

FIFTH ANNUAL REPORT

OFFICE

of the

**QUEENSLAND
INFORMATION COMMISSIONER**

1 JULY 1996 TO 30 JUNE 1997

PRESENTED TO PARLIAMENT

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30 October 1997

The Honourable N J Turner MLA
Speaker of the Legislative Assembly
Parliament House
George Street
BRISBANE Q 4000

Dear Mr Speaker

I am pleased to present to you my 1996/97 Annual Report to State Parliament.

The report marks my Office's 5th year of operation. The year under review has been one of enhanced performance with the finalisation of 246 external review applications - the highest output achieved in any reporting year. Despite a significant increase in new applications received, the Office was able to reduce its case backlog to 277 cases.

I am hopeful greater inroads into the case backlog will be made in 1997/98 with a modest increase in funding provided to the Office.

Yours faithfully

[original signed by]

F N Albietz
INFORMATION COMMISSIONER

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EXECUTIVE SUMMARY

The *Freedom of Information Act 1992 Qld* (the FOI Act) is designed to extend as far as possible the right of the community to have access to information held by Queensland government. Subject to exceptions provided for in the FOI Act, every person has a legally enforceable right to be given access to any document of an agency or official document of a Minister. The exceptions provided for in the FOI Act recognise that there are competing public and private interests which may warrant non-disclosure of some government-held information. The FOI Act also provides for mandatory publication by agencies of specified documents and information concerning their operations, and allows individuals to apply for amendment of government-held information which relates to their personal affairs. While decisions in relation to disclosure and amendment are generally made in the first instance by an officer of the agency which has received an application under the FOI Act, Parliament has made provision for independent external review of agency decisions by establishing the Office of Information Commissioner. The specific categories of decision which the Information Commissioner has the power to investigate and review are set out in s.71 of the FOI Act (those categories are listed in paragraphs 1.3 to 1.5 of this Report).

In 1996/97, the Office of the Information Commissioner achieved a significant increase in its output, with the finalisation of 246 external review applications, as compared to 203 in the previous reporting period (an increase of 21%). This increased output was achieved with a small increase in professional staff (from the equivalent of 6.3 full-time staff to 8 full-time staff over the course of the year), made possible by additional temporary funding allocated to assist the office to make inroads into a substantial accumulated backlog of cases (as to which, see paragraph 2.1 and Table 4 in Chapter 2 of this report).

Table 1 - Applications for review under Part 5 of the FOI Act - 1996/97

Pending at start of reporting period (1/7/96)	292
Opened during the reporting period	231
Completed during the reporting period	246
Pending at end of reporting period (30/6/97)	277

Note 1: a table showing the distribution of applications for review made in 1996/97, across the categories of decision subject to investigation and review by the Information Commissioner (as specified in s.71 of the FOI Act), appears at Appendix 1.

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

Unfortunately, the 21% increase in outputs did not make as great an impact on the backlog as had been anticipated, because of an 11% increase in new applications received (231 new applications compared to 209 new applications in the previous reporting period), a result that went against the trend of the previous two years which saw declines in the number of new applications received (see Table 4 in Chapter 2). Nevertheless, in this reporting period, the Office has, for the first time, resolved more applications than were received. It is anticipated that an increase in base funding, and further temporary funding allocated to the Office for the 1997/98 financial year, will allow further inroads to be made into the backlog.

The Office of the Information Commissioner has accumulated substantial experience and expertise in the resolution of FOI disputes, having (in the 4½ years from when it commenced operations, up to 30 June 1997) dealt with a total of 1057 applications for review, and resolved 780. While there have been many recurring areas of dispute, there has been no shortage of novel cases, posing new problems in the interpretation and application of the FOI Act, as citizens seek to make use of it to access government-held information over a wide variety of areas of state and local government administration. My office continues to accord prime importance to its responsibility to provide authoritative guidance for FOI administrators on the correct interpretation and application of the provisions of the FOI Act, not only by publishing formal decisions of a high standard, but also, in the mediation/negotiation phase of the review process, by explaining to agencies, whether in conference or in correspondence, the basis on which my office considers that an agency may have misunderstood or misapplied the FOI Act in a particular case. With a view to disseminating the Information Commissioner's formal decisions to government agencies and interested members of the public, as quickly and as cheaply as possible, a web-site has been established to provide free access, via the internet. The Information Commissioner's web-site is <http://www.slq.qld.gov.au/infocomm> and the web-site became operational on 15 October 1997.

The Office of the Information Commissioner also accords great importance to offering a dispute resolution service that is as informal, and inexpensive for participants (including government agencies), as the issues requiring resolution in a particular case will permit. My office places emphasis on informal methods of dispute resolution, endeavouring, in all cases, to undertake a preliminary assessment of the documents in issue as quickly as possible, and to negotiate with the participants in the review with a view to achieving settlement, or at least narrowing the range of issues in dispute which must proceed to a formal determination. This approach is intended to serve the aims of the FOI Act by procuring, as quickly as possible, the disclosure of as much information as possible. Procedures are tailored to suit the circumstances of each individual case, with a view to keeping down the costs of participation in the external review process, not only for applicants but also for agencies (and hence for the public purse). The Office of the Information Commissioner consciously tries to reduce or eliminate unnecessary expense and formality for participants, at least so far as the duty to accord procedural fairness, and the complexity of the issues for determination in any particular case, will allow. In 1996/97, 195 (or 79%) of the 246 applications finalised were resolved without the need for a formal decision.

Table 2 - Outcome of external reviews completed during 1996/97

No jurisdiction	24
Decision not to review/review further under s.77 of the FOI Act	2
Agency granted further time to deal with application	1
Resolved/Withdrawn following mediation	171
Decision issued - affirming decision under review	22
Decision issued - varying decision under review	17
Decision issued - setting aside decision under review; making decision in substitution	9
TOTAL	246

Of the 171 cases resolved or withdrawn following mediation, seven involved questions of whether a fee or charge was payable by the applicant. Six involved applications for amendment of documents, with the applicant being successful, in whole or in part, in obtaining an amendment or notation previously refused by an agency, in four of those cases. One hundred and thirty-four external review applications challenging agency decisions to refuse access to documents were resolved by informal means, with 77 (or 57%) resulting in the applicant obtaining access to documents or matter previously withheld. The remaining 24 cases involved 'reverse FOI' applications, by third parties who had been consulted under s.51 of the FOI Act, seeking to overturn decisions of agencies to disclose documents to an initial applicant for access under the FOI Act. Twelve of those 24 cases were resolved in a manner that allowed the initial access applicant to obtain access to the information in issue, or at least part of it.

Table 3 - Time for resolution of cases completed during 1996/97

Under 1 month	25	15 - 18 months	16
1 - 3 months	49	18 - 21 months	5
3 - 6 months	45	21 - 24 months	7
6 - 9 months	21	24 - 27 months	10
9 - 12 months	18	27 - 30 months	8
12 - 15 months	17	over 30 months	25
		TOTAL	246

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

In my third and fourth Annual Reports, I noted that the relevant reporting periods had witnessed a significant retreat from the principles of openness, accountability and responsibility which the FOI Act was intended to enshrine. A series of, in my opinion, ill-considered and unnecessarily wide exemptions or exclusions from the right of access to documents of agencies and Ministers conferred by s.21 of the FOI Act, were introduced by amendments to the FOI Act and the *Freedom of Information Regulation 1992 Qld* (the FOI Regulation). I note that no action has yet been taken in regard to my comments, and I revisit them briefly in Chapter 3 of this report.

CONSTITUTION & FUNCTIONS; STRUCTURE & ORGANISATION

PART A : CONSTITUTION & FUNCTIONS

Enabling Legislation; Statutory Powers and Functions

- 1.1 The *Freedom of Information Act 1992* Qld (the FOI Act) is designed to extend as far as possible the right of the community to have access to information held by Queensland government. Agencies covered by the FOI Act include State government departments and statutory authorities, and local government authorities. Subject to exceptions provided for in the FOI Act, every person has a legally enforceable right to be given access to any document of an agency or official document of a Minister. The exceptions provided for in the FOI Act recognise that there are competing public and private interests which may warrant non-disclosure of some government-held information. The FOI Act also provides for mandatory publication by agencies of specified documents and information concerning their operations, and allows individuals to apply for amendment of government-held information which relates to their personal affairs.
- 1.2 Decisions in relation to disclosure and amendment are generally made in the first instance by an officer of the agency which has received an application under the FOI Act. If an applicant, or a person who has been consulted in accordance with s.51 of the FOI Act, is unhappy with an agency decision, he or she may seek internal review by an officer of the agency of at least the same seniority as the first decision-maker. After this stage, a person who remains aggrieved by an agency decision can apply for external review by the Information Commissioner.
- 1.3 The Office of Information Commissioner is established by s.61(1) of the FOI Act. That subsection is the first provision in Part 5 of the FOI Act, the title of Part 5 being "External Review of Decisions". Section 71(1) of the FOI Act, sets out agency decisions which the Information Commissioner has jurisdiction to investigate and review:

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

- (a) decisions under section 20 not to publish statements of affairs or as to whether a statement of affairs complies with Part 2;*
- (b) decisions refusing to grant access to documents in accordance with applications under section 25;*
- (c) decisions deferring providing access to documents;*
- (d) decisions giving access to documents subject to the deletion of exempt matter;*

- (e) *decisions as to the amount of charges required to be paid before access to documents is granted, whether or not the charge has already been paid;*
- (f) *decisions—*
 - (i) *to disclose documents contrary to the views of a person obtained under section 51; and*
 - (ii) *to disclose documents if an agency or Minister should have taken, but has not taken, steps to obtain the views of a person under section 51; and*
 - (iii) *not to amend information in accordance with applications under section 53.*

1.4 In respect of these categories of decisions, the Information Commissioner is empowered to conduct a complete review of the merits of the decision, and a formal determination by the Information Commissioner in effect substitutes for the decision of the agency or Minister which was under review.

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

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

- power to determine the procedure to be followed on a review under Part 5 of the FOI Act (s.72 (1) (a));
- power to give directions to participants in a review as to the procedure to be followed on a review under Part 5 of the FOI Act (s.72 (2));
- power to extend the time limit for lodging an application for review (s.73 (1));
- power to make preliminary inquiries of an applicant, or a respondent agency or Minister, in order to determine whether the Information Commissioner has power or jurisdiction to review the matter to which the application relates, or whether the Commissioner may decide not to review the matter under s.77 of the FOI Act (s.75);
- power to require the production of a document or matter for inspection for the purpose of enabling the Information Commissioner to determine whether the document or matter is exempt, or is an official document of a Minister (s.76 (1));

- power to decide not to review, or not to review further, a decision in respect of which the Information Commissioner is satisfied that the application for review is frivolous, vexatious, misconceived or lacking in substance (s.77);
- power to permit third parties to be participants in the review process (s.78);
- power to grant an extension of time to an agency or Minister to deal with an application under the FOI Act, and to grant such an application subject to conditions such as reduction or waiver of charges (s.79 (2) and (3));
- power to try to effect a settlement between the participants, or suspend a review to allow the participants to negotiate a settlement (s.80);
- power to require an agency or Minister to provide an additional statement of reasons for a decision under review, where the initial statement of reasons is considered to be inadequate (s.82);
- power, for the purposes of a review, to obtain information from such persons, and make such inquiries, as the Information Commissioner considers appropriate (s.83 (2));
- power to permit a participant to be represented by another person when appearing before the Information Commissioner (s.83 (4));
- power to give to persons written notices requiring the giving of information in writing, or the production of documents to the Information Commissioner, or requiring a person to attend before the Information Commissioner and answer questions relevant to a review (s.85);
- power to examine witnesses on oath or affirmation (s.86);
- power to refer a question of law arising on a review under Part 5 of the FOI Act to the Supreme Court for decision (s.97).

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

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

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

- 1.8 Section 89 of the FOI Act provides that the Information Commissioner, after conducting a review of a decision (other than a review of a decision of the Minister for Justice and Attorney-General to issue a certificate under ss.36, 37 or 42 of the FOI Act) must make a written decision:
- (a) affirming the decision; or
 - (b) varying the decision; or
 - (c) setting aside the decision and making a decision in substitution for the decision.

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

- 1.9 The Department of Justice has foreshadowed that it is no longer prepared to distribute Information Commissioner decisions to government agencies as a free service. Ms Susan Heal of my office has worked on the establishment of a web-site (in respect of which the generous assistance of the State Library of Queensland is gratefully acknowledged) to provide agencies, and any interested member of the public, with free access, via the internet, to all decisions published in the Information Commissioner's formal decision series. The Information Commissioner's web-site is <http://www.slq.qld.gov.au/infocomm> and the website became operational on 15 October 1997.
- 1.10 The Information Commissioner can properly be described as a specialist tribunal. The Information Commissioner has been conferred with powers and functions, and a role in the scheme of the FOI Act, which are comparable to those of the Commonwealth Administrative Appeals Tribunal (the Commonwealth AAT) and the Victorian Administrative Appeals Tribunal (the Victorian AAT) which undertake the function of independent external review authority in the scheme of the *Freedom of Information Act 1982 Cth* (the Commonwealth FOI Act) and the *Freedom of Information Act 1982 Vic* (the Victorian FOI Act), respectively. Unlike those two bodies, however, which are tribunals of general jurisdiction, the Information Commissioner provides a specialised dispute resolution service confined to disputes under the FOI Act. Moreover, it is clear from Part 5 of the FOI Act and its legislative history that the Queensland Parliament intended that the Information Commissioner provide a speedier, cheaper, more informal and more user-friendly method of dispute resolution than the court system or tribunals such as the Commonwealth AAT and the Victorian AAT, which adopt court-like procedures. In Chapter 2 of my first Annual Report (1992/93) I traced the evolution of the Information Commissioner model of dispute resolution for FOI cases. I note that that model has been embraced in the freedom of information statutes of Western Australia, South Australia and Tasmania, although in the last two instances the South Australian Ombudsman and the Tasmanian Ombudsman have been given determinative powers in FOI matters, without the creation of a new statutory office of Information Commissioner.

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

Public Finance Standards - Program Structure & Goals

- 1.13 Although the Office of Information Commissioner and the Office of Parliamentary Commissioner are separate statutory offices, funding is provided for the Office of the Information Commissioner under the program budgeting arrangements for the Office of the Parliamentary Commissioner. The Office of the Information Commissioner has its corporate services functions of finance, personnel, administration and information technology performed by the Corporate and Research Division of the Office of the Parliamentary Commissioner. In terms of program management, the Office of the Information Commissioner forms part of the program "Complaint Investigation and Resolution", Office of the Parliamentary Commissioner. The audited financial statements for 1996/97 in respect of that program have been certified and will be published in the 23rd Annual Report of the Parliamentary Commissioner. In 1996/97, \$582,706 was paid in salaries and related costs in respect of staff of the Office of the Information Commissioner, with other costs, including administration costs, being met from the resources of the Office of the Parliamentary Commissioner.
- 1.14 The program goal for the "Complaint Investigation and Resolution" program is to ensure responsive, independent and impartial investigation of grievances from members of the public. While this goal is in a general sense appropriate to the role and functions of the Information Commissioner, its wording was obviously chosen for the Parliamentary Commissioner's role, which covers most of state government administration and all local government administration, and which involves attempting to resolve grievances without the

aid of determinative powers. In contrast, the role of the Information Commissioner is confined to reviewing decisions of specified kinds made under the FOI Act, and the Information Commissioner can exercise determinative powers, i.e., can make decisions which are binding on the participants to a dispute (subject to a participant's right to seek judicial review by the Supreme Court if an error of law in the Information Commissioner's decision can be demonstrated). I have endorsed more specifically appropriate goals and performance indicators for the Office of the Information Commissioner which are explained in Chapter 2 of this report.

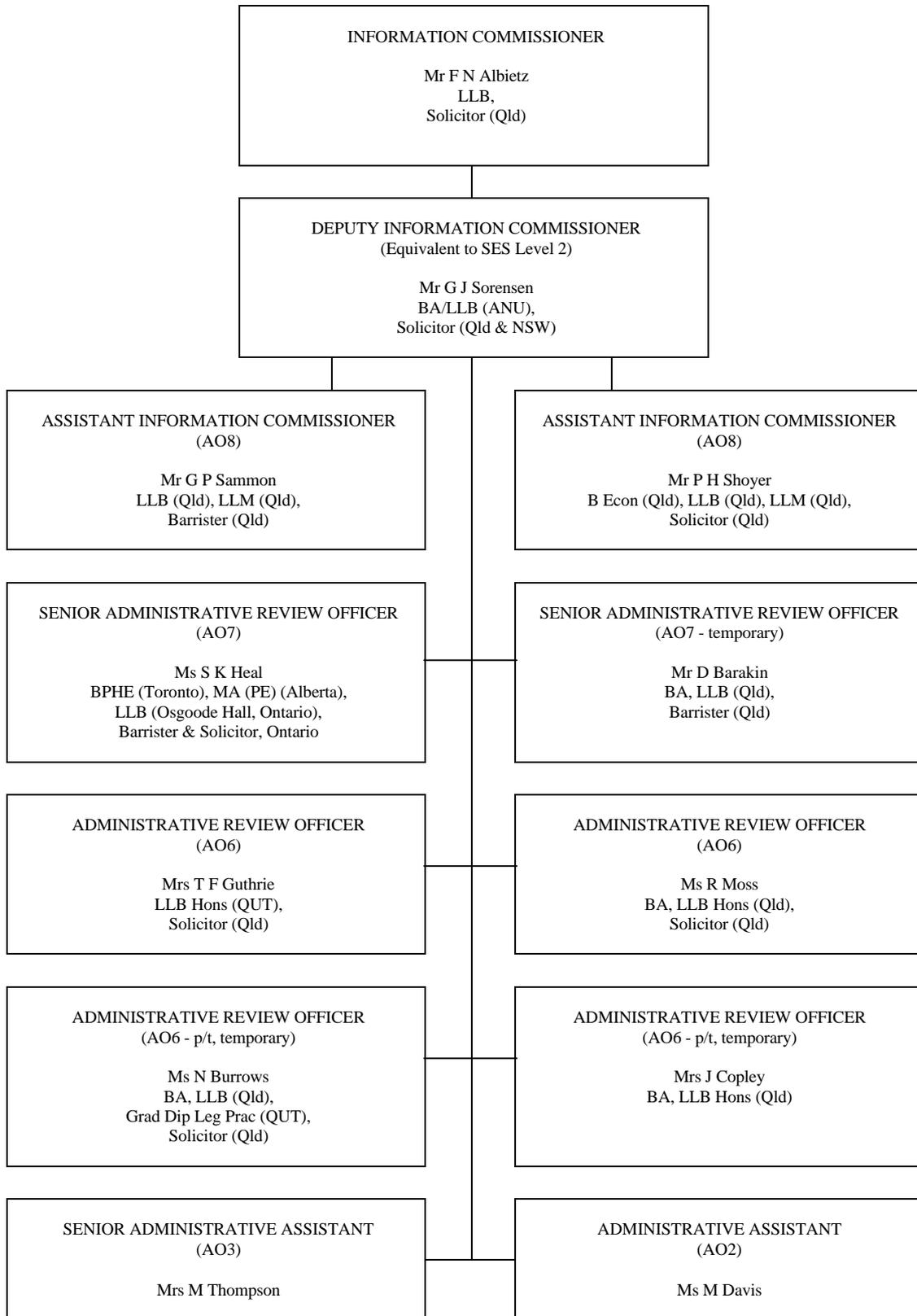
PART B : STRUCTURE & ORGANISATION

- 1.15 The principal place of business of the Office of the Information Commissioner is Level 25, Jetset Centre, 288 Edward Street, Brisbane, 4000 (telephone (07) 3246 7100).
- 1.16 I, Frederick Norman Albietz, was appointed by the Governor-in-Council on 16 May 1991 to a three year term as Parliamentary Commissioner for Administrative Investigations pursuant to s.5 of the *Parliamentary Commissioner Act 1974*, and on 16 May 1994 was re-appointed to a further three year term. On 15 May 1997, I was appointed to a further two year term until 16 May 1999. By virtue of that appointment, I also hold office as Information Commissioner pursuant to s.61(2) of the FOI Act.
- 1.17 The organisational chart on page 10 sets out the structure of the Office of the Information Commissioner, as at 30 June 1997, and also identifies the staff member occupying each position.

ORGANISATIONAL CHART

OFFICE OF THE INFORMATION COMMISSIONER

30 JUNE 1997



OVERVIEW OF OPERATIONS DURING THE REPORTING YEAR

2.1 In 1996/97, the Office of the Information Commissioner significantly increased its output, with the finalisation of 246 external review applications, as compared to 203 in the previous reporting period (an increase of 21%). For the first time, the office was able to resolve more external review applications than it received in the course of a reporting period. This indicates that the level of resourcing presently allocated to the office is adequate to meet recurring demand for the Information Commissioner's services, and the only impediment to the achievement of desired standards of timeliness of service is the remaining backlog of cases (accumulated principally during the first two years after the commencement of the FOI Act, when the resources allocated to the office were manifestly inadequate to deal with the unforeseen pent-up demand for use by Queenslanders of the FOI Act, and of the right to seek independent external review of unfavourable decisions made by agencies or Ministers). The history of performance of the office, in terms of numbers of applications dealt with, is set out in Table 4 below. In 1996/97, the increased output by the office has meant that the large backlog accumulated in previous years was reduced slightly during the reporting period. The factor which precluded the achievement of more significant inroads into the backlog was an unexpected 11% increase (reversing the trend of the previous two years) in new applications received during the year.

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

Reporting period	Applications received	Applications completed	Applications pending	Equivalent full-time professional staff
18/1/93 - 30/6/93	120	27	93	2
1/7/93 - 30/6/94	274	125	242	4
1/7/94 - 30/6/95	223	179	286	6
1/7/95 - 30/6/96	209	203	292	6.3
1/7/96 - 30/6/97	231	246	277	8
Total	1057	780		

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

- utilised additional temporary funding to implement a more effective management structure within the office, and hire additional staff, in an effort to reduce the accumulated backlog of applications. An increase in base funding and further temporary funding for 1997/98 will allow these measures to be continued;

- reinforced the emphasis on attempts at informal resolution of disputes by mediation and negotiation between the participants;
- continued the practice of giving my formal decisions by way of letters to the participants only, in less complex cases involving the application of settled principles to the facts of the particular case, and where the formal decision has little or no broader instructive value that would warrant its public dissemination. These 'letter decisions' (summarised in Appendix 4) are still formal decisions under s.89 of the FOI Act, but preparation in this form provides some privacy for participants, requires less detail in the expression of reasons for decision (e.g., through cross-referencing to other material already in the hands of the participants), and is generally less time-consuming than the preparation of formal decisions for publication; and
- reduced, wherever possible, the length of my published decisions (a step not lightly undertaken, given the statutory requirement to produce complete written reasons for decision, the need to explain my decision completely in the event that the matter should be challenged in the Supreme Court, and the reduction in the educative value of decisions which do not fully discuss issues of significance to agencies and members of the public).

Despite these measures, some applicants for review have been left dissatisfied with the fact that their cases have not been speedily resolved. The individual case-loads allocated to professional staff remain too high for them to progress all allocated files in a timely fashion. I have continued to prioritise the case-loads of staff according to the factors identified in paragraphs 2.15 to 2.16 of my second Annual Report.

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

- 2.4 In my first and second Annual Reports, I expressed my views on the effectiveness of the Information Commissioner model for independent, external review of decisions made under freedom of information legislation. (For a considered assessment of the advantages of the Information Commissioner model, see P. Bayne, "External Review of FOI decisions by the Information Commissioners" (1995) 3 *Australian Journal of Administrative Law*, p.53). I also indicated that the performance achieved by the Western Australian Information Commissioner confirms that when a reasonable balance is achieved between the resources available to an Information Commissioner, and the extent of the demand for an Information Commissioner's dispute resolution service, the Information Commissioner model is the most efficient and cost-effective for the interests of all concerned. The "review and complaint resolution" branch in the Office of the Western Australian Information Commissioner, with an establishment of six professional staff working to the Commissioner, has achieved excellent standards of timeliness in the resolution of cases, having received considerably fewer applications for review than my office has received. (In its first 30 weeks of operation, the Office of the Western Australian Information Commissioner received 61 appeals, and resolved 26; in 1994/95 it received 123 formal appeals and resolved 105; in 1995/96 it received 168 formal appeals and resolved 206; and in 1996/97 it received 143 formal appeals and resolved 142.) The performance of my office in 1996/97 demonstrates that, absent the large backlog of cases referred to in paragraph 2.2, my office is capable, with its present resourcing, of matching the timely disposal of cases achieved by the Western Australian Information Commissioner. For the moment, however, as a consequence of the substantial backlog of cases, it remains true to say that the Information Commissioner model of dispute resolution in Queensland works efficiently and cost-effectively for those whose cases are given priority, but standards of timeliness have inevitably suffered for the participants in other cases. Nevertheless, the prospects for reducing the backlog to manageable proportions (enabling enhanced standards of timeliness) in the medium term are good, if present levels of resourcing are maintained.
- 2.5 In my previous Annual Reports, I have included information comparing the performance of the Office of the Information Commissioner with the performance of the Commonwealth AAT and the Victorian AAT in the first years following the commencement of FOI legislation in the respective jurisdictions. Those figures are updated in Table 5 on page 14 of this report. Comparisons have been made with the Commonwealth and Victoria because the number of applications made to the relevant external review authorities in other Australian jurisdictions have been much lower, and do not afford meaningful comparisons (except for Western Australia which is referred to in paragraph 2.4).
- 2.6 One other interesting comparison with the Commonwealth and Victoria is that the percentage of total FOI applications which proceed through to the stage of external review is much higher in Queensland, which tends to suggest that the less formal Information Commissioner model for dispute resolution in FOI cases is less expensive and less intimidating for applicants aggrieved by agency decisions. In previous annual reports, I have published statistical tables setting out, for each jurisdiction, the number of applications which proceed to external review as a percentage of the total number of applications made under the FOI legislation of the respective jurisdictions. I have been unable to publish updated figures in this report, because I was unable to obtain, before my publication deadline, figures for the total number of applications made to agencies under the Queensland FOI Act in 1996/97.

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

	Queensland	Commonwealth	Victoria
	Period: 19.11.92 - 30.6.93	Period: 1.12.82 - 30.6.83	Period: 5.7.83 - 30.6.84
Applications to external review authority	120	69	59
Resolved by formal decision	7	3	Not available
Resolved without formal decision	20	16	Not available
Total resolved	27	19	Not available
Pending at end of reporting period	93	50	Not available
	Period: 1.7.93 - 30.6.94	Period: 1.7.83 - 30.6.84	Period: 1.7.84 - 30.6.85
Applications to external review authority	274	203	112
Resolved by formal decision	20	16	40
Resolved without formal decision	105	125	20
Total resolved	125	141	60
Pending at end of reporting period	242	112	58
	Period: 1.7.94 - 30.6.95	Period: 1.7.84 - 30.6.85	Period: 1.7.85 - 30.6.86
Applications to external review authority	223	334	119
Resolved by formal decision	43	46	29
Resolved without formal decision	136	213	59
Total resolved	179	259	88
Pending at end of reporting period	286	187	89
	Period: 1.7.95 - 30.6.96	Period: 1.7.85 - 30.6.86	Period: 1.7.86 - 30.6.87
Applications to external review authority	209	267	151
Resolved by formal decision	44	64	18
Resolved without formal decision	159	85	89
Total resolved	203	149	107
Pending at end of reporting period	292	305	133
	Period: 1.7.96 - 30.6.97	Period: 1.7.86 - 30.6.87	Period: 1.7.87 - 30.6.88
Applications to external review authority	231	171	165
Resolved by formal decision	51	41	17
Resolved without formal decision	195	66	81
Total resolved	246	107	98
Pending at end of reporting period	277	369	200

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

- 2.7 In Chapter 4 (pp.24-29) of my first Annual Report, I explained the procedural approach that would ordinarily be adopted for the resolution of FOI disputes. That approach has been adhered to during 1996/97. The main emphasis of that approach is on negotiation with the participants to resolve as many issues in dispute as possible. When that process is exhausted, opportunities are given to the participants to lodge evidence and written submissions in support of their respective cases, preparatory to a formal determination. The procedures adopted are intended to keep the costs for participants (including government agencies) as low as possible.
- 2.8 One of the most important functions of my Office is to provide authoritative guidance for FOI administrators on the correct interpretation and application of the provisions of the FOI Act. This is done not only through the publication of formal decisions, but through attempting, in

the mediation/negotiation phase of the review process, to explain to agencies, both in conference and in correspondence, the basis on which my Office considers that an agency may have misunderstood or misapplied the FOI Act in a particular case. The quality of formal decisions is, of course, of prime importance in discharging the educative and normative (i.e., standard-setting) role expected of an external review authority. Notes on the significant issues dealt with in each published formal decision given in 1996/97 are set out in Appendix 3 to this report.

- 2.9 Section 23 of the *Public Sector Ethics Act 1994* Qld requires annual reports to include implementation statements giving details of action taken by agencies during the reporting period to comply with provisions of the Act. Copies of the ethics principles and ethics obligations for public officers have been circulated to existing staff, are included in induction materials for new staff, and are posted on the staff noticeboard. A number of seminars relating to public sector ethics were also held during the reporting period. Preparation of a Code of Conduct is progressing in co-operation with the Office of the Parliamentary Commissioner. As the Code has not been finalised, requirements relating to access, inspection, *et cetera*, concerning the Code are not yet relevant.

GOALS & PERFORMANCE IN 1996/97

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

Goal 1

To conduct the investigation and review of decisions subject to review under Part 5 of the FOI Act, with a high standard of professionalism, timeliness and efficiency, in order to establish the correct decision required by the provisions of the FOI Act (or resolve the dispute by informal means) with as much expedition as the requirements of procedural fairness, and the issues for determination in the case, will allow.

Performance Indicators

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

Goal 2

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

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

Performance Indicators

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

Goal 3

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

Performance Indicator

- proportion of Information Commissioner's formal decisions that are overturned for legal error by the Supreme Court in judicial review proceedings, as a percentage of the total number of decisions issued by the Information Commissioner in the relevant reporting period.

Performance against Goal 1

- 2.11 During 1996/97, the target which I set for my professional staff was to resolve a minimum of 240 cases. This target took account of the effect of disruptions caused by a significant turnover of staff during the year, and the amount of time taken by new staff to become proficient in what is a highly specialised field. Ultimately, the Office was able to resolve 246 applications for review, which I regard as a good result. This represented an increase of 21% on the number of applications for review resolved in 1995/96.
- 2.12 The proportion of cases closed in 1996/97 which were resolved within 12 months of lodgment was 64% (a slight decrease from 69% in 1995/96). This represents a significant decline from the proportion of 92% achieved in 1993/94, but, as I explained in paragraph 3.5 of my second Annual Report, this figure was expected to decline due to the aging of the unexpectedly large number of cases (394) received in the first 18 months of operations, a substantial proportion of which it has proved impractical to resolve quickly. There was an increase in the average time for finalisation of cases completed during the reporting period, from 292 days (i.e., approximately 42 weeks) in 1995/96 to 352 days (i.e., approximately 50 weeks) in 1996/97. Again, this is indicative of an increase in the number of older cases resolved during the period, rather than of any added delay in finalising newer applications.

Performance against Goal 2

- 2.13 The proportion of total cases assessed for investigation and review during 1996/97 in which informal dispute resolution methods were undertaken was, again, high at 91% (the figure was 93% in 1995/96). A total of 195 cases were resolved informally compared to 51 cases resolved by formal written determination, making a proportion of 79% resolved by informal methods (a slight increase on the 1995/96 figure of 78%). Again, I can report that it has been my experience that even if mediation and/or negotiation does not fully resolve a dispute it has, in nearly all cases, resulted in some significant progress towards narrowing and reducing the number of issues which must be the subject of formal determination.

Performance against Goal 3

- 2.14 Since formal decisions represent a most significant part of the work undertaken by my Office during the reporting period, I have recorded, in Appendix 3 to this Report, some notes on what I consider to be the significant issues dealt with in each published formal decision issued in 1996/97. This may be of assistance as a check list or handy guide for FOI administrators. From my examination of agency decisions at primary and internal review level (in those cases which progress to the stage of external review), it is clear that most agencies continue to obtain assistance from my formal decisions, and refer to them to explain and justify to applicants the stance which an agency has taken in a particular case.
- 2.15 The number of cases resolved by formal decision in 1996/97 was 51 (compared to 44 in 1995/96). During the reporting period, no applications were made to the Supreme Court challenging decisions made by me under the FOI Act.

GENERAL OBSERVATIONS ON THE FOI PROCESS IN QUEENSLAND

SERVING THE COMMUNITY IN A REPRESENTATIVE DEMOCRACY

- 3.1 In my last annual report (at paragraphs 3.1 to 3.21), I discussed at some length the significance, in a representative democracy, of the principles of freedom of information/open government and the need for cultural change in agencies. I will not repeat my comments, but I wish to record that further support can be found for them in the recent High Court decision of *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96. In *Lange's* case, the High Court reviewed its earlier decisions in *Theophanous v Herald and Weekly Times Limited* (1994) 182 CLR 104, which I referred to in my last annual report, and *Stevens v West Australian Newspapers Limited* (1994) 182 CLR 211. In *Lange's* case, the full bench of the High Court gave a joint judgment. At pages 106-108, the Court discussed the importance of freedom of communication in our system of government. At page 106, it said:

Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be "directly chosen by the people" of the Commonwealth and the States, respectively. At federation, representative government was understood to mean a system of government where the people in free elections elected their representatives to the legislative chamber which occupies the most powerful position in the political system. As Birch points out, "it is the manner of choice of members of the legislative assembly, rather than their characteristics or their behaviour, which is generally taken to be the criterion of a representative form of government". However, to have a full understanding of the concept of representative government, Birch also states that:

we need to add that the chamber must occupy a powerful position in the political system and that the elections to it must be free, with all that this implies in the way of freedom of speech and political organisation.

Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation. While the system of representative government for which the Constitution provides does not expressly mention freedom of communication, it can hardly be doubted, given the history of representative government and the holding of elections under the system in Australia prior to federation, that

the elections for which the Constitution provides were intended to be free elections in the sense explained by Birch. Furthermore, because the choice given by ss 7 and 24 [of the Commonwealth Constitution] must be a true choice with "an opportunity to gain an appreciation of the available alternatives", as Dawson J pointed out in Australian Capital Television Pty Ltd v Commonwealth, legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election.

[Footnotes omitted]

3.2 The Court went on to state (at page 107):

... Section 128, by directly involving electors in the States and in certain Territories in the process for amendment of the Constitution, necessarily implies a limitation on legislative and executive power to deny the electors access to information that might be relevant to the vote they cast in a referendum to amend the Constitution. Similarly, those provisions which prescribe the system of responsible government necessarily imply a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal parliament. Moreover, the conduct of the executive branch is not confined to ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a minister who is responsible to the legislature. In British Steel Corp v Granada Television Ltd, Lord Wilberforce said that it was by these reports that effect was given to "[t]he legitimate interest of the public" in knowing about the affairs of such bodies. ...

[Footnote omitted]

3.3 The decision in *Lange*'s case related to the validity of defamation laws in New South Wales, and the Court was called on to determine whether the limitations contained in the Commonwealth Constitution meant that the laws of that State concerning defamation were invalid. In that sense, the Court was called on to determine to what extent the Constitution places limits on actions by government rather than to determine the existence of any individual rights or duties with respect to provision of information by government. However, the principles discussed by the Court clearly recognised the importance of informed public participation in the democratic process. At page 115, the Court stated:

Accordingly, this court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion — the giving and receiving of information — about government and political matters.

3.4 In *Lange*'s case, the High Court acknowledged that the right to freedom of communication was a qualified right. In the same way, the "duty to disseminate" government information which is recognised in the FOI Act is a qualified one. But, in my view, the aim of legislators in

formulating freedom of information legislation must be to find a proper balance in devising a system which allows members of the community to inform themselves of the workings of government, subject only to the protection of essential public and private interests. I consider that the FOI Act, as originally enacted in 1992, represented a generally fair and reasonable approach which adequately balanced the competing interests. I do not consider that this remains the case, following some of the amendments to the FOI Act made since 1992.

MATTERS OF CONCERN RAISED IN PREVIOUS ANNUAL REPORTS

3.5 In prior annual reports, I have gone into some detail explaining my concerns with respect to-

- amendments to the FOI Act in November 1993 and March 1995 which radically expanded the scope of the Cabinet/Executive Council exemption provisions;
- provisions which exclude the application of the FOI Act to documents relating to the commercial activities of government owned corporations (GOCs); and
- provisions which exclude the application of the FOI Act to bodies holding aggregate student data.

No action has been taken in relation to the issues I raised, and events during the reporting period have done nothing to dispel my concerns about those issues.

Continuing concerns with regard to s.36 and s.37 of the FOI Act

- 3.6 In my 1994/95 and 1995/96 annual reports, I discussed the amendments that were made to s.36 and s.37 of the FOI Act in November 1993 and March 1995. I expressed the view that they exceeded the bounds of what was necessary to protect traditional concepts of collective ministerial responsibility (and its corresponding need for Cabinet secrecy) to such an extent that they are antithetical to the achievements of the professed objects of the FOI Act in promoting openness, accountability and informed public participation in the processes of government.
- 3.7 The provisions allow scope for the "manufacture" of an exemption claim by giving blanket exemption to documents placed before Cabinet or Executive Council, even for documents that were not prepared for the purpose of submission to Cabinet or Executive Council, and indeed even for documents which have been previously published (see paragraph 3.18 below). They extend a right to keep secret numerous documents created to brief a Minister or chief executive on an issue, which documents may in no way indicate the views of the Minister or Cabinet on any particular topic. The only exception to the Cabinet and Executive Council exemptions is also worded far too narrowly (see paragraph 3.18 below). Several cases which I have dealt with during the reporting period have given me cause for concern about the way that agencies apply the provisions.
- 3.8 In one case, a quarterly statistical report covering aspects of one agency's operations had for some time been provided by the agency to a body representing a profession with a legitimate ongoing interest in the agency's operations. The report was clearly relevant to the activities of the professional body, and to matters of public interest concerning expenditure of public funds. The arrangement, which had operated outside the FOI Act, ceased when the agency decided that the quarterly statistical report should no longer be provided to the professional body. The professional body then requested access to the report under the FOI Act, and was first met with a decision that the report had been prepared for inclusion in a Cabinet Information Paper and was therefore exempt under s.36(1)(c). By the time of the internal review decision, the agency determined that the report had been submitted to Cabinet and was therefore exempt matter

under s.36(1)(a) of the FOI Act. Thus, a category of information routinely prepared by an agency for monitoring its own operations (rather than for the purpose of submission to Cabinet), which had for some time been made available for scrutiny by an interested professional body, was insulated from disclosure under the FOI Act, simply by the fact of its having been submitted to Cabinet for information purposes, and without any requirement under the terms of the applicable exemption provision to consider whether disclosure of the information would be preferable in the interests of furthering the public interest objects of the FOI Act. (Factors of the last-mentioned kind should, however, be taken into account when an agency decision-maker exercises the discretion conferred by s.28(1) of the FOI Act in deciding whether or not to refuse access to a document or matter which satisfies a relevant test for exemption.)

- 3.9 Another case involved a report prepared on the activities of a public servant. A second public servant who was mentioned briefly in a number of places in the report applied under the FOI Act for access to the report. The case came before me on the basis of a deemed refusal of access (see s.79 of the FOI Act), and, shortly after that, the report was submitted to Cabinet, in conjunction with an oral submission by the relevant Minister. The agency then relied on s.36(1)(a) of the FOI Act to refuse the applicant access to the small segments of matter in the report relating to him. As is my usual practice in such cases, I required the agency to provide evidence of the material facts which must be proved to establish a case for exemption under s.36(1) or s.37(1) of the FOI Act. Cabinet records were provided to me which briefly recorded the fact that the report had been noted by Cabinet in conjunction with an oral submission from the relevant Minister. There was no way of telling from those records whether the report had been submitted to Cabinet merely for the purpose of insulating it from disclosure under the FOI Act. Given the sensitivity of the report as it affected the main subject of the report, it is probable that the report was noted by Cabinet for legitimate purposes, and the timing of the oral Cabinet submission relative to the processing of the FOI access application was probably merely coincidental. However, it was difficult to see any possible basis on which disclosure to the access applicant of the segments of the report which concerned him could have revealed anything about Cabinet discussions or proposals, or compromised the integrity of the Cabinet process in any way.
- 3.10 These cases show that regardless of how closely requested information relates to an individual applicant for access, or how great the public interest in disclosure of particular information, an agency may refuse access to a document under s.36 or s.37, whether or not the document was created for the purpose of submission to Cabinet or Executive Council, or would reveal anything about the Cabinet or Executive Council process.
- 3.11 In my view, not only are the provisions too wide but they are relied on more frequently than is reasonable. As another example, one local authority objected to disclosure of a draft development plan on the basis that the final plan had been submitted to Executive Council for its approval. The document in issue, being a draft of a document submitted to Executive Council, was arguably exempt matter under s.37(1)(f). Even though the final version of the document appeared to have been published by decision of Executive Council, the draft itself had not, and so the exception in s.37(2) arguably did not apply. Fortunately, my staff negotiated the disclosure to the applicant of a part of the draft, which resolved the review. However, one must question the sense in having a provision so widely framed that it does not allow for a balancing of the public interest considerations telling for and against disclosure of a draft document, where the final version of the document has been made public.
- 3.12 Cases such as those discussed above could be remedied by judicious exercise of the discretion conferred on agencies and Ministers by s.28(1) of the FOI Act (a discretion which it is not open

to me to exercise on external review because of the specific provision made by s.88(2) of the FOI Act). Section 28(1) does not require an agency or Minister to refuse access to exempt matter. It confers a discretionary power to refuse access to exempt matter which may be exercised or not exercised at the discretion of the relevant agency or Minister: see *Re Norman and Mulgrave Shire Council* (1994) 1 QAR 574 at p.577 (paragraph 13). It is therefore important for agency decision-makers to consider carefully the exercise of that discretion, particularly in cases involving s.36(1) and s.37(1), since the terms of those exemption provisions do not call for consideration of public interest factors favouring disclosure of particular information, or even the fact that the information in issue is already in the public domain. Regardless of whether s.36 and s.37 are returned to the form in which they were originally enacted (and I strongly urge that they should be), decision-makers within agencies should have proper regard to the nature of the discretionary power which they exercise under s.28(1) of the FOI Act.

- 3.13 At paragraph 3.11 of my third annual report (1994/95) and at paragraphs 3.19-3.20 of my fourth annual report (1995/96), I urged the Queensland government to follow the example of the Commonwealth government by issuing guidelines for agencies on the exercise of the discretion conferred by s.28(1) of the FOI Act, which guidelines ought to focus on the need to assess whether any genuine harm could follow from disclosure of a document, or particular information in it, before making a decision to invoke an exemption provision that is technically available. That has not occurred. It would be welcome to see the Queensland government demonstrate continued support for the spirit of the FOI Act by issuing guidelines of the kind suggested.

Continuing concerns with regard to exclusion of agencies from the FOI Act

- 3.14 I discussed my concerns about the exclusion of government owned corporations (GOCs) from the FOI Act at paragraphs 3.50 to 3.73 of my third annual report (1994/95) and at paragraphs 3.30 to 3.41 of my fourth annual report (1995/96). I indicated my view that s.11A in all likelihood extends protection to GOCs beyond that enjoyed by any private sector competitor. While the situation relating to state GOCs remains of concern, the reporting period has seen the introduction of s.11B of the FOI Act, which applies in a similar vein to local government owned corporations (LGOCs). This amendment is even more disturbing, because it does not appear to require legislative approval for the creation of an LGOC, merely a series of local authority resolutions. It therefore appears possible for a local authority to protect many of its functions from accountability under the FOI Act without the input or overview of Parliament, again in such manner as to put the LGOC in a more protected position, with respect to the application of the FOI Act to documents concerning commercial activities, than any private sector competitor.
- 3.15 I also note that exceptions to the operation of FOI legislation are being included in other legislation without reference in the FOI Act. This is the case with s.423(2) of the *WorkCover Queensland Act 1996*, whereby documents of WorkCover Queensland relating to certain of its commercial activities are excluded from the application of the FOI Act. I have previously expressed concerns about the scope of such exclusions for GOCs and similar bodies, but to confer them without amendment to the FOI Act itself gives rise to additional concerns. It not only promotes confusion and uncertainty among citizens who ought to be able to rely on reference to the FOI Act and *Freedom of Information Regulation 1992 Qld* (the FOI Regulation) to ascertain the precise scope of the legislative scheme, but it also fails to direct the attention of Parliament to the significance of granting such a privilege to a public authority, in the manner that seeking an amendment of the FOI Act or FOI Regulation would do.

AMENDMENTS SUGGESTED IN MY FORMAL DECISIONS

- 3.16 In the course of the reporting year I have drawn attention in two of my formal decisions to concerns I have with anomalies or problem areas in the FOI Act.
- 3.17 In *Re McPhillimy and Gold Coast Motor Events Co* (Information Commissioner Qld, Decision No. 96018, 31 October 1996, unreported), I decided that the Gold Coast Motor Events Corporation (the GCMEC) does not fall within the definition of "public authority" in s.9 of the FOI Act and is not an agency for the purposes of the FOI Act. However, I noted that s.5(f) of the FOI Regulation prescribes that the FOI Act does not apply to the GCMEC in relation to its competitive commercial activities. A regulation in those terms could only have been made on the assumption that the GCMEC was an agency for the purposes of the FOI Act, and that it required exclusion from the application of the FOI Act in respect of some (perhaps most), but not all, of its activities. However, the first part of the assumption is, in my view, mistaken, and action would now be required to ensure that the GCMEC is subject to the FOI Act in respect of part of its activities. I suggested at paragraph 51 of my formal decision that the fact that the GCMEC did not fall within the defined categories of agencies subject to the FOI Act was in many respects an anomalous result, given that its operations are subsidised by public funds. I suggested that it ought, in principle, to be a body which is accountable to the public by being subject to the obligations imposed on agencies by the FOI Act. I suggested that this could be achieved by the making of a regulation under s.9(1)(c)(ii) of the FOI Act, declaring the GCMEC to be a public authority for the purposes of the FOI Act. Section 5(f) of the FOI Regulation would then still have effect, according to its tenor.
- 3.18 In my decision in *Re Lindeberg and Department of Families, Youth & Community Care* (Information Commissioner Qld, Decision No. 97008, 30 May 1997, unreported), I drew attention to the unduly limited nature of the only exception to the Cabinet and Executive Council exemptions. Subsections 36(2) and 37(2) provide, in effect, that matter is not exempt under s.36(1) or s.37(1) if it has been officially published by decision of Cabinet or Executive Council, respectively. I have reproduced below, for consideration by Parliament, my comments in paragraphs 26-30 of *Re Lindeberg*:
26. *This case has again highlighted an absurd anomaly caused by the present wording of s.36(2) and s.37(2) of the FOI Act, which afford the only exceptions to the operation of s.36(1) and s.37(1), respectively, of the FOI Act. I first drew attention to the anomaly in Re Beanland at paragraphs 65-66, in connection with an agency's claim that 100 pages of material that had been disclosed to Mr Russell Cooper MLA, in his capacity as a member of a budget estimates committee of the Queensland Parliament, was nevertheless exempt from disclosure to Mr Cooper, in the capacity of an applicant for access under the FOI Act.*
27. *Cabinet or the Governor in Council will sometimes turn their attention to authorising official publication of their decisions or of material put before them for consideration, and make a decision as to the manner and/or timing of official publication. However, it is also frequently the case that material that is technically exempt matter under s.36(1) or s.37(1) of the FOI Act (e.g., through having been submitted to Cabinet or Executive Council) is published through official channels (e.g., through a Ministerial press statement, through inclusion in answers to Parliamentary questions (with or without notice), through tabling in Parliament, or through release of a Green Paper) without Cabinet or*

the Governor in Council ever having been asked to turn their attention to, or ever having made a formal decision about, official publication of that material. Generally, there is nothing untoward about such publication, which may occur weeks, months or years after any sensitivity attending consideration of a matter by Cabinet, or the Governor in Council, has dissipated.

28. *In the present case, the substance of the decision made by the Governor in Council on 7 February 1991, which is recorded in page 249, has become a matter of public record through a Ministerial statement to Parliament some four years later. However, the matter in page 249 remains exempt under s.37(1) of the FOI Act, because it has not been officially published by decision of the Governor in Council. To my mind, it is absurd that publication of information through an official channel of the Queensland government should not constitute a sufficient exception to the application of s.36(1) and s.37(1) of the FOI Act.*
29. *I have previously expressed my views on the need for amendments to s.36 and s.37 of the FOI Act In addition to those views, I feel it is necessary to respectfully suggest that Parliament give consideration to amending s.36(2) and s.37(2) of the FOI Act so that they read as follows:*
- (2) Subsection (1) does not apply to matter officially published by government.
30. *That wording would ensure that FOI access was not available in respect of Cabinet or Executive Council matter that was published only by virtue of an unauthorised leak, and it would not affect the ability of Cabinet or Executive Council to control the dissemination of sensitive information where Cabinet or Executive Council desires that control, but it would remove the present anomaly that permits agencies and Ministers to claim exemption under s.36(1) and s.37(1) of the FOI Act in respect of information that has been released into the public domain through official channels of the Queensland government.*

OBLIGATION TO PROVIDE APPLICANTS WITH DETAILS OF REVIEW RIGHTS

- 3.19 Section 34(2)(i) of the FOI Act provides that the written notice of decision which an agency or Minister is obliged to provide to an access applicant must include specifics of "*the rights of review conferred by this Act in relation to the decision, the procedures to be followed for exercising the rights and the time within which an application for review must be made*". I am concerned that I continue to receive applications for review of decisions in respect of which the requirements of s.34(2)(i) have not been met by the agency or Minister concerned, and that in some cases that default has prejudiced a person's chances of pursuing the review rights conferred by the FOI Act. (For example, it remains a common mistake in some agencies that persons wishing to pursue a 'reverse FOI' application are informed that they have 60 days in which to apply to the Information Commissioner, rather than the 28 day time limit stipulated by s73(1)(d)(ii) of the FOI Act.)

- 3.20 Because the specific terms of s.34(2)(i) require that an access applicant is to be advised of review rights "in relation to the decision", I consider that the information concerning review rights which an agency or Minister includes in a written notice of decision ought to be tailored to the individual case, rather than using standard form paragraphs of generic information concerning all of the various types of review rights provided for in the FOI Act. The following example, taken from standard paragraphs used in written notices of decision by a major government department, illustrates what I consider to be insufficiently specific, and unnecessarily confusing, information concerning an applicant's statutory entitlement to seek review of the agency decision under the FOI Act:

EXTERNAL REVIEW BY THE INFORMATION COMMISSIONER

- (a) *If, after an internal review has been completed, you are still dissatisfied with the agency's decision, you can request a review by the Information Commissioner of the decision.*
- (b) *Provided you have had an internal review you can apply for a review by the Information Commissioner. However, you must apply to the Information Commissioner within 60 days of receiving the decision from your internal review or within 28 days where the decision is contrary to your views as a consulted third party.*

...

- 3.21 The above extract is taken from the written notice of decision given in response to an application for internal review of an initial agency decision. Accordingly, there was no reason for it to include the first sentence of paragraph (b). Such language may confuse some applicants as to whether they have satisfied requirements, in cases where those requirements are no longer in issue. Further, the relevant time limit by which the recipient of an internal review decision may apply for external review ought to be readily ascertainable, in any particular instance, by the agency or Minister concerned, and ought to be specifically stated in the written notice of decision. This would greatly reduce the confusion which the type of generic language quoted above causes for some applicants, who are unsure which of the time periods mentioned is applicable to them.
- 3.22 I encourage agencies and Ministers to review their current practices in relation to inclusion of information concerning review rights in their written notices of decision, and to ensure that each access applicant is provided with information concerning review rights which is specifically relevant to the circumstances of their particular application, rather than *pro forma* which may tend to confuse or mislead some access applicants about their rights of review.

APPENDIX 1

Applications for external review received in 1996/97, by category (as per s.71 of the FOI Act)

STATEMENT OF AFFAIRS (PART 2)	
<input type="checkbox"/> Refusal to publish, or to ensure compliance with Part 2	0
<input type="checkbox"/> Deemed refusal	0
ACCESS TO DOCUMENTS (PART 3)	
<input type="checkbox"/> Refusal to grant access	80
<input type="checkbox"/> Deletion of exempt matter	31
<input type="checkbox"/> Combination - refusal to grant access/deletion of exempt matter	13
<input type="checkbox"/> Deemed refusal to grant access	33
<input type="checkbox"/> Deferred access	1
<input type="checkbox"/> Charges	9
<input type="checkbox"/> Combination - refusal to grant access/charges	2
<input type="checkbox"/> Third party consulted; objects to disclosure	36
<input type="checkbox"/> Third party not consulted; objects to disclosure	0
AMENDMENT OF RECORDS (PART 4)	
<input type="checkbox"/> Refusal to amend	0
<input type="checkbox"/> Deemed refusal to amend	4
ISSUANCE OF CONCLUSIVE CERTIFICATE	
<input type="checkbox"/> Cabinet matter	0
<input type="checkbox"/> Executive Council matter	0
<input type="checkbox"/> Law enforcement/Public safety matter	0
MISCELLANEOUS	
<input type="checkbox"/> No jurisdiction or misconceived application	22
TOTAL	231

APPENDIX 2

Applications for external review received in 1996/97, by respondent agency

<u>Departments</u>	<u>No.</u>	<u>Other agencies</u>	<u>No.</u>
Police	27	Qld Corrective Services Commission	13
Education	18	WorkCover Queensland*	7
Health	9	Criminal Justice Commission	4
Justice	6	Legal Aid Office (Qld)	4
Natural Resources	6	Building Services Authority	3
Tourism, Small Business and Industry	6	Queensland Law Society Inc	2
Primary Industries, Fisheries and Forestry	5	Queensland Tourism and Travel Corp	2
Transport	5	University of Queensland	2
Families, Youth and Community Care	4	Board of Professional Engineers	1
Premier and Cabinet	4	Bond University**	1
Treasury	4	Community Living Inc	1
Public Works and Housing	3	Crowley Vale Water Board	1
Training and Industrial Relations	3	Griffith University	1
Emergency Services	2	Ipswich Grammar School**	1
Environment	2	Nominal Defendant	1
Local Government and Planning	1	Pioneer Mill Supplier's Committee	1
Mines and Energy	1	Q-Build	1
		Queensland Rail	1
		Queensland University of Technology	1
		Surveyors Board of Queensland	1
<u>Health agencies</u>		<u>Local authorities</u>	
Regional Health Authorities*		Brisbane City Council	5
—Brisbane North	2	Redland Shire Council	4
—Brisbane South	1	Burnett Shire Council	3
—Sunshine Coast	1	Gold Coast City Council	3
—Peninsula and Torres Strait	1	Redcliffe City Council	2
District Health Services*		Yarrabah Community Council	2
—Cairns	4	Broadsound Shire Council	1
—West Moreton	4	Bundaberg City Council	1
—Prince Charles Hospital	2	Esk Shire Council	1
—Princess Alexandra Hospital	2	Gatton Shire Council	1
—Gold Coast	1	Gayndah Shire Council	1
—Hervey Bay - Maryborough	1	Isis Shire Council	1
—Mackay	1	Laidley Shire Council	1
—Rockhampton	1	Mackay City Council	1
—Royal Brisbane Hospital	1	Maryborough City Council	1
—South Burnett	1	Pine Rivers Shire Council	1
—Tablelands	1	Rockhampton City Council	1
—Toowoomba	1	Thuringowa City Council	1
—Townsville	1	Toowoomba City Council	1
Health Rights Commission	7	Townsville City Council	1
Medical Board of Queensland	4	Warwick Shire Council	1
Psychologists Board of Queensland	3		
Aboriginal and Islander Medical Centre**	1		
Queensland Nursing Council	1		

* During the reporting period, Regional Health Authorities were replaced by District Health Services, and the Workers' Compensation Board was replaced by WorkCover Queensland.

** The listing of these bodies in this table should not be taken to mean that they are agencies required to provide access to documents under the FOI Act. It merely indicates that applications for review were received, naming those bodies as respondents.

APPENDIX 3

Notes on significant issues dealt with in formal decisions published by the Information Commissioner in 1996/97

Re Ferguson and Director of Public Prosecutions

(Decision No. 96013, 31 July 1996, unreported)

This case illustrates the application of s.22(a) of the FOI Act, which I analysed in *Re "JM" and Queensland Police Service* (1995) 2 QAR 516. I found that the respondent was entitled under s.22(a) to refuse access to the transcripts of the applicant's Supreme Court trial, because they were reasonably open to public access under the *Criminal Code 1889 Qld* and the *Criminal Practice Rules 1900 Qld*.

I also found that the respondent could refuse access to its annual reports under s.22(c) of the FOI Act, as they had been placed (during the course of the external review) in the State Library. I stated that the wording of s.22(c) means that the reasonable availability of a document is not influenced by factors which might hinder a particular applicant from attending at the relevant public library. I did indicate that such factors may be relevant to a consideration of whether or not an agency should exercise its discretion to invoke s.22(c), even though the requirements of s.22(c) are met, but, as the annual reports had also been placed in a library accessible to the applicant, I decided that the respondent was entitled to refuse access to them under the FOI Act.

Applying the principles I discussed in *Re Smith and Administrative Services Department* (1993) 1 QAR 22, I found a number of documents were exempt under s.43(1), as they would be privileged from production in a legal proceeding. In doing so, I discussed the position of the Director of Public Prosecutions with respect to legal professional privilege. I also found that photographs of children (in respect of whom the applicant had been charged with offences), and correspondence concerning the affairs of another prisoner, were exempt under s.44(1) - the personal affairs exemption.

Re "EDH" and Griffith University (respondent) and Lewis (third party)

(Decision No. 96014, 30 July 1996, unreported)

Applying the principles discussed in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, I found that certain parts of a doctoral thesis on the process of change within an Australian tertiary institution, were exempt matter under s.46(1)(a). I discussed the 'public interest exception' to actions for breach of confidence expounded by the High Court in *Esso Australia Resources Limited and Ors v Plowman* (1995) 69 ALJR 404. I decided that relevant public interest considerations concerning -

- enhancement of public knowledge and understanding of aspects of the operation of the publicly-funded tertiary institution portrayed in the thesis;
- the accountability of Griffith University in respect of assessment of theses; and
- the availability to the community of research subsidised by public funding;

were satisfied by the disclosure, which had already occurred, of the vast majority of the thesis.

Re Richardson and Queensland Corrective Services Commission

(Decision No. 96015, 16 August 1996, unreported)

I applied the principles for the application of s.41(1) discussed in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 and *Re Trustees of the De La Salle Brothers and Qld Corrective Services Commission* (Decision No. 96004, 4 April 1996 unreported), to documents relating to the termination of the applicant's contract of employment as a senior executive of the respondent. I found that considerable parts of the matter in issue merely consisted of factual matter, and so were excluded from exemption under s.41(1) by s.41(2)(b). As to the balance of the matter in issue (which I accepted was 'deliberative process' matter falling within the terms of s.41(1)(a)), I rejected a 'frankness and candour' argument that disclosure would impede the proper flow of information between public servants and the Minister. I also considered that there was a public interest in members of the community having access to documents which related to the negotiation, and application, of special terms in the applicant's contract. I found that the respondent had not satisfied the onus on it (under s.81 of the FOI Act) to establish that its decision was justified.

Re Ferrier and Queensland Police Service

(Decision No. 96016, 19 August 1996, unreported)

I considered the application of various exemptions claimed by the Queensland Police Service to apply to documents created for the purposes of the Special Branch, prior to its winding-up in 1989. I found that some matter which could reasonably be expected to identify sources of information provided to the Special Branch, was exempt matter under s.42(1)(b) - confidential source of information. I determined that other matter, including matter which concerned the shared personal affairs of the applicant and others, was exempt matter under s.44(1) - personal affairs. I rejected the claims of the respondent that other matter was exempt under s.38, s.41(1), s.42(1)(b), s.42(1)(e), s.42(1)(f), s.42(1)(h), s.44(1) and/or s.46(1)(b).

However, I did decide that some file names and other matter which would identify organisations with respect to which files were retained by the Counter-Terrorist Section of the respondent (the CTS) in 1990, were exempt under s.42(1)(h). In doing so, I discussed the meaning of the word "system", and found that disclosure of the fact that an individual or group was, or was not, targeted by a body like the CTS could prejudice the system for the protection of persons and property set out in the CTS Charter.

I also upheld the decision of the respondent, under s.35, to neither confirm nor deny that it held any documents relating to the applicant which had been created by, or for the purposes of, the CTS since 1990.

Re Willsford and Brisbane City Council

(Decision No. 96017, 27 August 1996, unreported)

In the context of s.44(1) (the personal affairs exemption), I discussed the public interest in a person who has suffered, or may have suffered, an actionable wrong, being able to obtain access to information which would assist the person to pursue any remedy which the law affords. I indicated that a public interest consideration favouring disclosure would arise if it could be established that:

- (a) loss or damage or some kind of wrong had been suffered, in respect of which a remedy is, or may be, available under the law;
- (b) the applicant has a reasonable basis for seeking to pursue the remedy; and

- (c) disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing.

I noted that the existence of a public interest consideration of this kind would not necessarily be determinative. I also indicated that it would ordinarily be true to say that the greater the magnitude of the loss, damage or wrong, and/or the stronger the prospects of successfully pursuing an available remedy in respect of it, then the stronger would be the weight of the public interest consideration favouring disclosure.

In this case, the owner of a car which collided with a dog was seeking matter which would identify the owner of the dog, in order to take steps to assess whether she was in a position to recover damages. I weighed the public interest consideration discussed above against the privacy interests of the dog owner, and determined that, on balance, it was in the public interest that the car owner have access to the matter in issue.

Re McPhillimy and Gold Coast Motor Events Co
(Decision No. 96018, 31 October 1996, unreported)

I determined that the respondent (a partnership initially comprising some private interests but later bought out entirely by the Queensland government) was not an "agency" for the purposes of the FOI Act. I decided that the respondent was not a public authority under s.9(1)(a)(i) as it was not established by an enactment, nor under s.9(1)(a)(ii) as it was not established under an enactment. I discussed whether the words "under an enactment" qualify the word "established" or the words "for a public purpose", but did not find it necessary to form a conclusion. I also discussed the other provisions of s.9 but found that none applied to the respondent.

I also considered the application of s.8(2) which, in my view, operates in a similar way to s.9(2); that is, the obligations of an agency under the FOI Act are enlarged to the extent that an agency must also discharge those obligations in respect of bodies which stand in a relationship to it, of a kind described in s.8(2)(a) or 8(2)(b). This has the effect that documents of such a body come within the terms of the FOI Act. I noted that the use of the word "enabling" in s.8(2)(b) gives the provision a restricted scope of application. On the facts of the case, because the respondent, and any relevant identifiable agencies were separate legal entities, the respondent was not "part" of an agency, for the purposes of s.8(2)(a). Nor did it exist mainly for the purpose of enabling an agency to perform its functions, under s.8(2)(b).

Re "ROSK" and Brisbane North Regional Health Authority (respondent) and Others (third parties)
(Decision No. 96019, 18 November 1996, unreported)

I determined that the provisions of the *Mental Health Act 1974* Qld relating to the issue of warrants for removal of persons to places of safety in the interests of the subject of the warrant, or for the protection of other persons, constitute a "system for the protection of persons" within the terms of s.42(1)(h) of the FOI Act. I also found that disclosure of information supplied by third parties in support of the issue of the warrant could reasonably be expected to prejudice that system, because it might unduly inhibit members of the community from volunteering like information in the future.

Re O'Reilly and Queensland Police Service

(Decision No. 96020, 18 November 1996, unreported)

This case was similar in many respects to *Re Ferrier and Queensland Police Service* (discussed above). I found that some matter was exempt under s.42(1)(b) and some matter was exempt under s.44(1). However, I rejected claims that other matter was exempt under s.42(1)(f) and s.42(1)(h). In doing so, I discussed the 'mosaic theory' and acknowledged that, in an appropriate case, submissions and/or evidence could be lodged by an agency, which could form a basis for a finding that there is an expectation, for the occurrence of which real and substantial grounds exist, that disclosure of one piece of information in issue, when combined with other available information, could enable further information to be deduced, thereby occasioning prejudice of a kind specified in s.42(1)(f) or s.42(1)(h) of the FOI Act. However, I emphasised that there must be a reasonable expectation of prejudice, and declined to adopt references to a "degree of speculation", which appear in two decisions of the Commonwealth Administrative Appeals Tribunal, as being sufficient to satisfy this requirement.

I upheld the decision of the respondent, under s.35, to neither confirm nor deny that it held any documents relating to the applicant which had been created by, or for the purposes of, the Counter-Terrorist Section of the Queensland Police Service since 1990.

Re Ryman and Department of Main Roads

(Decision No. 96021, 19 December 1996, unreported)

I applied the principles concerning s.36(1)(c) of the FOI Act which I stated in *Re Little and Department of Natural Resources* (Decision No. 96002, 22 March 1996, unreported), to documents relating to a proposal for a western bypass highway for Brisbane. I found that one memorandum to a Minister was exempt under s.36(1)(c), but that the Department had not discharged its onus to establish that the dominant purpose for creation of two other documents was for briefing, or the use of, a Minister or chief executive in relation to a matter submitted, or proposed to be submitted, to Cabinet.

I rejected claims that other documents were exempt under s.36(1)(e) and s.36(1)(g). I stated that matter could not ordinarily qualify for exemption under s.36(1)(e) if its creation preceded discussion, deliberation or noting in Cabinet. I noted that, if the Department had not in its evidence stated that the matter in issue corresponded to information which had been submitted to Cabinet, the applicant would have had no knowledge of that coincidence. Since the test for exemption under s.36(1)(e) turns on the consequences of disclosure of the matter in issue itself (not its disclosure in conjunction with extraneous information from the respondent stating that the matter in issue corresponds to matter submitted to Cabinet), I found that the test for exemption under s.36(1)(e) was not satisfied. The mere disclosure of the matter in issue would not involve the disclosure of any consideration of Cabinet.

Re "NHL" and The University of Queensland

(Decision No. 97001, 14 February 1997, unreported)

This case contains a detailed analysis of the application of s.44(1) of the FOI Act to information relating to complaints of sexual harassment made by the applicant against an employee of the respondent. In accordance with principles set out in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.343-344, I considered whether segments of the matter in issue comprised information concerning solely the personal affairs of the applicant, or solely the personal affairs of the alleged sexual harasser, or the shared personal affairs of the applicant and the alleged sexual harasser. I also discussed the public interest balancing test contained in s.44(1).

I discussed and explained the requirements of s.41(1) in relation to the respondent's contention that incomplete or provisional draft responses to correspondence compiled by the respondent, comprised deliberative process material which was exempt under s.41(1).

I also considered the application of s.32 of the FOI Act, which deals with deletion of exempt matter, in rejecting the respondent's contention that it was impracticable to provide the applicant with copies of the documents in issue from which exempt matter had been deleted.

Re Director-General, Department of Families, Youth and Community Care and Department of Education (respondent) and Perriman (third party)

(Decision No. 97002, 18 February 1997, unreported)

This decision dealt with two 'reverse-FOI' cases. I determined that matter relating to the behaviour of two students attending a government school was information concerning their personal affairs under s.44(1), but that, on balance, it was in the public interest that a teacher, who had allegedly been assaulted by one of the students, be permitted to have access to the particular matter in issue. The decision contains a detailed analysis of public interest considerations weighing for and against disclosure, and of factors affecting the relative weight of those public interest considerations.

Re Myles Thompson and Queensland Law Society Inc.

(Decision No. 97003, 28 February 1997, unreported)

The applicant sought access to certain documents relating to an investigation undertaken by the Professional Standards Department of the respondent. Applying the principles set out in *Re Smith and Administrative Services Department* (1993) 1 QAR 22, I determined that all but one of the documents was exempt under s.43(1) - the legal professional privilege exemption. I rejected a claim by the applicant that the documents were not exempt because the solicitor giving the advice was a member of the respondent and could not therefore have the appropriate independent professional relationship with the respondent.

I rejected a claim by the respondent that the other document in issue was exempt matter under s.41(1). The submission of the respondent was tantamount to a 'class claim' for exemption on public interest grounds of any material arising out of investigations conducted by it into allegations of malpractice, professional misconduct or unprofessional conduct because of the inherent sensitivity of the material. I indicated that that was not an acceptable approach to the application of s.41(1), and that the apprehended consequences of disclosure of the particular matter in issue must be evaluated in each case.

Re Prisoners' Legal Service Inc. and Queensland Corrective Services Commission

(Decision No. 97004, 27 March 1997, unreported)

I considered the application of a number of exemption provisions in relation to parts of a report by an inspector appointed by the respondent to investigate the circumstances of the death of a prisoner at a correctional centre. I generally found that information which had already been made public at the trial of the prisoners charged with murdering the deceased, including the identity and evidence of some witnesses referred to in the report, was not exempt matter under the FOI Act.

I determined that matter which would identify prisoners who provided information to the inspector about criminal conduct or wrongdoing by other persons, and whose identity or existence remained confidential, was exempt matter under s.42(1)(b). I also determined that some matter was exempt on the basis that disclosure

could reasonably be expected to endanger the security of the correctional centre (s.42(1)(g)) or facilitate a person's escape from lawful custody (s.42(1)(i)).

I rejected a claim to exemption under s.42(1)(e) in respect of matter which I had not found to be exempt under s.42(1)(b). The respondent claimed that officers and prisoners would be reluctant to provide any information to an inspector in future, if it became known that the report would be disclosed, and this would cause prejudice to a lawful method or procedure for preventing, investigating or dealing with a contravention or possible contravention of the law. I decided that disclosure of the methods and procedures used by the inspector could not, in itself, prejudice the effectiveness of those methods or procedures. I also determined that disclosure of the matter in issue which did not qualify for exemption under s.42(1)(b), could not reasonably be expected to prejudice the future supply of information.

As to the application of s.41(1), I found that some matter was purely factual matter, and was therefore excluded from eligibility for exemption under s.41(1), by virtue of s.41(2)(b). I also found that disclosure of the inspector's analysis and recommendations with respect to problems in systems and methods of control at the correctional centre would, on balance, be in the public interest. However, I found that disclosure of recommendations for disciplinary action against individual prison officers, which did not ultimately proceed, would be contrary to the public interest in fair treatment of the officers. I decided that deletion of identifying references would adequately protect the officers, while still permitting access to relevant information in the inspector's report.

I rejected claims for exemption under s.42(1)(c), s.46(1)(a) and s.46(1)(b) in relation to matter which did not qualify for exemption under other provisions. I found that some matter referring to personal relationships between prisoners and their families was exempt under s.44(1).

Other matter concerned the criminal histories of prisoners, and security classifications of prisoners. Ultimately, it was not necessary to decide on the status of this matter, since the applicant did not press for access to it. I noted the considerable difficulties that would attend a decision as to whether a person's criminal history is information that concerns his or her personal affairs (e.g., the fact that the criminal justice process of trial and sentencing ordinarily takes place in open court and is difficult to characterise as a private aspect of a person's life, whereas policy considerations relating to rehabilitation of offenders suggest that privacy considerations are relevant to the recording and dissemination of criminal history information).

Re Summers and Cairns District Health Service (respondent) and Hintz (third party)
(Decision No. 97005, 27 March 1997, unreported)

The applicant sought access to medical records of her deceased adult daughter, in respect of admissions to hospital prior to the admission during which her daughter died. The daughter's husband objected to the records in issue being disclosed to the applicant. I found that the matter in issue concerned the daughter's personal affairs under s.44(1), and that disclosure would not, on balance, be in the public interest.

I stated that the public interest in respecting the privacy of an individual's medical records is ordinarily a strong one. In paragraph 19 of my reasons for decision, I commented on circumstances in which the weight of that privacy interest might be diminished.

I accepted that there is a legitimate public interest in enhancing the accountability of public hospitals for the provision of medical services in accordance with proper professional standards, and for timely and cost-effective service delivery. However, when one attempts to apply that public interest as a consideration favouring disclosure of the medical records of a particular individual (other than the

applicant for access), there is an immediate collision with the public interest in protecting the privacy and confidentiality of an individual's medical records. I expressed the view that the former would not ordinarily outweigh the latter, unless there were a particularly strong public interest in accountability to be served by disclosure, for example, by exposing unsatisfactory or negligent performance, and enabling remedial and/or compensatory action to be taken.

Re Bayliss and Medical Board of Queensland

(Decision No. 97006, 28 April 1997, unreported)

The respondent asserted that documents created for the purpose of an investigation of aspects of the applicant's medical practice were excluded from the application of the FOI Act, because the respondent was deemed by s.13(1) of the *Medical Act 1939* Qld to be a commission of inquiry for the purpose of making its investigations, and because s.11(1)(i) of the FOI Act provides that the FOI Act does not apply to a "... commission of inquiry issued by the Governor in Council". I determined that, while the respondent may be deemed to be a commission of inquiry for the purposes stated in s.13(1) of the *Medical Act*, the respondent was not a commission of inquiry "issued by the Governor in Council" and s.11(1)(i) of the FOI Act did not apply to it. I also discussed the proper interpretation of the FOI Act when a provision is ambiguous, and the nature, and limited operation, of the deeming provisions in the *Medical Act 1939* Qld on which the respondent relied.

Re Bayliss and Queensland Health (respondent) and Another (third party)

(Decision No. 97007, 28 April 1997, unreported)

I found that matter which would identify a person who had made a complaint to the Minister for Health about the applicant's work as a medical practitioner was exempt under s.42(1)(b). I rejected the applicant's contentions that the complainant could not be regarded as a confidential source because:

- (a) the disclosure of the information by the third party to the Premier, the Minister for Health, the Medical Board and the Health Rights Commission, amounted to "substantial dissemination" of the third party's views, negating any claim to confidentiality;
- (b) the applicant asserted that he was aware of the identity of the third party (I considered that in making such an assertion the applicant was engaging merely in guesswork and that for reasons which would be apparent to any independent arbiter permitted to examine the matter in issue, I was satisfied that the applicant had no confirmed knowledge of the identity of the third party);
- (c) the third party communicated with the various authorities for no other reason than to cause a mischief (I stated that s.42(1)(b) was not intended to involve an examination of the motives of the putative confidential source of information); and
- (d) the matter communicated by the third party was already, to the knowledge of the third party, under investigation by the Medical Board.

I disagreed with the respondent's finding that the information given related to the enforcement or administration of the *Health Services Act 1991* Qld (since that Act concerns the organisation and delivery of public sector health services in Queensland, rather than the private health services which the applicant provided), but found that the information in issue related to the administration and enforcement of provisions of the *Medical Act 1939* Qld and probably also the *Health Rights Commission Act 1991* Qld.

Re Lindeberg and Department of Families, Youth and Community Care

(Decision No. 97008, 30 May 1997, unreported)

I found that various documents and segments of matter in issue were exempt under one of s.36(1)(c), s.36(1)(e), s.36(1)(g), s.37(1)(a) or s.37(1)(g), all of which concern Cabinet or Executive Council matter.

I also indicated that the case provided another clear example of an absurd anomaly caused by the present wording of s.36(2) and s.37(2). Those provisions set out the only exceptions to s.36(1) and s.37(1) and have the effect that matter will not be exempt if it has been officially published by decision of Cabinet (s.36(2)) or Executive Council (s.37(2)). I pointed out that this leads to a situation where matter which has been otherwise published through official sources, e.g. by a Minister, may nevertheless be exempt matter because no decision of Cabinet or Executive Council authorised its publication. I recommended that Parliament consider amendments to s.36(2) and s.37(2) so that any matter which has been published by an official government source is not exempt matter under s.36(1) or s.37(1).

Re Turner and Northern Downs District Health Service

(Decision No. 97009, 30 May 1997, unreported)

I decided that an applicant seeking to obtain access to medical records concerning her late father was required to pay a \$30 application fee under the FOI Regulation, as the documents sought did not concern the applicant's personal affairs. I rejected arguments that the applicant's status as next of kin, and as personal representative (executrix) of her late father's estate (the FOI access application being made, she argued, in a representative capacity, on behalf of her late father) meant that no application fee was payable.

APPENDIX 4

Summaries of Decisions Issued by Means of Letters to the Participants, in 1996/97

"SAR" & Patient Review Tribunal

(S 227/93, 12 July 1996)

This case involved the application of the principles set out in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, regarding s.46(1)(a) and s.46(1)(b). The matter in issue consisted of six medical reports concerning the applicant and his regulation under the *Mental Health Act 1974* Qld. I found that one passage in one report, which recorded information provided to a psychiatrist by a third party, was exempt under s.46(1)(a) and s.46(1)(b). However, I decided that the other matter in issue was not exempt, as the authors of the reports had consented to disclosure of their reports, and the respondent could therefore no longer be subject to an obligation to treat the reports in confidence, as against the applicant.

"PAS" & Queensland Police Service

(S 47/94, 1 August 1996)

The matter in issue was generated by the respondent during investigation of the applicant's allegations of criminal conduct against a number of people. Applying the principles set out in *Re McEniery and Medical Board of Queensland* (1994) 1 QAR 349, I found that some of the matter in issue was exempt under s.42(1)(b), as its disclosure would disclose the identity of confidential sources of information. I found that the balance of the matter was exempt under s.44(1) as it concerned the personal affairs of people other than the applicant and, given the extent of previous disclosures to the applicant, there was no public interest favouring disclosure of that matter to the applicant which would outweigh the public interest in protecting the privacy of those people.

Gadsby & Queensland Health

(S 92/96, 13 September 1996)

This was a 'sufficiency of search' case which I approached according to the principles set out in *Re Shepherd and Department of Housing, Local Government & Planning* (1994) 1 QAR 464. I determined that there were no reasonable grounds to believe that the respondent held further documents falling within the terms of the initial FOI access application, and that, in any event, the searches made by the respondent had been reasonable in all the circumstances of the case.

"PAS" & Brisbane South Regional Health Authority

(S 23/94, 9 October 1996)

Applying the principles set out in *Re McEniery*, I found that some of the matter in issue (information supplied by third parties relating to the admission of the applicant to hospital as a regulated patient under the *Mental Health Act*) was exempt under s.42(1)(b), as its disclosure would disclose the identity of confidential sources of information. I found that the balance of the matter in issue was exempt under s.44(1), as it concerned the personal affairs of third parties and the public interest in the applicant having access to the matter (having already been given access to the great bulk of his medical records) did not outweigh the public interest in protecting the privacy of the third parties, and in protecting the continued supply of relevant information to hospital authorities to assist in their care of psychiatric patients.

Szep & Building Services Authority (respondent) & Alpert (third party)

(S 29/96, 9 October 1996)

This was a 'reverse FOI' case in which the applicant objected to the disclosure to the third party of matter from three files relating to complaints made to the respondent by home owners unhappy with building work which involved the applicant. The complainants in respect of two of the files did not object to disclosure of the matter in issue. I was unable to contact the complainant in respect of the third file, but the third party indicated that he did not seek access to matter which would identify the complainant. I rejected the applicant's claim that the matter in issue concerned his personal affairs and found that the matter was not exempt under s.44(1). Applying the principles set out in *Re "B"*, I also rejected claims that the matter (almost all of which did not comprise communications by the applicant) was exempt under s.46(1)(a) or s.46(1)(b).

The Real Estate Office & Department of Lands

(S 172/95, 30 October 1996)

This was a 'sufficiency of search' case which I approached according to the principles set out in *Re Shepherd*. I determined that, following the location of additional documents in the course of my review, there were no reasonable grounds to believe that the respondent held further documents falling within the terms of the initial FOI access application, and that, in any event, the searches made by the respondent had been reasonable in all the circumstances of the case.

Marchetto & Department of Transport

(S 122/96, 6 November 1996)

Applying the principles set out in *Re "B"*, I found that the matter in issue (complaints made against the applicant, while he was a tenant of departmental premises) was exempt matter under s.46(1)(a), as its disclosure would found an action for breach of confidence. I also expressed the view that most of the matter in issue may also be exempt under s.44(1), but it was not necessary to decide the case on that basis.

"SOF" & Legal Aid Office (Qld)

(S 130/96, 6 December 1996)

Applying the principles set out in *Re McEnery*, I found that the matter in issue (matter which would identify a third party who complained to the Attorney-General about the eligibility of the applicant to receive legal aid) was exempt matter under s.42(1)(b), as its disclosure would reveal the identity of a confidential source of information in relation to the administration of the law.

"SHE" & Brisbane South Regional Health Authority

(S 71/96, 6 December 1996)

Applying the principles discussed in *Re "B"*, I found that the matter in issue (information about the applicant supplied by third parties to health professionals) was exempt matter under s.46(1)(a), as disclosure would found actions for breach of confidence.

Sport Drinks Australia Pty Ltd & Department of Tourism, Small Business and Industry
(S 170/96, 13 January 1997)

I refused to exercise my discretion to extend the time for lodging a 'reverse FOI' external review application. Applying the principles explained in *Re Young and Workers' Compensation Board of Queensland* (1994) 1 QAR 543, I decided that prejudice would be caused to the initial FOI access applicant, and that the 'reverse FOI' applicant did not have a reasonably arguable case, with reasonable prospects of success, for review of the respondent's decision.

"ALE" and "RBA" (applicants) & Central Queensland University (respondent) & W (third party)
(S 9/95 and S 10/95, 20 January 1997)

These 'reverse FOI' cases concerned two memoranda, each written by a staff member of the respondent to their Dean, criticising the supervision of students by the third party. Applying the principles set out in *Re "B"*, I decided that the memoranda were not exempt under s.46(1). Parts of the memoranda were deliberative process matter and, because the memoranda were provided by the authors in their capacity as officers of the respondent, ineligible for exemption under s.46(1), by virtue of s.46(2). As to the balance of the memoranda, I found that s.46(1)(a) did not apply as the respondent was not under an equitable obligation to refrain from supplying that matter to the third party. As to s.46(1)(b), I decided that there was no mutual understanding between the authors, and management of the respondent, that the memoranda would be kept confidential, that disclosure would not prejudice the future supply of like information to the respondent, and that disclosure to the respondent would be in the public interest. In addition, I determined that s.40(c) and s.41(1) were not applicable, as disclosure to the respondent would be in the public interest. I also rejected claims that the texts of the memoranda concerned the personal affairs of the authors, but decided that their signatures and a number of references to students contained in the memoranda were exempt matter under s.44(1).

Austin & Legal Aid Office (Qld)
(S 158/96, 30 January 1997)

The matter in issue comprised parts of a memorandum from one officer of the respondent to another, concerning an incident which occurred during a Court proceeding in which an officer of the respondent defended the applicant. I found that the matter in issue was exempt under s.44(1). I decided that the matter concerned the personal affairs of the author notwithstanding that the document was brought into existence as a result of an incident which occurred during the course of the author's employment with the respondent. I found that there were no public interest considerations of sufficient weight to overcome the public interest in protecting the author's privacy.

Hawck & Department of Training and Industrial Relations
(S 150/96, 31 January 1997)

In this 'reverse FOI' case, I found that job application material, in relation to a position for which Mr Hawck was the successful applicant, was not exempt matter under s.44(1), as disclosure would not disclose information concerning his personal affairs. In doing so, I referred to my comments in *Re Baldwin and Department of Education* (Information Commissioner Qld, Decision 96008, 10 May 1996, unreported), that if a job application succeeds, that person's employment in the new position will become, in effect, a matter in the public domain (and in the case of an appointment to a government agency, a matter of public record) and the fact that the person applied for the position can no longer be regarded as information about a private aspect of the person's life.

Aylward & Griffith University
(S 33/96, 5 February 1997)

The applicant sought review of the respondent's decision to refuse him access to documents which disclosed details of subjects studied and results obtained, by another person, in the course of studies for a graduate diploma awarded by the respondent and a degree awarded by another tertiary institution. I found that the matter in issue was exempt matter under s.44(1), and that any public interest considerations favouring disclosure of the matter in issue were not sufficiently strong to outweigh the public interest in non-disclosure which is inherent in the satisfaction of the test for *prima facie* exemption under s.44(1).

"CHI" & Department of Education
(S 15/96, 10 February 1997)

In this 'reverse FOI' case, the applicant objected to disclosure to a teacher of matter concerning the applicant's daughter, and complaints made to school authorities about treatment of her daughter by the teacher. I determined that the matter in issue did concern the personal affairs of the applicant's daughter under s.44(1) and, in respect of certain matter, the personal affairs of other persons, but concluded that disclosure of the matter to the teacher, with the names of the applicant, her daughter and other persons deleted, would, on balance, be in the public interest. This would provide the teacher with information sufficient to satisfy the public interest considerations telling in favour of disclosure to her, while also affording the persons named a measure of privacy protection as against the world at large.

Gist & Department of Transport
(S 126/96, 14 February 1997)

In this 'reverse FOI' case, applying the principles set out in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, I rejected claims by the applicant that information concerning his company's successful tender for a taxi licence was exempt under s.45(1)(b) or s.45(1)(c). As the tender process had been finalised and the applicant's tender was successful, I was unable to see any possibility that release of information as to the tender amount could either destroy or diminish the commercial value of that information, or have an adverse effect on the applicant's business or commercial affairs. The tender price in this case was specific to the tender and would have no bearing on future tenders. In addition, I accepted that there is a public interest in disclosing tender amounts of successful tenders, to the public, to encourage competitiveness, and to ensure the efficient supply of products and services to government agencies.

"NHL" & The University of Queensland
(S 49/93, 14 February 1997)

"SCH" & The University of Queensland
(S 7/93; 14 February 1997)

"SCH" & The University of Queensland
(S 36/93, 14 February 1997)

The focus of the applicants' access applications in these related files was to determine how the respondent had dealt with sexual harassment complaints made by the applicants against certain of the respondent's staff. The issues for my determination included a 'sufficiency of search' question regarding the applicants' contention that the respondent held further relevant documents which had not been disclosed to them (the determination of this issue involved a review of the respondent's central record-keeping procedures), as well as whether or not a student submission, which the applicants had been

involved in compiling, contained matter which could be identified as directly or indirectly relating to the affairs of the applicants. In each case, I concluded that there were no reasonable grounds to believe that the University held further documents falling within the terms of the relevant FOI access applications.

Allanson & Queensland Tourist and Travel Corporation; Allanson & Department of Tourism, Small Business and Industry

(S 164/96 & S 166/96, 14 February 1997)

In these 'sufficiency of search' cases, the applicant sought access to any matter held by the respondents which would show that s.183 of the *Copyright Act 1968* Cth, had been invoked to make copies of works in which she or an associated company held copyright. In applying the principles set out in *Re Shepherd*, I found that there was no reasonable grounds to believe that such documents existed. I accepted that neither of the respondents ever considered that its actions would infringe the applicant's copyright in any work, and there was therefore no reason to suggest that either agency would have considered it necessary to obtain written authorisations under s.183 of the *Copyright Act*.

Rorrison & Queensland Police Service

(S 147/94, 24 February 1997)

This was a 'sufficiency of search' case which I approached according to the principles set out in *Re Shepherd*. I determined that there were no reasonable grounds to believe that the respondent held further documents falling within the terms of the initial FOI access application.

Banks & Queensland Corrective Services Commission

(S 39/93, 25 February 1997)

I first dealt with a 'sufficiency of search' issue, which I approached according to the principles set out in *Re Shepherd*. I determined that, following the location of additional documents in the course of my review, there were no reasonable grounds to believe that the respondent held further documents falling within the terms of the initial FOI access application. I then determined that, under s.22(a), the respondent was entitled to refuse the applicant access to a report by a psychologist and a psychiatrist, tendered at the applicant's trial, on the basis that it was reasonably open to public access under an enactment. I found that some matter which referred to a complaint by another prisoner, and the name of a person who was making a claim for compensation, was exempt matter under s.44(1) - the personal affairs exemption. I also decided that some matter which comprised a complaint by a prison officer against other prison officers was exempt matter under s.46(1)(b) - matter communicated in confidence. It appeared that this matter did not refer to the applicant at all, and had apparently been misfiled.

"MTTO" & Queensland Police Service

(S 23/96, 25 February 1997)

"MTTO" & Queensland Police Service

(S 24/96, 25 February 1997)

"MTTO" & Queensland Health

(S 146/96, 25 February 1997)

In S 24/96, applying the principles set out in *Re "ROSK" and Brisbane North Regional Health Authority* (see Appendix 3), I determined that the grounds given by an informant in support of the issue of a warrant under the *Mental Health Act 1974* Qld, in respect of the applicant, were exempt matter

under s.42(1)(h), as disclosure could reasonably be expected to prejudice a system for protection of persons. I also decided that the informant's signature and address was matter that concerned the informant's personal affairs and was exempt under s.44(1).

In S 23/96, the applicant sought access to matter contained in a report by a police officer to the Director of Mental Health, which was required because the warrant referred to above was not executed. However, the application for external review was made several months outside the prescribed time limit. Applying the principles set out in *Re Young*, I decided not to allow an extension of time. I considered that the matter in issue was *prima facie* exempt under s.44(1), and that the applicant did not have a reasonably arguable case, with reasonable prospects of success.

Again in S 146/96, the applicant was some months late in lodging his application for external review of a decision to refuse him access to matter referring to the same informant in a letter from the Acting Director of Mental Health to a police officer, consequent upon the report referred to above. I refused to grant an extension of time, considering that the matter in issue was *prima facie* exempt under s.42(1)(b), and that the applicant did not have a reasonably arguable case, with reasonable prospects of success.

Gleeson & Department of Education

(S 83/94, 28 February 1997)

This was a 'sufficiency of search' case which I approached according to the principles set out in *Re Shepherd*. I determined that there were no reasonable grounds to believe that the respondent held further documents falling within the terms of the initial FOI access application.

Somerset & Queensland Police Service

(S 16/95, 11 April 1996)

I first dealt with 'sufficiency of search' issues, which I approached according to the principles set out in *Re Shepherd*. I found that it was reasonable to believe that some warrant documentation had been in the possession or control of the respondent at least at one time, but that it had either been destroyed, or passed into the possession or control of a Magistrates Court. I found that there were no reasonable grounds to believe that further documents falling within the terms of the initial FOI access application had ever existed. I then decided that matter in an interim investigation report, recording a police officer's opinion as to the possible criminal liability of certain persons who were the subject of an unfinished investigation, was exempt under s.41(1) - the deliberative process exemption. I found that it would be contrary to the public interest to disclose this matter, as it came into existence at an early stage of the investigation and did not reflect the final outcome of the investigation, which resulted in no action being taken against the persons named.

Sport Drinks Australia Pty Ltd & Department of Tourism, Small Business and Industry (respondent) & Yensch (third party)

(S 178/96, 11 April 1997)

In this 'reverse FOI' case, applying the principles set out in *Re Cannon* and *Re "B"*, I rejected the applicant's claim that certain matter concerning the transfer of a hotel licence was exempt under s.45(1) and s.46(1). I noted that much of the matter had already been made public in the course of applications to, and orders made by, the Licensing Court. I noted that the applicant had failed to demonstrate a basis for finding that any of the matter in issue was exempt.

"NEU" & Princess Alexandra Hospital and District Health Service

(S 150/95, 15 May 1997)

This case involved the application of the principles set out in *Re "B"*, to parts of medical and related records concerning the applicant. I decided that information which had been supplied by third parties relating to the applicant was exempt under s.46(1)(a). I also decided that the names of, and personal information about, a number of people comprised exempt matter under s.44(1).

Turnbull & Princess Alexandra Hospital and District Health Service

(S 35/97, 23 May 1997)

Applying the principles discussed in *Re "B"*, I found that the matter in issue (information about the applicant supplied by third parties to health professionals) was exempt matter under s.46(1)(a), as disclosure would found actions for breach of confidence.

Thorsen & Department of Justice

(S 9/93, 6 June 1997)

This case involved a number of 'sufficiency of search' issues which I approached according to the principles set out in *Re Shepherd*. I determined that, following the location of additional documents in the course of my review, there were no reasonable grounds to believe that the respondent held further documents falling within the terms of the initial FOI access application. Applying the principles set out in *Re Smith and Administrative Services Department* (1993) 1 QAR 22, I also determined that a number of documents were exempt under s.43(1) - the legal professional privilege exemption.

Higgins & Department of Education

(S 165/96, 20 June 1997)

In this 'reverse FOI' case, I rejected a claim by the applicant that the respondent ought to have refused to deal with an access application for documents concerning the applicant's selection and appointment to a position with the respondent, on the grounds that it involved a substantial and unreasonable diversion of the resources of the respondent (s.28(2)). I indicated that the discretion conferred by s.28(2) was one for the relevant agency to exercise, not a third party. I saw no error in the respondent's assessment of the issues relevant to the application of s.28(2). By the time the application for review had been lodged, the respondent had already located, and made decisions in respect of, the documents sought by the access applicant. Since I must decide cases according to the material facts and circumstances which apply at the time I come to make my decision (see *Re Woodyatt and Minister for Corrective Services* (1995) 2 QAR 383 at p.398 and pp.405-406), it was no longer possible to say that dealing with the FOI access application would substantially and unreasonably divert the respondent's resources. I also decided that the documents in issue were not exempt matter under s.44(1) of the FOI Act.