OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 97016
Application S 151/95

Participants:

RONALD JOHN PRICE
Applicant

DIRECTOR OF PUBLIC PROSECUTIONS
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents recording communications undertaken in preparation for, and documents prepared for use in, the presentation of the Crown case in respect of various criminal charges against the applicant, and appeals against conviction brought by the applicant - whether subject to legal professional privilege - whether legal professional privilege does not apply because documents were created to further an illegal purpose - application of s.43(1) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - applicant challenging sufficiency of search by respondent for documents falling within the terms of the applicant's FOI access application - whether reasonable grounds exist for believing that the respondent has possession or control of additional documents which fall within the terms of the applicant's FOI access application, but which have not been dealt with in its response to the applicant's FOI access application - whether search efforts by the respondent have been reasonable in all the circumstances of the case.

FREEDOM OF INFORMATION - review by Information Commissioner - rulings on procedural matters - authority of Information Commissioner to convey preliminary views to participants on the issues for determination in a review - manner in which an agency may satisfy the onus of proof cast on it by s.81 of the *Freedom of Information Act 1992* Qld - agency receiving an FOI access application not required to obtain and process requested documents which are in the possession of another agency - no obligation on an agency to produce, for the benefit of an access applicant, a schedule of documents to which access has been granted - discussion of circumstances in which it may be appropriate for the Information Commissioner to order an agency to prepare a schedule of documents to which access has been granted.

Freedom of Information Act 1992 Qld s.7, s.27(4), s.27(7), s.34, s.34(2)(f), s.36(1)(a), s.37(1)(d), s.43(1), s.52(4), s.71(3), s.72, s.72(1)(a), s.72(2), s.79(1), s.81, s.87
Acts Interpretation Act 1954 Qld s.36
Director of Public Prosecutions Act 1984 Qld s.13

Attorney-General (NT) v Kearney (1985) 158 CLR 500
Attorney-General (NT) v Maurice (1986) 161 CLR 475
Austin v Deputy Secretary, Attorney-General's Department (1986) 12 FCR 22; 23 A Crim R 107; 67 ALR 585; 10 ALD 169
Carter v Managing Partner, Northmore Hale Davy and Leake & Ors (1995) 183 CLR 121; 69 ALJR 572; 129 ALR 593
Clarkson and Attorney-General's Department, Re (1990) 4 VAR 197
Commissioner, Australian Federal Police and Another v Propend Finance Pty Ltd and Others (1996) 141 ALR 545
Dalleagles Pty Ltd v Australian Securities Commission (1991) 4 WAR 325; 6 ACSR 498
Deren & Anor v New South Wales (Supreme Court of New South Wales, No. 11952/90, CLS 1995 NSWSC CL 71, Levine J, 28 April 1995, unreported)
Director of Public Prosecutions v Smith [1991] 1 VR 63; (1991) 100 FLR 6
Dunesky & Anor v Edler & Ors (1992) 35 FCR 429; 60 A Crim R 459; 107 ALR 573
Goldberg v Ng (1995) 185 CLR 83; 69 ALJR 919; 132 ALR 57
Grofam Pty Ltd & Ors v Australia and New Zealand Banking Group Limited & Ors (1993) 45 FCR 445; 117 ALR 669
Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd [1985] 3 NSWLR 44
Packer v DCT (Qld) [1984] 1 Qd R 275; (1984) 73 FLR 205; (1984) 55 ALR 242
Shepherd and Department of Housing, Local Government and Planning, Re (1994) 1 QAR 464
Smith and Administrative Services Department, Re (1993) 1 QAR 22
Southern Equities Corporation Ltd v West Australian Government Holdings (1993) 10 WAR 1
Trade Practices Commission v Sterling (1979) 36 FLR 244
Waterford v Commonwealth of Australia (1987) 163 CLR 54

DECISION

1. I set aside the decision under review (which is identified in paragraph 3 of my accompanying reasons for decision).

2. In substitution for it, I decide that the matter remaining in issue, which is identified in paragraph 12 of my accompanying reasons for decision, is exempt matter under s.43(1) of the *Freedom of Information Act 1992* Qld.

3. I also find that no further documents, which fall within the terms of the applicant's FOI access application dated 13 July 1995, exist in the possession or control of the respondent.

Date of decision: 24 October 1997

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INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's refusal to give him access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to several documents from the respondent's files concerning various criminal charges against the applicant, and appeals against conviction brought by the applicant. The applicant also challenges the 'sufficiency of search' made by the respondent for documents falling within the terms of the applicant's FOI access application.

2. By letter dated 13 July 1995 to the Director of Public Prosecutions (the DPP), the applicant lodged an FOI access application in the following terms:

> *I request under the FOI Act a copy of all my files referred to in my letters to yourself recently.*
>
> *The cases were Nelson v Price (Gatton Magistrates Court and the Appeal to the higher court).*
>
> *Smith v Price (Committal Gatton Magistrates Court plus, District Court and the Full Court of Appeal)*
>
> *McDonald v Price (Gatton Magistrates Court, Full Court of Appeal and High Court)*
>
> *I request a full copy of the entire files relating to the above cases both in your possession and the Police. To include a copy of the inquiry into these matters by yourself and your department involving a Mr Svenson or similar name. This application is for copies of all documents including videos,*

photographs, tape recordings that were at any time in the possession of the police or the Prosecutors possession at any time, whether on loan to them or not.

I wish to inspect the file as well. I don't believe the files due to the recent circumstances will be a problem to locate, a cheque is on its way.

3. Having received no notice of decision from the respondent at the expiration of the statutory time limit provided for in s.27(4) and s.27(7) of the FOI Act, the applicant applied to me, by letter dated 10 September 1995, for review, under Part 5 of the FOI Act, of the decision the respondent is deemed to have made, refusing access to the requested documents: see s.79(1) of the FOI Act.

External review process

4. I sought and obtained from the applicant further particulars of the files to which he had requested access, so as to assist the respondent in identifying the files in its records system.

5. On 3 October 1995, I wrote to the respondent providing those further particulars. I asked the respondent to indicate whether it was prepared to give the applicant access to any of the requested documents (or parts thereof), in which case I indicated that I would authorise the respondent to give the applicant access accordingly. In respect of any documents or parts of documents claimed to be exempt under the FOI Act, I asked the respondent to supply me with working copies for my inspection and use during the course of the review, and also to provide a schedule listing those documents or parts of documents, and setting out the grounds of exemption relied upon.

6. Under cover of a letter to me dated 30 October 1995, the respondent provided the requested copies, and schedule, of documents claimed to be exempt. Section 43(1) of the FOI Act (legal professional privilege) was the exemption provision relied upon in all instances. In the covering letter, the respondent stated that four files responsive to the terms of the applicant's FOI access application had been located in its records, and that, apart from the documents listed in the schedule, the respondent was prepared to give the applicant access to the files. I authorised the respondent to give access accordingly.

7. On 6 November 1995, I wrote to the applicant providing him with a copy of the respondent's schedule of documents claimed to be exempt under s.43(1) of the FOI Act, and informing him that I had authorised the respondent to give him access to the balance of the documents in the four files identified in the schedule.

8. In response, the applicant informed me that the DPP had failed to locate a file (which he referred to as "Nelson v Price") in which the DPP had opposed the applicant's appeal to the District Court from a conviction in the Magistrates Court for driving without due care and attention. After further inquiries, it was established that the DPP did possess a file in respect of that matter, which had been mis-filed in its records system. The DPP informed me that it wished to claim exemption under s.43(1) of the FOI Act for 10 pages of handwritten notes prepared by a Crown Prosecutor for his use during the hearing of the District Court appeal, but that otherwise the DPP was prepared to give the applicant access to the documents contained on that file. I authorised the DPP to give the applicant access accordingly, and I informed the applicant that he could have access to the file except for the 10 pages claimed to be exempt under s.43(1) of the FOI Act.

9. Documents from five DPP files have been claimed to be exempt under s.43(1):

- File 1 (Smith v Price) concerns the trial of the applicant in the District Court at Ipswich from 7-10 December 1993 at which the applicant was convicted on a charge of wilful damage, arising from an incident in which the applicant was accused of cutting a neighbour's fence.

- File 2 concerns the applicant's successful appeal to the Queensland Court of Appeal (CA No. 477 of 1993) against conviction on the charge of wilful damage.

- File 3 concerns the applicant's unsuccessful appeal to the Queensland Court of Appeal (CA No. 319 of 1994) against his conviction in the Magistrates Court at Gatton on two charges of common assault. (The Magistrates Court hearing was the case referred to in the applicant's FOI access application as "McDonald v Price".)

- File 4 concerns the applicant's application for special leave to appeal to the High Court from the judgment of the Queensland Court of Appeal, delivered on 25 October 1994, dismissing the applicant's appeal against conviction on the two charges of common assault.

- File 5 (Nelson v Price) concerns the applicant's unsuccessful appeal to the District Court against his conviction in the Magistrates Court at Gatton in November 1991 on a charge of driving without due care and attention.

10. A great deal of the time and effort expended in this review has involved the pursuit of 'sufficiency of search' issues raised by the applicant. An enormous amount of correspondence - too great to warrant detailed reference in this decision - was generated in that regard. The results of relevant searches and inquiries are detailed in paragraphs 48-76 below.

11. In respect of the exemption claims raised by the DPP, I wrote to both the applicant and the DPP on 19 September 1996 conveying my preliminary view that several of the documents claimed to be exempt under s.43(1) did not satisfy the relevant legal test to attract legal professional privilege, but that the remainder did satisfy the relevant legal test.

12. The DPP accepted my preliminary view that several documents did not satisfy the test for exemption under s.43(1), and I authorised the DPP to give the applicant access to those documents. Further concessions were subsequently made by the DPP in respect of two other documents, and again I authorised the DPP to give the applicant access to them. Thus, the documents which remain in issue in this review are:

File 1

Document 1: File note dated 29 September 1993 by Crown Prosecutor M Copley of telephone attendances in preparation for trial;
Document 2: Report dated 30 September 1993 by Crown Prosecutor W Clark *re* request by applicant's legal representatives that the prosecution against the applicant be discontinued;
Document 3: Memorandum dated 30 September 1993 by Crown Prosecutor M Copley *re* request by applicant's legal representatives that the prosecution against the applicant be discontinued;

Document 4: Memorandum dated 13 September 1993 to Deputy Director of Public Prosecutions Mr Brendan Butler *re* request by applicant's legal representatives that the prosecution against the applicant be discontinued;
Document 5: Memorandum dated 16 March 1993 from the Solicitor for Prosecutions to Crown Prosecutor R Pointing;
Document 6: Memorandum dated 15 March 1993 from the Solicitor for Prosecutions to the Director of Public Prosecutions.

File 2

Document 2: Interoffice memorandum dated 7 March 1994 from Crown Prosecutor T Ryan seeking material to assist in preparation of written outline of argument for lodgment in the Court of Appeal;
Document 3: Interoffice memorandum dated 12 January 1994 to Crown Prosecutor T Ryan supplying requested material to assist in preparation of written outline of argument for lodgment in the Court of Appeal.

File 3

Document 2: Letter dated 11 August 1994 from the DPP to Senior Police Prosecutor seeking material to assist in preparation of documents for lodgment in the Court of Appeal.

File 4

Nil.

File 5

Ten pages of handwritten notes prepared by a Crown Prosecutor for his use during the hearing of the District Court appeal.

13. The applicant did not accept my preliminary view that the documents listed above satisfied the requirements for exemption under s.43(1) of the FOI Act. In that event, I had extended to the applicant the opportunity to lodge evidence and written submissions in support of his case that the documents in issue do not qualify for exemption under s.43(1) of the FOI Act. Since I extended that opportunity to the applicant, I have received from him a number of letters, but no formal evidence, and no detailed formal written submission. Several further opportunities were extended to the applicant to lodge any evidence or written submissions on which he wished to rely in this review. Since nothing of that kind has been received from the applicant, I have taken into account all material contained in his correspondence to my office which is relevant to the issues I have to determine in this review.

14. The DPP has lodged schedules of documents claimed to be exempt, which briefly state the basis of its claims for exemption, and also some other correspondence relevant to the issues for determination in this review. Copies of that material have been supplied to the applicant. I did not consider it necessary to invite the DPP to lodge evidence and submissions in support of its claims for exemption in respect of the few documents remaining in issue.

15. During the course of the review, the applicant has persistently raised a number of procedural or jurisdictional issues, in respect of which I have effectively made interlocutory rulings, and it is appropriate that I record those matters in my reasons for decision.

Preliminary views/Onus of proof

16. In a letter to me dated 17 October 1996, and in subsequent correspondence, the applicant questioned my authority to convey preliminary views on the issues for determination, and, in particular, challenged my authority to convey preliminary views and to ask the applicant to submit his case in response to them, without requiring the DPP to lodge evidence and submissions to establish its case for exemption, as contemplated by s.81 of the FOI Act.

17. Section 81 of the FOI Act provides that, in a review under Part 5 of the FOI Act, the respondent agency or Minister has the onus of establishing that the decision under review was justified, or that I should give a decision adverse to the applicant. That does not mean that I must require the respondent, in every case, to lodge evidence and written submissions to establish that the decision under review was correct. In some cases, an examination of the matter in issue, in conjunction with the relevant notice of decision (see s.34(2)(f) and s.52(4) of the FOI Act) setting out the agency's reasons for the decision under review (or, as in this case, the respondent's grounds of exemption as stated in a schedule of documents claimed to be exempt), may be sufficient to establish that the decision under review is justified. For example, it may be clear from an examination of its contents that a particular document is a Cabinet submission that qualifies for exemption under s.36(1)(a) of the FOI Act, or an official record of Executive Council that qualifies for exemption under s.37(1)(d) of the FOI Act.

18. Similarly, in some cases, an examination of the contents of a document claimed to be exempt under s.43(1) of the FOI Act may be sufficient to satisfy an authorised decision-maker that the document was created for the sole purpose of a client obtaining legal advice from a professional legal adviser, or for the sole purpose of use in litigation. Certainly, it is not uncommon for judges, asked to rule on whether particular documents are privileged from production in a legal proceeding on the ground of legal professional privilege, to be satisfied on that issue from an examination of the documents themselves. In other instances, of course, the documents in issue may not "speak for themselves" sufficiently to satisfy the relevant test(s) to attract legal professional privilege, and additional evidence and/or submissions may be required to establish that legal professional privilege applies.

19. It is my routine practice in the conduct of reviews under Part 5 of the FOI Act to ask the respondent agency to provide me with working copies of documents containing the matter in issue, and to undertake a preliminary assessment of the matter in issue in light of the reasons given by the respondent agency in its notice of decision refusing access (or in a requested schedule of matter claimed to be exempt), and in light of any other relevant material before me at that preliminary stage (e.g., arguments made by the applicant in the application for external review).
The preliminary assessment is undertaken to determine the best method for progressing the review in light of the particular issues for decision in the particular case. Not infrequently, the preliminary assessment indicates that, subject to consideration of any evidence or submissions which other participants wish to put before me, the decision under review appears to be correct in respect of some or all of the matter in issue.

20. In choosing the best method and procedures for progressing a review under Part 5 of the FOI Act, one of the important factors to which I have regard is that of minimising unnecessary costs for participants, including government agencies. The cost to a government agency (whether measured in terms of a monetary cost, or resources diverted from the performance of other agency functions) is ultimately a cost borne by the general public. Where I consider that it is necessary or advisable for a government agency to lodge evidence and/or written submissions to establish its case in respect of a claimed exemption, it is proper that I inform the agency accordingly, and give it an opportunity to do so. However, I would not regard it as proper, but rather as an unjustifiable waste of scarce, publicly-funded resources, to require an agency to lodge evidence and/or written submissions to prove a case for exemption that is apparent on the face of the documents in issue. (Of course, an applicant may lodge evidence and/or submissions which cast doubt on a preliminary assessment that matter in issue appears to be exempt on its face, and the respondent agency may then be called upon to lodge evidence and/or submissions to justify the decision under review. When I express a preliminary view to a participant in a review, it is genuinely preliminary, in that it will be reconsidered in the light of any evidence or written submissions lodged with me by that participant, or other participants in the review.)

21. In this case, my letter to the applicant dated 19 September 1996 conveyed my preliminary view (based on my inspection of the documents in issue) that the documents in issue satisfied the relevant test to attract legal professional privilege, and explained my reasons for forming that preliminary view, so far as it was possible to do so without infringing the prohibition, imposed by s.87 of the FOI Act, on disclosure to an applicant of exempt matter. (I note that that prohibition would similarly restrict the form, and extent, of any submission or evidence lodged by an agency to establish its case for exemption, which could be passed on to an applicant for response.)
Procedural fairness was thereby accorded to the applicant, who was sufficiently informed of the nature of the case he had to meet. I might add that the power to direct the procedure to be followed, in the course of a review under Part 5 of the FOI Act, is clearly committed to the Information Commissioner: see s.72(1)(a) and s.72(2) of the FOI Act. I have no doubt that in an appropriate case (depending on the particular documents in issue, the particular exemption provision said to be applicable, and the relevant circumstances in the particular case), an agency may discharge its onus under s.81 of the FOI Act merely by lodging for inspection by the Information Commissioner copies of the documents in issue, together with a statement of the grounds of exemption relied upon. I consider that the applicant's criticism of the procedures adopted for progressing this review (see paragraph 16 above) was unfounded, and I have informed him accordingly.

Review confined to documents in the possession or control of the DPP

22. In his FOI access application dated 13 July 1995 (see paragraph 2 above), the applicant purported to request from the DPP access, under the FOI Act, to documents in the possession of both the DPP and the Queensland Police Service (the QPS), including documents that were in their possession at any time, whether on loan to them or not. In my initial letter (dated 19 September 1995) to the applicant following receipt of his application for external review, I said:

> *... The Queensland Police Service is a separate agency to the DPP. If you have reason to believe that some of the files to which you seek access are in the possession of the Queensland Police Service, you should make a separate FOI access application direct to the Queensland Police Service.*

> *I will require the DPP to deal only with any documents in its possession or control, which fall within the terms of your FOI access application dated 13 July 1995, once the documents to which you seek access have been sufficiently identified.*

23. In response to a further letter (dated 21 September 1995) from the applicant on that topic, I replied (by letter dated 22 September 1995):

> *... I observe that it is quite clear on the face of the FOI Act that the obligations of an agency which receives an FOI access application extend only to documents, covered by the terms of the FOI access application, which are in the possession or control of that agency. You cannot lodge an FOI access application with Agency A, and ask Agency A to also deal with any documents falling within the terms of the FOI access application which are in the possession or control of Agency B. You must instead lodge a separate FOI access application with Agency B.*
>
> *That is why I will not require the Director of Public Prosecutions (DPP) to deal with any documents covered by the terms of your FOI access application dated 13 July 1995 which are not in the possession or control of the DPP, but which are in the possession or control of the Queensland Police Service ... .*

24. Notwithstanding the clear ruling which I conveyed to him on that issue, the applicant subsequently asserted that I was obliged to deal in this review with a file of the Gatton Shire Council. The applicant asserted that among the documents to which he was given access by the DPP were several documents which came from a Gatton Shire Council file. The applicant asserted that a Council officer, a Mr Schulz, had supplied the Council file to the QPS for use in one of the Magistrates Court prosecutions of the applicant. The applicant contended that the DPP had access to the Gatton Shire Council file because the DPP was able to require the QPS to produce it to the DPP, and that the DPP was therefore obliged to deal with the Gatton Shire Council file in response to the applicant's FOI access application to the DPP. In a letter to the applicant dated 8 August 1996, the Deputy Information Commissioner responded to the applicant's contention in the following terms, which I endorse as being clearly correct:

> *This contention illustrates a misconception on your part as to the intended scheme for administration of the FOI Act, which is implicit in the terms of, and procedures laid down in, the FOI Act itself. In simple terms, the scheme is such that if you want access to a file of the Gatton Shire Council, which is in the possession of the Gatton Shire Council, you lodge your FOI access application with the Gatton Shire Council. You cannot lodge your FOI access application with another agency and argue that it should take possession of the Gatton Shire Council file and deal with that file in response to your application. The FOI Act was never intended to operate in the way you contend.*

25. The applicant also forwarded to my office a copy of s.13 of the *Director of Public Prosecutions Act 1984* Qld and argued that it supported his contention that the DPP has power to require the QPS to produce to the DPP documents held by the QPS. In his letter to the applicant dated 8 August 1996, the Deputy Information Commissioner responded to the applicant's contention in the following terms, which I endorse as being clearly correct:

> *As a matter of law, your contention is simply wrong. Section 13 of the* Director of Public Prosecutions Act 1984 *merely authorises the DPP, in relation to any criminal proceedings conducted by the DPP, to request the Commissioner of Police, where a matter arises which requires further investigation, for the assistance of police officers in the conduct of that investigation. It has nothing whatever to do with authorising the DPP to require the QPS to provide to the DPP, documents held by the QPS, for the purposes of the DPP responding to an access application under the FOI Act. As a matter of law, that provision affords you no assistance with your misconceived argument that, for the purposes of the administration of the FOI Act, the DPP can be made to deal with documents in the possession or control of the QPS. The Information Commissioner has already ruled on that issue, and you are wasting your time and my time by continually seeking to re-open it.*

Preparation of schedules of the documents to which the DPP agreed to give the applicant access

26. When I authorised the DPP to give the applicant access to those documents which had been in issue by virtue of the DPP's deemed refusal of access (see s.27(4) and s.79(1) of the FOI Act), but in respect of which the DPP did not wish to claim exemption under the FOI Act, I did not require the DPP to undertake the reasonably onerous task of preparing a schedule of the documents to which it was prepared to give the applicant access. I did not consider that necessary for the further conduct of my review, and I was not prepared, therefore, to require the DPP to expend resources on performing such a task.

27. I did require the DPP to prepare a schedule of the documents in respect of which it claimed exemption under the FOI Act, since I considered it necessary for the further conduct of the review, and for the benefit of both myself and the applicant in that regard, that the DPP identify the documents remaining in issue, and indicate the grounds on which they were claimed to be exempt.

28. The applicant has persistently demanded that I direct the DPP to prepare a schedule of the documents to which the DPP has agreed to give the applicant access. He has referred to the fact that other agencies to which he has made FOI access applications have supplied schedules of the documents to which those agencies decided to give him access under the FOI Act. He has contended that preparation of such a schedule is necessary to accord him natural justice.

29. That contention is clearly not correct. Once I have authorised the DPP to give the applicant access to documents which it is prepared to disclose, those documents are no longer in issue in my review. There is no basis on which preparation of a schedule of those documents could be regarded as necessary to accord procedural fairness on the question of whether the documents remaining in issue comprise exempt matter under the FOI Act. It is possible that cases could arise where it might be necessary, in order to accord procedural fairness in respect of a 'sufficiency of search' issue, that a schedule be prepared of the documents to which an agency had agreed to give access, or where the preparation of such a schedule was necessary or desirable for the more efficient conduct of a review under Part 5 of the FOI Act. I consider that I have sufficient power under s.71(3) and s.72 of the FOI Act to direct an agency to prepare a schedule of 'non-exempt' documents in such circumstances. However, neither of those considerations applies in the present case. I certainly would not regard it as an appropriate exercise of my powers under s.71(3) and s.72 to order an agency to expend resources on producing a schedule of 'non-exempt' documents for no better reason than that the applicant for access desired to have one.

30. I note in this regard that there is no provision in s.34 of the FOI Act (which deals with notification of agency decisions in response to access applications), or elsewhere in Part 3 of the FOI Act, which obliges an agency to produce, for the benefit of an access applicant, a schedule of the documents to which it is prepared to give access. The applicant is correct in asserting that many agencies do produce schedules of that kind. I would not wish to discourage agencies from doing so. In many instances, it is a practical necessity, and a matter of good record-keeping practice, for an FOI administrator to prepare such a schedule so as to assist the agency to keep track of precisely what material has been disclosed to an access applicant and what has not.

31. Nevertheless, the fact remains that an agency has no legal obligation to produce a schedule of 'non-exempt' documents, and is free to choose whether or not it is prepared to do so. I do not regard it as appropriate for me to direct an agency to produce a schedule of 'non-exempt' documents unless that is necessary to accord procedural fairness in a particular case, or necessary or desirable for the more effective and efficient conduct of a review in which I am seized of jurisdiction under Part 5 of the FOI Act. When the applicant's desire to have a schedule of 'non-exempt' documents was first raised with the DPP early in my review, the DPP declined to expend resources on preparing a schedule for the applicant's benefit. Since I did not, and still do not, regard the preparation of such a schedule as necessary for the conduct of the review, or necessary to accord procedural fairness to the applicant, I refused the applicant's request that I direct the respondent to prepare such a schedule.

32. I note that, late in the course of this review, when the FOI Co-ordinator of the Department of Justice had assumed the conduct of the review as agent for the DPP, that FOI Co-ordinator decided that it was necessary to prepare a schedule listing exempt and non-exempt documents in this review, and in other reviews commenced by the applicant against decisions of the Department of Justice, so as to have a convenient record of what documents had been released or withheld from the applicant in the different review proceedings. The FOI Co-ordinator of the Department of Justice was kind enough to supply a copy of that schedule to the applicant for his own use.

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

33. Each of the documents remaining in issue is claimed to be exempt under s.43(1) of the FOI Act, which provides:

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

34. The s.43(1) exemption turns on the application of those principles of Australian common law which determine whether a document, or matter in a document, is subject to legal professional privilege. The grounds on which a document attracts legal professional privilege are fairly well settled in Australian common law. In brief terms, legal professional privilege attaches to confidential communications between lawyer and client for the sole purpose of seeking or giving legal advice or professional legal assistance, and to confidential communications made for the sole purpose of use, or obtaining material for use, in pending or anticipated legal proceedings.

35. The test for exemption under s.43(1) of the FOI Act was discussed in my decision in *Re Smith and Administrative Services Department* (1993) 1 QAR 22. In particular, at pp.51-52 (paragraph 82) of *Re Smith*, I said:

... The nature and scope of legal professional privilege at common law has been the subject of consideration by the High Court of Australia in a number of recent cases. A concise summary of the general principles which can be extracted from those High Court judgments is contained in the decision of Mr K Howie, Member of the Victorian Administrative Appeals Tribunal, in Re Clarkson and Attorney-General's Department*, (1990) 4 VAR 197, at p. 199:*

> "The nature of legal professional privilege has been closely examined by the High Court in a number of decisions, in particular *Grant v Downs* (1976) 135 CLR 674, *Baker v Campbell* (1983) 153 CLR 52, *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, and *Waterford v Commonwealth of Australia* (1987) 163 CLR 54.
>
> From these decisions, the following principles emerge:
>
> (1) To determine whether a document attracts legal professional privilege consideration must be given to the circumstances of its creation. It is necessary to look at the reason why it was brought into existence. The purpose why it was brought into existence is a question of fact.
>
> (2) To attract legal professional privilege the document must be brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings. Submission to legal advisers for advice means professional legal advice. It includes the seeking or giving of advice. Use in legal proceedings includes anticipated or pending litigation.
>
> (3) The reason for legal professional privilege is that it promotes the public interest. It assists and enhances the administration of justice by facilitating the representation of clients by legal advisers.
> There are eloquent statements of the importance of this public interest in each of the cases referred to above.
>
> (4) Legal professional privilege attaches to confidential professional communications between salaried legal officers and government agencies. It must be a professional relationship which secures to the advice an independent character. The reason for the privilege is the public interest in those in government who bear the responsibility of making decisions having free and ready confidential access to their legal advisers. Whether or not the relationship exists is a question of fact.
>
> (5) If a document contains material that does not fulfil the required test, that does not necessarily deny the document the protection of the privilege. What matters is the purpose for which the document was brought into existence. If it was for the required purpose, it is not to the point that the document may contain advice which relates to matters of policy as well as law. However, an analysis of the document may assist in determining its moving purpose.

(6) A client may waive legal professional privilege: see in particular the *Maurice* case.

(7) Some vigilance is necessary to ensure that legal professional privilege is not successfully invoked to protect from production documents that do not properly fall within its ambit. Otherwise the important public purposes it is intended to serve will be undermined.

(8) Legal professional privilege does not attach to documents brought into existence for the purpose of guiding or helping in the commission of a crime or fraud, or for the furtherance of an illegal purpose, including an abuse of statutory power, or for the purpose of frustrating the process of the law itself: see the *Kearney* case."

36. I note that the High Court cases referred to in this passage, while being authoritative as to those aspects of legal professional privilege which were in issue on the facts of each case, did not purport to exhaustively state all aspects of legal professional privilege which have been accepted by Australian courts; see, for example, *Trade Practices Commission v Sterling* (1979) 36 FLR 244, *Packer v DCT (Qld)* [1984] 1 Qd R 275, *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* [1985] 3 NSWLR 44, *Dalleagles Pty Ltd v Australian Securities Commission* (1991) 4 WAR 325, *Southern Equities Corporation Ltd v West Australian Government Holdings* (1993) 10 WAR 1, *Goldberg v Ng* (1995) 185 CLR 83, *Commissioner, Australian Federal Police and Anor v Propend Finance Pty Ltd and Others* (1996) 141 ALR 545.

37. It has been accepted by some of Australia's senior appellate courts that a person holding office as Director of Public Prosecutions may -

(a) stand in a professional relationship of legal adviser to client, in respect of clients, such as the Attorney-General or a government agency, who seek legal advice, or provide instructions, in respect of a criminal prosecution matter; or

(b) in the course of discharging the functions and duties of his or her office, stand in the relationship of client to legal adviser, in respect of independent counsel, or legally qualified salaried employees of the Director of Public Prosecutions, who are instructed to provide legal advice or professional legal assistance to, or conduct court proceedings on behalf of, the Director of Public Prosecutions.

(As to point (a), see the judgments given by Full Courts of the Federal Court of Australia in *Austin v Deputy Secretary, Attorney-General's Department* (1986) 12 FCR 22 at p.23, and in *Grofam Pty Ltd & Ors v Australia and New Zealand Banking Group Limited & Ors* (1993) 45 FCR 445 at p.452; also *Dunesky & Anor v Elder & Ors* (1992) 107 ALR 573 and *Deren & Anor v New South Wales* (Supreme Court of New South Wales, No. 11952/90, CLS 1995 NSWSC CL 71, Levine J, 28 April 1995, unreported). As to point (b), see the judgment of a Full Court of the Supreme Court of Victoria in *Director of Public Prosecutions v Smith* [1991] 1 VR 63 at p. 70, and *Austin's* case at p.23.)

38. Thus, confidential communications made pursuant to relationships of professional legal adviser and client, of a kind referred to above, which satisfy the 'sole purpose test' and other criteria of eligibility under the general law to attract the protection of legal professional privilege, will qualify for exemption under s.43(1) of the FOI Act. This does not mean that every communication between the Director of Public Prosecutions and his or her salaried legal staff will attract the protection of legal professional privilege, as is evident from the finding by a Full Court of the Supreme Court of Victoria in *DPP v Smith* (at p.70) that a communication from the Victorian Director of Public Prosecutions to a solicitor employed in his office, which expressed the Director's own opinion on the discharge of a function of his office, did not attract legal professional privilege. Similarly, in the present case, the DPP accepted that some documents initially claimed to be exempt under s.43(1) were not subject to legal professional privilege because they were created for an internal DPP administrative purpose.

39. I have examined the documents remaining in issue (see paragraph 12 above). They are communications between, or documents created by, legally qualified salaried employees of the DPP who were instructed to provide legal advice or professional legal assistance to, or conduct court proceedings on behalf of, the DPP (see point (b) in paragraph 37 above). They comprise records of communications created for the sole purpose of preparing for or advising in respect of, or documents created for the sole purpose of use in, the case to be presented on behalf of the Crown in one or other of the applicant's trials, or appeals against conviction. I am satisfied that each of the documents remaining in issue would be privileged from production in a legal proceeding on the ground of legal professional privilege, and hence that they are exempt under s.43(1) of the FOI Act.

40. The applicant's submission in this review (which he has repeated in other applications for review currently before me) is that there has been conspiracy and corruption on the part of various officers of the Queensland Police Service, Gatton Shire Councillors and others involved in matters which are of concern to or have affected the applicant. In a letter to me dated 20 November 1996, the applicant asserted:

> *... The DPP and his Office have a lot to answer for,* [a named officer] *of the Gatton Police played a significant part in deceiving the Court in this case, also he is identified as a key player behind the scenes in the other matters the subject of External review. I contend that the corrupt activity of the people involved in all the matters before you must be considered when you make a decision to release all the Documents of the agency. I submit that my affidavits to the Supreme Court and the fact that the corruption I exposed was not refuted in any way by the Crown is proof of a Rort Or Fraud at least and is consistent with perverting the course of Justice. The DPP cannot distance himself from the ramifications. I submit that you must take notice of the related matters before the Supreme Court, matters that your Office is aware of. ... I submit that the claim of the DPP for exemption is frivolous and vexatious in this instance.*
>
> *I submit that you should order the release of all documents of the Agency immediately so that I may place the truth and all the evidence before the relevant Courts so that I may defend myself against the unlimited resources of the Crown.*

41. According to the applicant, all of his applications for review (against decisions of various agencies) are related in some way, as he contends that all of the respondent agencies, plus the Gatton Shire Council, have colluded to cause events which have adversely affected the applicant - in this case, his various convictions by the courts. The applicant submits that legal professional privilege does not attach to the documents remaining in issue as they were created to further an illegal purpose: see point (8) of the passage quoted in paragraph 35 above.

42. In *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, Gibbs CJ (with whom Mason J and Brennan J agreed) addressed this exception to legal professional privilege in some detail (at pp.511-516):

> *One exception to which the general rule is subject is that communications by a client for the purpose of being guided or helped in the commission of a crime or fraud are not privileged from discovery.*
>
> ...
>
> *The explanation given by Turner V.C.* [in *Russell v Jackson (1851)* 68 ER 558 at p.360] *for the principle on which the exception rests, namely that a communication in furtherance of an illegal purpose is not within the ordinary scope of professional employment, was in substance accepted as correct in* Reg. v. Cox and Railton [(1884) 14 QBD at pp.168-169] *and is now generally accepted. Cardozo J. put it shortly in* Clark v. United States [(1933) 289 US 1 at p.15]*: "The privilege takes flight if the relation is abused."*
>
> ...
>
> *... It would be contrary to the public interest which the privilege is designed to secure — the better administration of justice — to allow it to be used to protect communications made to further a deliberate abuse of statutory power and by that abuse to prevent others from exercising their rights under the law.*
>
> *The privilege is of course not displaced by making a mere charge of crime or fraud or, in the present case, a charge that powers have been exercised for an ulterior purpose. This was made clear in* Bullivant v Attorney-General for Victoria *[1901] AC at pp 201, 203, 205, and in* O'Rourke v Darbishire *[1920] AC 581 at 604, 613-4, 622-3, 632-3. As Viscount Finlay said in the latter case (at p 604) "there must be something to give colour to the charge". His Lordship continued:*
>
> > "The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact…The court will exercise its discretion, not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications."

43. The High Court recently revisited this issue in the *Propend Finance* case, where Brennan CJ said (at p.553):

> *In determining whether a claim of legal professional privilege can be upheld, it is open to the party resisting the claim to show reasonable grounds for believing that the communication effected by the document for which legal professional privilege is claimed was made for some illegal or improper purpose, that is, some purpose that is contrary to the public interest. I state the criterion as "reasonable grounds for believing" because (a) the test is objective and (b) it is not necessary to prove the ulterior purpose but there has to be something "to give colour to the charge", a "prima facie case" that the communication is made for an ulterior purpose. The purposes that deny the protection of privilege for a communication (whether documentary or oral) between a client and the client's solicitor or counsel include the furthering of the commission of an offence.*
> [Footnotes omitted]

44. It would appear that communications made in furtherance of an illegal or improper purpose are not protected by legal professional privilege because the privilege never attaches to them. Their illegal object prevents them becoming the subject of privilege (see the *Propend Finance* case, per Gaudron J at pp.578-579 and McHugh J at p.587).

45. Applying the reasoning set out above to the facts and circumstances of the present case, I note that there is nothing on the face of the documents remaining in issue (nor on the face of any of the documents on DPP files which have been examined in the course of this review) which indicates or suggests that those documents were created in furtherance of an illegal or improper purpose. Further the applicant has not provided, or referred me to, any evidence or other material which affords reasonable grounds for believing that the documents remaining in issue were created in furtherance of an illegal or improper purpose. In the words of the courts, there is nothing "to give colour to the charge". The documents remaining in issue are of a kind which would routinely be created by Crown Prosecutors and other legal staff of the DPP in preparation for a criminal trial, or the hearing of an appeal against conviction. I am not satisfied that the documents remaining in issue fail to attract legal professional privilege because they were created in furtherance of an illegal or improper purpose.

46. The applicant also claimed that he required the documents in issue to assist in his application to the High Court of Australia for special leave to appeal against the decision of the Queensland Court of Appeal, upholding his convictions on two counts of common assault. At one stage in the course of my review, he asserted that this was sufficient in itself to override legal professional privilege and entitle him to access in order to prove his innocence of criminal charges. That assertion is clearly not correct: see the decision of the High Court of Australia in *Carter v Managing Partner, Northmore Hale Davy and Leake & Ors* (1995) 129 ALR 593.

47. I find that the documents listed in paragraph 12 above would be privileged from production in a legal proceeding on the ground of legal professional privilege, and are exempt matter under s.43(1) of the FOI Act.

'Sufficiency of Search' issue

48. I explained the principles applicable to 'sufficiency of search' cases in my decision in *Re Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464 at pp.469-470 (paragraphs 18 and 19), where I said:

> *18. It is my view that in an external review application involving 'sufficiency of search' issues, the basic issue for determination is whether the respondent agency has discharged the obligation, which is implicit in the FOI Act, to locate and deal with (in accordance with Part 3, Division 1 of the FOI Act) all documents of the agency (as that term is defined in s. 7 of the FOI Act) to which access has been requested. It is provided in s. 7 of the FOI Act that:*
>
> > **'document of an agency' or 'document of the agency'** means a document in the possession or under the control of an agency, or the agency concerned, whether created or received in the agency, and includes -
> >
> > (a) a document to which the agency is entitled to access; and
> >
> > (b) a document in the possession or under the control of an officer of the agency in the officer's official capacity;"
>
> *19. In dealing with the basic issue referred to in paragraph 18, there are two questions which I must answer:*
>
> *(a) whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency (as that term is defined in s. 7 of the FOI Act);*
>
> *and if so,*
>
> *(b) whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.*

49. I will consider the application of those principles in respect of each of the particular documents which, in his correspondence to me, the applicant has asserted should exist as documents of the DPP.

Documents alleged to be missing from file 3

50. The applicant raised with a member of my professional staff his concern that the DPP had not located and dealt with -

- records of witness expenses paid to witnesses; and

- records of interview obtained from two persons known to the applicant (a Mr and Mrs Witt) who attended the Gatton Magistrates Court as prospective witnesses but who were not ultimately called to give evidence;

at the hearing of the charges of common assault brought against the applicant.

51. Responsibility for the conduct of the Magistrates Court hearing of those assault charges lay with the Police Prosecutor, acting on instructions from investigating police officers. The DPP had no involvement with the matter until the applicant lodged an appeal against conviction, and the DPP assumed responsibility for presenting the case in response to the applicant's appeal. So far as the DPP was concerned, the only relevant material on the appeal was the evidence given in the Magistrates Court hearing: the DPP was not able to refer to or rely on evidence that was not before the Magistrates Court. When acting for the respondent in an appeal against a conviction in a Magistrates Court, the DPP obtains the appeal record, i.e., the record of proceedings in the Magistrates Court.

52. I find that there are no reasonable grounds to believe that records of interview with witnesses who were not called to give evidence in the Magistrates Court hearing, and records of payment of expenses to witnesses or prospective witnesses who attended the Magistrates Court hearing, exist as documents in the possession or control of the DPP. As explained in the preceding paragraph, there would be no cause for documents in the former category (if they exist) to pass into the possession or control of the DPP for the purpose of the conduct of the appeal. As to documents recording payments by the QPS of witness expenses in respect of the Magistrates Court hearing, there is simply no reasonable basis for believing that the DPP would have acquired or retained such documents. Such documents, if they exist, would be purely administrative documents of the QPS which would be of no relevance, and no use, to the DPP in acting for the respondent in an appeal against a conviction in a Magistrates Court.

Documents alleged to be missing from files 1 and 2

53. During the course of the review, the applicant raised with the respondent his concerns regarding the searches conducted by or on behalf of the DPP for certain documents he considered should exist as documents relevant to file 1 and file 2 (which concerned the charge of wilful damage arising from the fence-cutting incident - see paragraph 9 above). The particular documents referred to by the applicant were:

- search warrants; and
- the "original" of a one and a half page undated, unsigned and unaddressed document (the applicant had obtained access to a copy of this document from the DPP, but contended that the document to which he had been given access was an edited version of an original document which must have been provided to the DPP).

54. After obtaining further information from the applicant concerning the applicant's grounds for believing that the DPP should hold such documents, the Deputy Information Commissioner requested that the DPP conduct further searches for additional documents, relating to the trial and appeal in respect of the wilful damage charge, of the following kinds:

- any search warrants pursuant to which cutting tools were removed from the applicant's property on 1 September 1992;

- any scientific reports prepared in respect of the cutting tools removed from the applicant's property, together with the corresponding notes and any other records prepared by the person who conducted the scientific tests; and

- the "original" of a one and a half page undated, unaddressed and unsigned document to which the applicant had been given access.

55. By letter dated 7 November 1996, the applicant was informed of the outcome of the further searches and inquiries conducted in response to the Deputy Information Commissioner's request. The applicant was asked to indicate whether he accepted that response, and if not, he was invited to lodge further evidence or submissions on the 'sufficiency of search' issue.

56. The applicant responded by letter dated 20 November 1996, asserting that there were further documents which he considered should exist as documents of the DPP, but which had not been identified and dealt with in response to the applicant's FOI access application, namely:

- three pairs of tinsnips
- scientific tests and associated documents
- diary notes of the DPP and his staff
- "computer files".

57. In respect of the last two items, the applicant did not confine his assertion to files 2 and 3. The applicant also purported to raise issues about the existence of documents which, if they did exist, could not possibly fall within the terms of his FOI access application dated 13 July 1995. By letter dated 10 December 1996, the applicant was informed that issues raised by him concerning documents that could not fall within the terms of his FOI access application dated 13 July 1995 would not be considered in this external review.

58. By letter dated 10 December 1996, the respondent was informed of the additional issues raised by the applicant, as per paragraph 56 above, and further searches and inquiries were initiated. My findings on each separate issue raised by the applicant (in so far as it concerned documents which, if they existed, would fall within the terms of his FOI access application dated 13 July 1995) are set out below.

1. Search Warrant - 1 September 1992

59. The search warrant to which the applicant seeks access was executed by the Gatton police on 1 September 1992 during the course of an investigation into a complaint made to the QPS by the applicant's neighbour that the applicant had cut the neighbour's fence. Pursuant to the search warrant, Gatton police took possession of cutting implements found on the applicant's property.

60. I note that one of the documents to which the applicant has been given access by the DPP is a statement of Detective Senior Constable Smith, prepared for the committal hearing in respect of the wilful damage charge, in which Detective Senior Constable Smith states that the search warrant "is tendered". However, it is clear from an inspection of the transcript of the committal hearing on 25 January 1993, that the search warrant was not tendered at the

committal hearing. Perusal of the transcript of the District Court trial held from 7-10 December 1993, and the list of exhibits tendered in the trial, also confirms that the search warrant was not tendered in the District Court trial.

61. In a letter dated 29 October 1996, the respondent reported to me on searches undertaken to locate the search warrant:

> *A.* *Search Warrant*
>
> *Ms Barratt has thoroughly searched all the files held by the Director of Public Prosecutions, and advises there is not an original search warrant or a copy of one on any DPP file relating to Mr Price.*
> *... neither the transcript of the committal nor the trial* [Smith v Price] *makes any reference to the tender of a warrant. Your letter suggests there were 5 exhibits tendered at the committal. The cover sheet shows that only three exhibits, none of which is a warrant, were tendered.*

62. I am satisfied that the reference to the search warrant in the statement by Detective Senior Constable Smith was made in anticipation of the search warrant being tendered at the committal hearing, but that the search warrant was not in fact tendered at the committal hearing or the District Court trial. I also accept the assurance given on behalf of the respondent that thorough searches have been undertaken and that the search warrant, or any copy of it, is not contained on any DPP file relating to the applicant. In answer to the first question posed in paragraph 19 of *Re Shepherd* (which is set out at paragraph 48 above),
I find that there are no reasonable grounds to believe that the DPP has, in its possession or control, the search warrant (or any copy thereof) executed by Gatton police at the applicant's property on 1 September 1992.

63. Though not strictly necessary in view of the finding I have already stated, I also find, in respect of the second question posed in paragraph 19 of *Re Shepherd*, that the searches and inquiries undertaken on behalf of the respondent to locate the search warrant, which have been supplemented by searches and inquiries undertaken by members of my own professional staff, have been reasonable in all the circumstances of this case, and there are no further searches or inquiries which the respondent could reasonably be required to undertake.

2. Scientific reports

64. In its letter dated 29 October 1996, the respondent reported to me on searches and inquiries undertaken to locate any relevant scientific reports:

> *B.* *Scientific reports relating to cutting tools*
>
> *Ms Barratt has thoroughly searched the DPP files and advises there are no copies of a scientific report or reports relating to the cutting tools on the DPP files. Mr Tim Ryan, Crown Prosecutor at the trial, advises that although scientific tests were conducted by the Queensland Police Service, he does not recall having received any report or statement from the Queensland Police Service dealing with the cutting tools other than the handwritten one of Sergeant Keller*

> [to which the applicant has been given access]. *Generally, a report as such would not be provided to the DPP but the results of tests would be incorporated into a statement. What evidence is called is a matter for the prosecution.*

65. I initiated further inquiries of the Crown prosecutor at the District Court trial, Mr Tim Ryan, concerning this issue. I consider it worthwhile to set out the following excerpt from Mr Ryan's letter to me dated 17 December 1996:

> ...
>
> *I have had the opportunity of perusing the transcript of the trial and the original file of this office relating to the case.*
>
> *To the best of my recollection the only document which I received from the police regarding the scientific examination of the tools was the handwritten statement of Michael Bennet Keller.*
>
> *Sergeant Keller's evidence did not advance the Crown's case against the accused. As the trial transcript indicates (page 4 L19-32), I informed the Court at the outset of the trial that the result of the examination of the tools was inconclusive and that I did not intend to adduce any expert evidence that those tools had cut the wire in question.*
>
> *In view of my decision to take that course, there would have been no need for the police to supply me any further documentation. I do not recall receiving anything further. Moreover, any documentary material pertaining to a prosecution, is as a matter of practice, placed on the office file. The fact that no other document relating to the scientific testing was located on the file serves to confirm my recollection that there was no other document received by me from the police at any time relating to the scientific examination.*
>
> *Apart from the handwritten statement of Keller, I do not know what other documents were created by the police conducting the testing. I did not inquire of the police what other documents were created in the course of their testing.*
>
> *Generally, the statement provided to the prosecution by police scientific witnesses will incorporate all information relevant to the results of such scientific testing.*
>
> *Generally speaking, it is not the practice of prosecuting counsel to request police scientific witnesses to produce the notes of their examinations, particularly in cases where the prosecution is not adducing evidence from such witnesses. As the Crown Prosecutor in the case, to the best of my recollection, the office of the Director of Public Prosecutions did not receive any documents noting or recording the testing conducted by the scientific section, beyond the statement of Keller.*

> *The question as to what documents, if any, were made by the Officer of the police scientific section in the testing of the tools, could only be answered by the relevant officer or officers from that section.*

66. I accept the assurance given on behalf of the respondent that thorough searches have been undertaken and that no additional scientific reports relating to the cutting tools seized from the applicant's property are contained on any DPP file relating to the applicant. I also accept the statement by the Crown Prosecutor, Mr Tim Ryan, that the DPP did not receive any documents noting or recording any testing conducted by the scientific section of the QPS on cutting tools seized from the applicant's property, apart from the statement of Sergeant Keller. In answer to the first question posed in paragraph 19 of *Re Shepherd* (see paragraph 48 above), I find that there are no reasonable grounds to believe that the DPP has, in its possession or control, any documents relating to scientific testing of cutting tools taken from the applicant's property by police pursuant to a search warrant, other than the statement of Sergeant Michael Bennet Keller (to which the applicant has already been given access).

67. Though not strictly necessary in view of the finding I have already stated, I also find, in answer to the second question posed in paragraph 19 of *Re Shepherd*, that the searches and inquiries undertaken on behalf of the respondent, to locate scientific reports of the kind indicated above, have been reasonable in all the circumstances of this case, and there are no further searches or inquiries which the respondent could reasonably be required to undertake.

3. One and a half page unaddressed, unsigned, undated document

68. In respect of this document, the respondent informed me, in its letter dated 29 October 1996, as follows:

> *C.* *One and a half page unsigned document*
>
> ...
>
> *Mr David Field, Solicitor for the Prosecution, advises that he does not know who provided the one and a half page undated, unsigned, unaddressed document, and this cannot be ascertained from the document on the file. It appears to be an original 2 page document on continuous computer paper, which is torn at the perforations to separate pages one and two. It appears, on its face, to be the complete document.*

69. On the material before me, I find, on the balance of probabilities, that the DPP only ever received the one and a half page unaddressed, unsigned, undated document to which the applicant has been given access, and did not receive an "original" of which that document is a partial copy or extract. I find that there are no reasonable grounds to believe that the DPP has, in its possession or control, the "original" of that document (should one exist).

70. Even on the assumption that, contrary to my finding, such an "original" does exist, I am satisfied that the respondent has undertaken all reasonable searches and inquiries to locate such an "original" document, and that there are no further searches or inquiries which the respondent could reasonably be required to undertake.

4. Tinsnips

71. Mr Ryan, the Crown Prosecutor at the District Court trial, has informed me that the tinsnips are still in the court registry. In any event, such objects are not documents to which access may be requested under the FOI Act. The word "document" is defined in s.36 of the *Acts Interpretation Act 1954* Qld:

> ***36.*** *In an Act—*
>
> *"**document**" includes—*
>
> *(a) any paper or other material on which there is writing; and*
>
> *(b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and*
>
> *(c) any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device).*

72. There is also a definition of "document" in s.7 of the FOI Act:

> ***7. In this Act—***
>
> ***...***
>
> *"**document**" includes—*
>
> *(a) a copy of a document; and*
>
> *(b) a part of, or extract from, a document; and*
>
> *(c) a copy of a part of, or extract from, a document.*

73. Although neither definition is exhaustive, it is clear that the word "document" is intended to refer to something whose purpose is to record or convey information, sounds, images *et cetera*. I am satisfied that the tinsnips, or other cutting tools seized from the applicant's property, are not "documents" to which access may be requested under the FOI Act.

Diary notes, "computer files" and other documents

74. In response to my request for verification of the extent of searches undertaken to locate all documents falling within the terms of the applicant's FOI access application (prompted by the applicant raising the issue of the existence of documents of this kind), Mr Michael Byrne QC, Deputy Director of Public Prosecutions, requested searches of the DPP records to be undertaken. No further documents were located. The Senior Records Officer of the DPP also conducted a search of the DPP records, including the computer system. No additional documents were located. Memoranda were prepared by Mr Byrne QC, and the DPP's Senior Records Officer, Mr Davis, respectively, to confirm the searches conducted, and the results of those searches.

75. In respect of the diary notes, the Department informed me:

> ...
>
> *Mr Byrne QC has advised that it is the policy of the Office of the Director of Public Prosecutions that all file or diary notes, however they are described, relating to the conduct of matters within the Office be placed on the relevant files. I am advised the file or diary notes relating to the five matters within the ambit of the application are on the relevant files.*

76. I accept the responses of Mr Byrne QC and Mr Davis. Based on the material before me, I find that there are no reasonable grounds to believe that there exist in the possession or control of the DPP, any additional documents of the type under consideration. I am satisfied that the DPP has undertaken all reasonable searches and inquiries to locate such documents, and indeed all documents in the possession or control of the DPP which fall within the terms of the applicant's FOI access application dated 13 July 1995, and that there are no further searches or inquiries which the respondent could reasonably be required to undertake. I am satisfied that all documents in the possession or control of the DPP, which are responsive to the relevant FOI access application, have now been identified and dealt with.

Conclusion

77. I note that the decision under review was a deemed refusal of access to all documents requested by the applicant. During the course of my review, the applicant has obtained access to all but a few of the documents initially in issue. In the circumstances, it is appropriate that I set aside the decision under review. In substitution for it, I decide that the matter remaining in issue, which is identified in paragraph 12 of my reasons for decision, is exempt matter under s.43(1) of the FOI Act.

78. I also find that no further documents, which fall within the terms of the applicant's FOI access application dated 13 July 1995, exist in the possession or control of the respondent.

.....
F N ALBIETZ
INFORMATION COMMISSIONER