infringe the privileges of -*
>
> *(i) Parliament; ... .*

49. On 8 December 1994, I received a submission from the Department of Family Services and Aboriginal and Islander Affairs (which had not made a decision, prior to Mr Fagan invoking his right to apply for external review on the basis of a deemed refusal of access) indicating that two provisions of the FOI Act had been considered in respect of Mr Fagan's application. The Department drew my attention to s.11(1)(b) and s.50(c)(i) of the FOI Act, but did not expressly state that it sought to rely on them for the purposes of this review. Section 11(1)(b) states that the FOI Act does not apply to, among others, committees or members of the Legislative Assembly. I formed the view that this provision was of no relevance in these reviews. The applications in these cases were made to agencies for documents held by agencies, not to a committee or member of the Legislative Assembly for documents held by a committee or member of the Legislative Assembly. The fact that the documents were in some way relevant to a committee of the Legislative Assembly does not attract the application of s.11(1)(b) of the FOI Act.

50. Section 50(c)(i) provides that matter is exempt if its public disclosure would infringe the privileges of Parliament. It was suggested that the effect of s.3 of the *Parliamentary Papers Act 1992* Qld was such that papers prepared for the benefit of a Minister giving evidence before a Parliamentary committee could be regarded as "proceedings in Parliament", and so public disclosure of them might amount to an infringement of Parliamentary privilege. I considered that I should bring both provisions to the notice of each of the respondents and raise the possible application of s.50(c)(i) of

the FOI Act with the Speaker of the Legislative Assembly.

51. I wrote to the Speaker on 24 January 1995, outlining a number of concerns I had as to the possible applicability of s.50(c)(i) and inviting him to apply to become a participant in these external reviews. The Speaker responded by letter dated 10 March 1995, indicating that he did not consider that there was any basis on which a claim to exemption under s.50(c)(i) could succeed, and declining to apply to be a participant.

52. On or about 18 January 1995, I wrote to each of the respondents indicating my preliminary view that s.11(1)(b) was not applicable in the circumstances of these applications and that the documents in issue were not exempt under s.36(1)(d) or s.36(1)(g), as in force prior to the 1995 Amendment Act. I indicated that s.36(1)(d) and (g) were clearly designed to protect official records of Cabinet and deliberations or decisions of Cabinet, not material which had simply been provided to Cabinet. There has never been any contention on the part of the respondents that the documents in issue were prepared for submission to Cabinet or with Cabinet in mind. Their release would shed no light on the reason why they were presented to Cabinet, nor disclose any deliberation or decision of Cabinet in respect of Cabinet Submission No. 03758.

53. By letter dated 13 March 1995, the Crown Solicitor, acting on behalf of the respondents, indicated that his clients did not seek to rely on exemption provisions other than s.36(1)(a) of the FOI Act in contending that all of the documents in issue were exempt, but stated that his clients wished to reserve their rights to make submissions in relation to particular documents if a general claim to exemption under s.36(1)(a) should be rejected. In the circumstances, there is no need to consider these provisions further.

Application of s.36(1)(a)of the FOI Act

54. As the applicants have not indicated that they accept my preliminary views in relation to any of the arguments set forth at paragraph 17 above, it is necessary for me to consider each of those arguments. Before doing so, I will consider the claim of the respondents that s.36 of the FOI Act, as amended by the 1995 Amendment Act, has retrospective operation.

Retrospective operation of legislation

55. In *Re Woodyatt and Minister for Corrective Services* (Information Commissioner Qld, Decision No. 95001, 13 February 1995, unreported), I decided that the applicant had an accrued right to have his FOI access application dealt with in accordance with the provisions of the FOI Act as in force at the time he made his FOI access application. Section 20 of the *Acts Interpretation Act* 1954 preserved that accrued right in the face of subsequent amendments to s.36 of the FOI Act made by the 1993 Amendment Act. However, as I noted in that decision, the application of s.20 of the *Acts Interpretation Act* may be displaced, wholly or partly, by a contrary intention appearing in any Act (see *Acts Interpretation Act*, s.4). The 1995 Amendment Act added a new s.110 to the FOI Act which provides:

> ***110.(1)*** *The amendments made by the* Freedom of Information Amendment Act 1995 *(the* ***"amending Act"****) apply to an application made under this Act before the commencement of the amending Act.*
>
> ***(2)*** *Without limiting subsection (1), in deciding the application of the amendments made by the amending Act, the* Acts Interpretation Act 1954*, section 20 does not apply to an application made under this Act before the commencement of the amending Act.*

> ***(3)*** *This section does not apply to the amendment of section 42 made by the amending Act.*
>
> ***(4)*** *This section is a law to which the* Acts Interpretation Act 1954*, section 20A applies.*
>
> ***(5)*** *In this section -*
>
> *"**application**" includes an application for review under section 52, 73 or 84.*

56. Section 110 gives the amended s.36 retrospective operation, so that it applies to the FOI access applications lodged by the applicants for review. Accordingly, I am required to apply s.36 as in force at the time I give my decision in these reviews.

Time at which material facts are to be considered

57. A distinct but related question is whether the material facts which I must consider are those which existed at the time of lodgement of the relevant FOI access applications, or those which apply at the time I give my decision in these reviews. If I must consider the material facts as at the time of lodgement of the relevant FOI access applications, then the documents in issue in the applications commenced by Mr Fagan, Mr Borbidge, Mr Beanland and Mr Cooper would not be exempt under s.36(1)(a), because they had not by that time been placed before Cabinet. It appears that Mr Gilmore's FOI access application was not received until after the budget estimates documents were placed before Cabinet.

58. However, the relevant legal principles in this regard are, in my opinion, clear. They are stated at paragraph 35 (and re-stated at paragraph 58) of my reasons for decision in *Re Woodyatt*. A tribunal which, like the Information Commissioner, is empowered to conduct a full review of the merits of an administrative decision under challenge, for the purpose of determining whether an applicant has a present entitlement to some right, privilege or benefit, ordinarily (unless there is a clear indication to the contrary in the relevant statute) has regard to the relevant facts and circumstances as they stand at the date of its decision. As I said in *Re Woodyatt* at paragraph 58:

> *A significant change in material facts or circumstances may mean that a requested document which was not exempt at the time of lodgement of an FOI access application, has become exempt by the time of making a decision in response to the application (and vice versa), but that is simply a risk which the applicant must bear given the nature of many of the exemption provisions.*

I must therefore consider whether the documents in issue are exempt on the basis of the material facts as they now stand, rather than as at the time the applicants lodged their FOI access applications.

Not a real submission to Cabinet

59. In his letter of 15 September 1994, Mr Borbidge suggested that the documents in issue had not been submitted to Cabinet in a formal sense. Having examined the Cabinet submission and considered the relevant parts of the Cabinet Handbook, I am satisfied that there is no merit in this claim. A definition of the term "submit" was inserted in s.36(4) of the FOI Act by the 1995 Amendment Act (see paragraph 16 above) and I consider that the process by which the documents were put before Cabinet falls within that definition.

Purpose of consideration

60. The nature of this issue has been explained at paragraphs 17(c) and 29 above. The amendments to s.36(1) effected by the 1995 Amendment Act rendered this issue redundant before my investigations had reached a stage at which I was in a position to make a determinative finding in respect of it.

61. The amendments which came into force on 23 March 1995 make it clear beyond doubt that any purposive element has been removed from s.36(1)(a). Even if a document was deliberately submitted to Cabinet simply to make it exempt from disclosure under the FOI Act, the only finding open to me, on proof that the document had been submitted to Cabinet, would be a finding that the document comprises exempt matter under s.36(1)(a) of the FOI Act.

62. It is possible that an applicant for access under the FOI Act, who was aggrieved by the actions of an agency in arranging for a requested document to be placed before Cabinet for no legitimate purpose, but merely to render it 'Cabinet exempt' within the time-frame for processing the FOI access application, could apply to the Supreme Court by way of judicial review (or an action seeking a declaration) on the basis that the actions of the agency constituted an abuse of power. An issue of that kind is not one which I have jurisdiction to determine in a review under Part 5 of the FOI Act. However, a person seeking to pursue a Supreme Court challenge of the kind I have mentioned would face formidable hurdles in obtaining the evidence to support a case. Much of the necessary evidence would itself be exempt matter under the unnecessarily broad terms of s.36 (or s.37) of the FOI Act, and may even be subject to a claim of privilege from production in legal proceedings on grounds of public interest immunity.

Statistical matter

63. A number of the respondent agencies acknowledged that the documents in issue contain statistical matter. My examination of the documents in issue confirms this. The FOI Act prior to 23 March 1995 contained an exception to s.36(1) whereby "merely statistical matter" would not qualify for exemption under s.36(1), unless s.36(2)(a) and (b) were applicable. The respondents objected to release of all this matter on the grounds that it was not "merely" statistical matter, but a number of the applicants argued that some of the matter was merely statistical and therefore not exempt. That contest has been rendered redundant by the 1995 Amendment Act, which repealed (with retrospective effect) the former s.36(2) exception for "merely statistical, scientific or technical matter".

Findings in relation to s.36(1)(a)

64. The arguments of substance initially raised by the applicants (being the last two arguments referred to above) have been rendered redundant by the retrospective amendments to s.36 made by the 1995 Amendment Act. On the basis of Mr Stanley's statutory declaration, I find that the documents in issue in each application for review have been submitted to Cabinet, and that they therefore comprise exempt matter under s.36(1)(a) of the FOI Act, in its present form.

65. This applies not only to documents which have not been released to the applicants, but also to documents which have previously been released to an applicant, or indeed published. For example, in the case of one of Mr Cooper's applications (S 153/94), the internal review decision-maker indicated that approximately 100 pages of the documents in issue were claimed to be exempt, notwithstanding that they had already been provided to Mr Cooper in his capacity as a member of a budget estimates committee. It is also clear that a small number of the documents in issue have been published by agencies.

66. Publication of material will not necessarily mean that it ceases to be exempt under s.36(1) in its present form. The only exception to the exemption appears in s.36(2), which provides that s.36(1) does not apply to matter officially published by decision of Cabinet. Despite indications of prior

publication of some documents in issue, by a Minister or Department, I am not aware of any decision by Cabinet authorising publication of any of the budget estimates documents since the time that they were forwarded to Cabinet on 18 July 1994. They therefore remain exempt documents under the FOI Act.

67. Of course, agencies have a discretion to give access under the FOI Act to exempt documents or exempt matter (see s.28(1) of the FOI Act). In my letters to respondent agencies forwarded on or about 18 January 1995, I drew the attention of all respondents to the possible exercise of their discretion to disclose some of the matter in issue, even if it is exempt matter, saying:

> *While in the balance of this letter, I have proceeded on the basis that you and other relevant agencies wish to defend the decisions under review, I now ask that you give careful consideration to whether it is necessary or appropriate to exercise the discretion under s.28(1) of the FOI Act to claim exemption for all of the documents in issue (assuming for the moment that they are, technically, exempt).*
>
> *To my mind, there is an air of unreality about the making of this blanket claim for exemption in respect of documents that were not initially prepared for submission to Cabinet, but to brief Ministers for an exercise in public accountability,* viz. *questioning by the elected representatives of the people of Queensland, on aspects of the performance of agencies for which the relevant Ministers are responsible and accountable. A great deal of the briefing material must have been prepared on the basis that it was appropriate information to be put on the public record in response to questioning. I note, merely by way of example, that there is nothing in the briefing for the Premier prepared by the Office of the Parliamentary Commissioner for Administrative Investigations (which is among the documents in issue) which I regard as inappropriate or unsuitable to be placed on the public record. Indeed, it was prepared on the basis that the Premier may need to place on the public record (in response to questioning) any of the details contained in it.*
>
> *While I recognise that in respect of other agencies there are probably parts of the briefing materials which they would prefer should remain confidential, I consider that there are likely to be many other parts which the agencies would concede were always considered to be appropriate for release on to the public record, or the release of which, at this stage, could do no conceivable harm.*
>
> *If my views are correct, then the decision to claim a blanket exemption on the basis that the documents were subsequently submitted to Cabinet (for no more significant purpose, it appears, than ...) seems to me to be contrary to the spirit of the FOI Act, and arguably an inappropriate exercise of the discretion conferred by s.28(1) of the FOI Act (cf.* Re Norman and Mulgrave Shire Council *(Information Commissioner Qld, Decision No. 94013, 28 June 1994, unreported) at paragraphs 11-18). Decisions of this kind make it understandable why journalists and Opposition MP's have grown cynical about the administration of the FOI Act.*
>
> *I request that you give serious consideration to whether your Department should agree to the release of those documents in issue, the disclosure of which could do no harm to any relevant public or private interest, and inform me of any documents or parts of documents which you are prepared to release. I am sure any concessions on your part would be accepted by the applicants as a sign of good faith that such an exceptionally wide exemption provision as s.36(1) (which is capable of applying to documents already on the public record) is to be administered in a common sense manner.*

68. Notwithstanding my suggestion, the respondents did not agree to the disclosure of any of the matter in issue. The exercise of the discretion to release exempt documents is limited to agencies and Ministers. I am prohibited by s.88(2) of the FOI Act from directing the release of exempt documents. As the respondents have declined to exercise the discretion granted to them, and the matter in issue is exempt under s.36(1)(a) in its present form, I cannot direct release even of those documents which have previously been published, or made available to an applicant.

Comments on the amendments to s.36

69. In *Re Woodyatt* at paragraphs 11-12, I made comments that were critical of the extremely wide coverage of the s.36 exemption following the amendments effected by the 1993 Amendment Act. The amendments to s.36 (and s.37) effected by the 1995 Amendment Act only serve to amplify the concerns which prompted my previous critical comments. So wide is their reach, following the 1993 and 1995 amendments, that s.36 and s.37 of the FOI Act can no longer, in my opinion, be said to represent an appropriate balance between competing public interests favouring disclosure and non-disclosure of government information. They exceed the bounds of what is necessary to protect traditional conceptions of collective Ministerial responsibility (and its corresponding need for Cabinet secrecy) to such an extent that they are antithetical to the achievement of the professed objects of the FOI Act in promoting openness, accountability and informed public participation, in the processes of government. I have explained my concerns in this regard at some length in Chapter 3 of my third Annual Report as Information Commissioner (1994/95).

70. The potential for abuse of the accountability objects of the FOI Act is apparent on the face of these provisions. Under s.36(1)(a) in its present form, any document (even a bundle of thousands of documents) can be made exempt by placing it before Cabinet. A Minister, or official with sufficient influence to have a document placed before Cabinet, now holds the power, in practical terms, to veto access to any document under the FOI Act by adopting this mechanism. It does not matter that the document was not created for the purpose of submission to Cabinet, or that the disclosure of the document would not compromise or reveal anything about the Cabinet process. It is not even necessary that the document be in any way relevant to any issue considered by Cabinet. At any time, even at a time after an FOI access application has been made for that specific document, a document may be made exempt by placing it before Cabinet. (Section 36(1)(c) of the FOI Act, in its present form, also carries similar potential for abuse, as explained in paragraph 3.24 of my third Annual Report (1994/95)).

71. Much of the benefit of the FOI Act is prophylactic - the prospect of public scrutiny should deter officials from impropriety and encourage the best possible performance of their functions. However, the intended prophylactic effect of accountability measures of this kind is negated if there exists a certain method for evading scrutiny in the event of problems arising, by preventing the disclosure of embarrassing or damaging information. Moreover, the prospect of concerned citizens obtaining documents which would permit informed participation in the policy development phase of some issue which is ultimately intended to go before Cabinet or Executive Council is also reduced, by these exemption provisions, to something which is entirely at the discretion of Ministers, or officials with sufficient influence to create circumstances which attract the application of these exemption provisions.

72. Other anomalies in the operation of these unnecessarily wide exemption provisions should be apparent from my reasons for decision in this case. In Chapter 3 of my third Annual Report, I have recommended that s.36 be amended to restore it to the form in which it was originally enacted in 1992, when it struck an appropriate balance between preserving the degree of secrecy necessary in the Cabinet process to protect the convention of collective Ministerial responsibility and, on the

other hand, promoting the public interests in openness, accountability and informed public participation in the processes of government, which the FOI Act was intended to foster.

Conclusion

73. As my ultimate findings are based on an exemption provision which has been amended substantially since the making of the decisions under review, I consider it appropriate to set aside the decisions under review. In substitution for them, I find that the matter in issue in each application for review is exempt matter under s.36(1)(a) of the FOI Act, as in force following its amendment by the 1995 Amendment Act. I note, however, in respect of application for review No. S 137 of 1994, that ten pages remain in issue (see paragraph 2 above), not having been dealt with as documents in issue in these reasons for decision.

.....

F N ALBIETZ
INFORMATION COMMISSIONER