



SIXTH ANNUAL REPORT

**OFFICE**

*of the*

**QUEENSLAND  
INFORMATION COMMISSIONER**

**1 JULY 1997 TO 30 JUNE 1998**

PRESENTED TO PARLIAMENT

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Queensland



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Your ref.  
Our ref.

30 October 1998

The Honourable R K Hollis MLA  
Speaker of the Legislative Assembly  
Parliament House  
George Street  
BRISBANE Q 4000

Dear Mr Speaker

I am pleased to present to you my 1997/98 Annual Report to State Parliament.

The report marks my Office's sixth year of operation. The year under review has indeed been one of achievement. There was a significant increase in work output with the finalisation of 270 external review applications during the year - the highest output in six years. More importantly, a major inroad was made into the large accumulated backlog of 277 cases which has been reduced to 217 cases - the lowest case backlog in the past five years.

I am hopeful that a continuation of the funding increase provided in 1998/99 should see the elimination of the accumulated case backlog over the next two financial years.

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 the 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 1997/98, the Office of the Information Commissioner achieved a significant increase in its output, with the finalisation of 270 external review applications, as compared to 246 in the previous reporting period (an increase of approximately 10%). This increased output was achieved with a small increase in professional staff (from the equivalent of 8, to 8.5, full-time staff over the course of the reporting period), 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 3 in Chapter 2 of this report).

**Table 1 - Applications for review under Part 5 of the FOI Act - 1997/98**

Pending at start of reporting period (1/7/97)	277
Opened during the reporting period	210
Completed during the reporting period	270
Pending at end of reporting period (30/6/98)	217

**Note 1:** a table showing the distribution of applications for review made in 1997/98, 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, appears at Appendix 2.

This outcome represents a decrease of 60 cases in the backlog of cases on hand, as between the beginning and end of the reporting period. This is the first major inroad made on the large backlog of cases accumulated in the first few years of operation of the Office of the Information Commissioner, when the office was grossly under-resourced to meet the unforeseen high level of demand for its services. It reflects a concerted effort by staff to finalise some of the long delayed cases involving large numbers of documents and complex issues, while still attempting to turn over new cases as quickly as possible. That concerted effort will continue (with the aid of continued temporary funding for the purpose) in the next two financial years, and (provided the numbers of new cases received remain relatively steady) should see the elimination of the accumulated backlog. The concerted effort to finalise older, more complex cases (which are not capable of resolution by negotiation/mediation) is reflected in the fact that 91 cases were resolved by formal decision in 1997/98, compared to 51 in 1996/97.

The Office of the Information Commissioner has accumulated substantial experience and expertise in the resolution of FOI disputes, having (in the 5½ years from when it commenced operations, up to 30 June 1998) dealt with a total of 1267 applications for review, and resolved 1050. 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 website has been established to provide free access, via the internet. The Information Commissioner's website address is <http://www.slq.qld.gov.au/infocomm> and our monitoring indicates that the website has been widely used since it 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 1997/98, 179 (or 66%) of the 270 applications finalised were resolved without the need for a formal decision.

**Table 2 - Outcome of external reviews completed during 1997/98**

No jurisdiction	31
Decision not to review/review further under s.77 of the FOI Act	1
Agency granted further time to deal with application	0
Resolved/Withdrawn following mediation	148
Decision issued - affirming decision under review	37
Decision issued - varying decision under review	34
Decision issued - setting aside decision under review; making decision in substitution	19
<b>TOTAL</b>	<b>270</b>

Of the 148 cases resolved or withdrawn following mediation, one involved a question of whether a fee or charge was payable by the applicant. Five 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 two of those cases. One hundred and thirty-two external review applications challenging agency decisions to refuse access to documents were resolved by informal

means, with 85 (or 64%) resulting in the applicant obtaining access to documents or matter previously withheld. The remaining ten 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. Six of those ten 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.

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 Chapter 3, I have commented on some matters of general interest or concern with respect to the operation of the FOI Act.

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## 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.

- 1.9 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)*. Formal decisions may also be accessed via the Information Commissioner's website (address: <http://www.slq.qld.gov.au/infocomm>) which is maintained with the generous assistance of the State Library of Queensland.
- 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. 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 1997/98 in respect of that program have been certified and will be published in the 24th Annual Report of the Parliamentary Commissioner. In 1997/98, \$667,776 was expended on salaries and related costs (e.g., payroll tax, superannuation contributions). It was possible to identify administrative expenses directly attributable to the running of the Office of the Information Commissioner amounting to \$59,611. Additional costs of accommodation and shared facilities are subsumed in the budget 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.

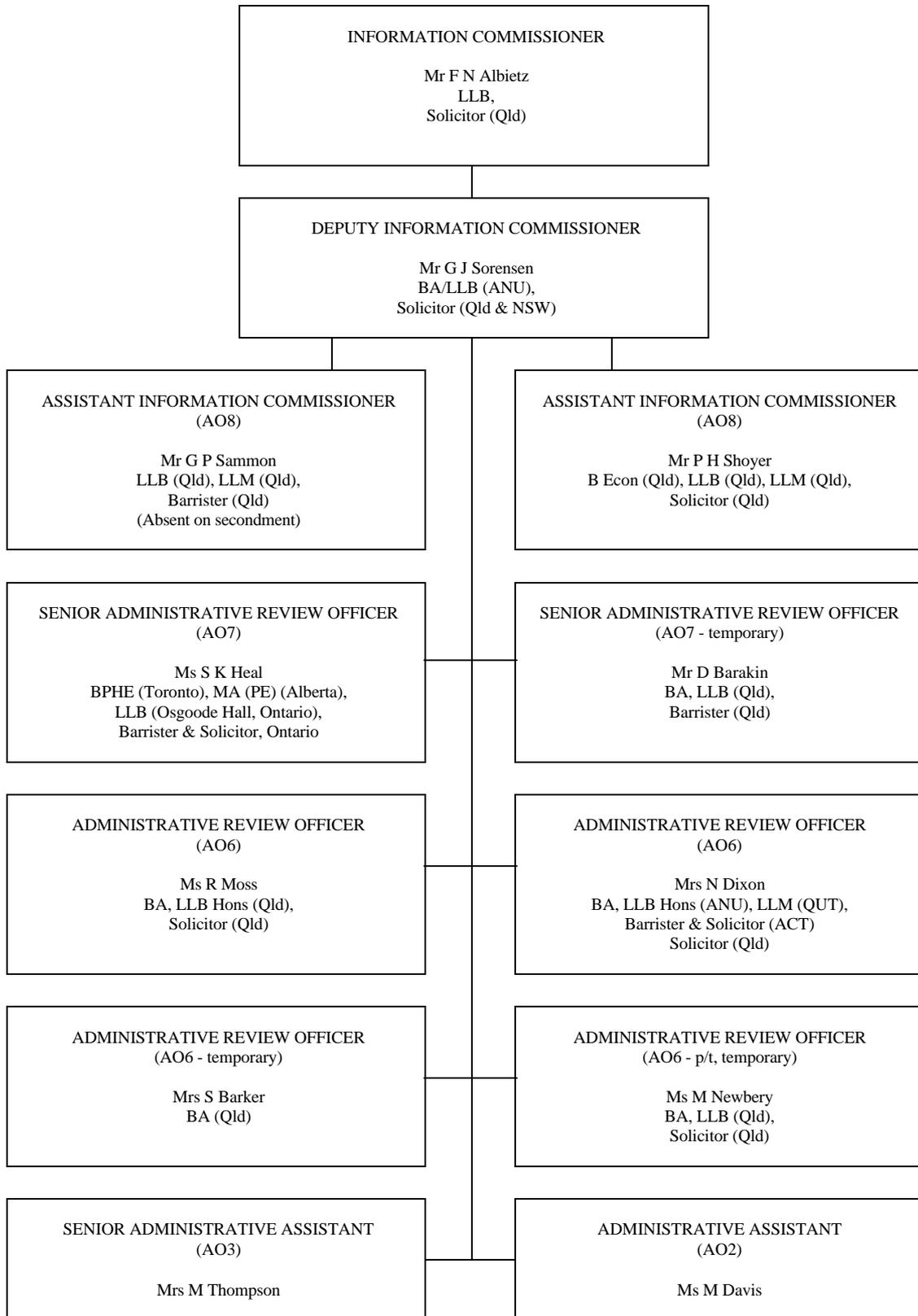
## **PART B : STRUCTURE & ORGANISATION**

- 1.15 The principal place of business of the Office of the Information Commissioner is Level 25, 288 Edward Street, Brisbane, 4000 (telephone (07) 3884 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 1998, and also identifies the staff member occupying each position.

# ORGANISATIONAL CHART

## OFFICE OF THE INFORMATION COMMISSIONER 30 JUNE 1998



## OVERVIEW OF OPERATIONS DURING THE REPORTING YEAR

2.1 In 1997/98, the Office of the Information Commissioner significantly increased its output, with the finalisation of 270 external review applications, as compared to 246 in the previous reporting period (an increase of 10%). This is the fifth straight year in which the office has significantly increased its outputs, and the second straight year in which it has managed to finalise more cases than it received during a year. More significantly, in 1997/98, the office finalised 60 more cases than it received, achieving the first major inroad on the large backlog of cases accumulated in its first three years of operation, when the office was grossly under-resourced to meet the unforeseen high level of demand for its services. Provided the numbers of new cases received remain relatively steady (as they have done, in the range of 210-230, over the past four years), a concerted effort by staff over the next two financial years (with the aid of continued temporary funding for the purpose) should see the elimination of the accumulated backlog by the end of that period. The office should then be in a position to achieve high standards of timeliness in service delivery (in all but the most complex cases) to match the high standards it has achieved in quality, and in keeping costs as low as possible for participants in cases. The history of performance of the office, in terms of numbers of applications dealt with, is set out in Table 3 below.

**Table 3 - 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
1/7/97 - 30/6/98	210	270	217	8.5
Total	1267	1050		

2.2 Unfortunately, while a significant backlog remains, there will continue to be a 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 the new management strategies I discussed in my 1996/97 Annual Report (at paragraph 2.2) were continued with considerable success. Nevertheless, 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 1993/94 Annual Report.

**Table 4 - Time for resolution of cases completed during 1997/98**

Under 1 month	35	12 - 18 months	20
1 - 3 months	35	18 - 24 months	16
3 - 6 months	47	24 - 30 months	12
6 - 9 months	25	30 - 36 months	13
9 - 12 months	23	over 36 months	44
<b>TOTAL</b>			<b>270</b>

- 2.3 In Chapter 2 of my 1993/94 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. As Table 5 shows, the "review and complaint resolution" branch in the Office of the Western Australian Information Commissioner has achieved excellent standards of timeliness in the resolution of cases, having received considerably fewer applications for review than my office has received.

**Table 5 - Formal appeals received and resolved by WA Information Commissioner**

Year	Formal appeals received	Formal appeals resolved
1993/94	61	26
1994/95	123	105
1995/96	168	206
1996/97	143	142
1997/98	130	134

The performance of my office in 1997/98 demonstrates that, absent the large backlog of cases referred to in paragraphs 2.1 - 2.2, my office is capable, with its present resourcing, of achieving comparable standards of timeliness to those achieved by the Western Australian Information Commissioner.

- 2.5 In Chapter 4 (pp.24-29) of my 1992/93 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 1997/98. The main emphasis of that approach is on negotiation with the participants to resolve as many issues in dispute as possible. When that process is exhausted, opportunities are given to the participants to lodge evidence and written submissions in support of their respective cases, preparatory to a formal determination. The procedures adopted are intended to keep the costs for participants (including government agencies) as low as possible.
- 2.6 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 1997/98 are set out in Appendix 3 to this report.
- 2.7 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 draft Code of Conduct for staff has been prepared in co-operation with the Office of the Parliamentary Commissioner, and circulated to all staff for consideration and comment. A working party will consider any staff proposals, and consultation with the staff union will follow. As the Code has not been finalised, requirements relating to access, inspection, *et cetera*, concerning the Code are not yet relevant.

## **GOALS & PERFORMANCE IN 1997/98**

- 2.8 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**

- 2.9 During 1997/98, I set my professional staff a goal of resolving 270 cases (which represented an increase of 10% on the figure of 246 cases resolved in 1996/97). This target took account of a productivity increase required under an enterprise bargaining agreement with staff, and I am pleased to say that the target was achieved, despite disruptions caused by staff turnover during the year, and the amount of time taken by new staff to become proficient in what is a highly specialised field. Unfortunately, late in the financial year, my office lost the services of a senior officer, with 5 years experience in the specialised work undertaken by the office, who had been discharging an important function in supervising and training junior staff. The impact of the loss of that officer's contribution to the outputs of a small office may be more marked in the succeeding financial year.
- 2.10 The proportion of cases closed in 1997/98 which were resolved within 12 months of lodgment (see Table 4 on p.12) was 61%, a slight decrease from 64% in 1996/97. This figure is less than ideal, and I would hope to be achieving a figure in the range of 80-90% when the backlog of complex cases requiring formal decisions has been eliminated (which, if this year's statistical trends hold steady, should occur over the course of the next two years). There was an increase in the average time for finalisation of cases completed during the reporting period, from 352 days (i.e., approximately 50 weeks) in 1996/97 to 478 days (i.e., approximately 68 weeks) in 1997/98. Again, this is indicative of the concerted effort made during the reporting period to resolve older cases, rather than of any added delay in finalising newer applications. I expect the performance on both of these measures of timeliness to be similar in the next reporting period, with a significant improvement becoming evident in following years.

### **Performance against Goal 2**

- 2.11 The proportion of total cases assessed for investigation and review during 1997/98 in which informal dispute resolution methods were undertaken was, again, high at 94% (the figure was 91% in 1996/97). A total of 179 cases were resolved informally compared to 91 cases resolved by formal written determination, making a proportion of 66% resolved by informal methods. This represents a decrease on the 1996/97 figure of 79%. This is a consequence of the concerted effort to finalise older cases which had proved incapable of resolution by negotiation/mediation (sometimes because of the complexity of the issues, and sometimes because of the refusal of a participant to accept my recommendations). The number of cases resolved by formal decision increased from 51 in 1996/97 to 91 in 1997/98 (an increase of 80%). 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**

- 2.12 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 1997/98. 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.
- 2.13 The number of cases resolved by formal decision in 1997/98 was 91 (compared to 51 in 1996/97). During the reporting period, one application was made to the Supreme Court challenging a decision made by me under the FOI Act. That case has not yet been resolved.

## GENERAL OBSERVATIONS ON THE FOI PROCESS IN QUEENSLAND

In each of my last four Annual Reports, I have sought to draw the attention of the Legislative Assembly to problems I have perceived in the operation of the FOI Act. In several instances, I have recommended amendments to the FOI Act to enhance the effectiveness of the Act's operation, and the furthering of the Act's professed objects. No changes have yet occurred to the FOI Act in response to those recommendations. Nevertheless, in a triumph of optimism over experience, I have decided to briefly address some old and new issues in this Chapter.

### Need to wind back overly broad exemption provisions

In previous annual reports, I have raised concerns about a number of amendments made to the FOI Act which I see as marking a significant retreat from the principles of openness, accountability and responsibility which the FOI Act was intended to enshrine. Those changes involved-

- amendments to the FOI Act in November 1993 and March 1995 which radically expanded the scope of the Cabinet/Executive Council exemption provisions;
- the inclusion of provisions (s.11A and s.11B of the FOI Act) which exclude the application of the FOI Act to documents relating to the commercial activities of government owned corporations (GOCs) and local government owned corporations (LGOCs); and
- the inclusion of provisions which exclude the application of the FOI Act to bodies holding aggregate student data.

With respect to the amendments to the Cabinet/Executive Council exemption provisions (s.36 and s.37 of the FOI Act), I have expressed in previous annual reports the view that those amendments exceed the bounds of what is necessary to protect traditional concepts of collective ministerial responsibility (and its corresponding need for Cabinet secrecy) to such an extent that they are antithetical to the achievement of the professed objects of the FOI Act, i.e., to promote openness, accountability, and informed public participation in the processes of government.

One of the concerns I have previously raised is that s.36 and s.37 in their present form 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 previously been published. The centrepiece of the FOI Act, the conferral by s.21 of a legally enforceable right of access to documents of agencies and official documents of Ministers (subject only to limited exceptions designed to protect the private and business affairs of members of the community, and *essential* public interests: see s.5(2) of the FOI Act) has been reduced, in practical terms, to a right of access subject to Ministerial veto. In my 1995/96 Annual Report, I noted that the prospect of public scrutiny deters officials from impropriety and encourages the best possible performance of their functions. If that prospect can, in effect, be evaded (as it can be under s.36 and s.37) and the disclosure of embarrassing or damaging information prevented, one of the chief objects of the FOI Act - accountability of government - is defeated.

I note that, prior to the June 1998 general election, the Hon Peter Beattie MLA introduced into Parliament a private member's Bill (the *Freedom of Information Amendment Bill 1998*) which sought to amend s.36 and s.37 of the FOI Act in two main respects:

- (a) by amending the definitions of "Cabinet matter" and "Executive Council matter" to specifically exclude Ministerial expenses matter; and
- (b) by providing that s.36(1) and s.37(1) would not apply where action taken to bring matter within the terms of a s.36(1) or s.37(1) exemption provision was taken predominantly for the purpose of making it exempt matter.

I welcome the spirit and intention of the Bill in attempting to counter the potential for abuse of s.36 and s.37 of the FOI Act, as presently enacted. However, I consider that the application of the Bill's provisions with respect to (b) above would have given rise to considerable practical difficulties, and would not have redressed all the problems to which I have previously adverted. The Bill lapsed on the dissolution of Parliament in May 1998, but I will briefly record my views, so that the Parliament might take them into account in the event that it is asked to consider similar provisions in any future Bill put before the Parliament.

The Bill would have required the relevant FOI decision-maker (whether that be an agency decision-maker, or the Information Commissioner upon an application for external review) to decide the "predominant purpose" for which matter in issue was submitted to Cabinet or Executive Council (or for which action was taken that otherwise brought matter within the terms of the s.36(1) or s.37(1) exemption provisions). The decision-maker would have been required, in effect, to judge whether matter was submitted for a legitimate purpose, or whether it was submitted predominantly for the purpose of avoiding disclosure under the FOI Act.

The application of such a test would, in my view, be productive of substantial practical and evidentiary difficulties. An applicant for access will rarely be in a position to shed any light on the purpose for submission of a document to Cabinet or Executive Council. The best evidence as to the purpose for submission to Cabinet or Executive Council would ordinarily come from the Minister who submitted the document or his/her senior officials/advisers. Such evidence is unlikely to ever directly support a finding that action has been taken for the predominant purpose of avoiding disclosure of a document under the FOI Act. Therefore, in most, if not all, cases, any decision favouring disclosure by virtue of cl.36(2)(c) or cl.37(2)(c) of the *Freedom of Information Amendment Bill 1998* would have to be based on inferences drawn from whatever material could be discovered in investigations by the decision-maker. Given the inherent difficulties in divining a colourable, improper purpose from actions that can relatively easily be clothed with the appearance of legitimacy (it seems that documents are commonly submitted to Cabinet merely for information purposes: I am unable to assess whether this is a practice that has escalated since the advent of the FOI Act), and given the relatively limited investigative powers of agency decision-makers and my office, the provisions would seem to me to be destined to provoke considerable investigative effort for little result (*cf.* the cases referred to in paragraphs 3.8-3.9 of my 1996/97 Annual Report).

Moreover, it is a relatively easy thing for an access applicant to allege an improper purpose, and put the onus on decision-makers to investigate it and disprove it. I question whether the additional resources which would need to be expended by this office, by agencies and by Ministers and their senior officials/advisers, in investigating or answering such allegations, would be justified given the inherent difficulties of the nature of the inquiry.

While I commend the intentions behind the Bill, I consider that the correct conceptual approach to reducing or eliminating the potential for abuse of s.36 and s.37 of the FOI Act (in their present form) lies in re-thinking the appropriate boundaries, and degree, of secrecy that is genuinely essential for the proper functioning of the Cabinet/Executive Council process, having regard to the nature of our representative democracy (see paragraphs 3.8 - 3.9 of my 1995/96 Annual Report and paragraphs 3.1

- 3.4 of my 1996/97 Annual Report), the objects of the FOI Act, and the fact that control for the time being of the powers of executive government is conferred in trust to be exercised for the benefit of the citizenry (see paragraphs 3.10 - 3.12 of my 1995/96 Annual Report). If the scope of permissible Cabinet/Executive Council secrecy is confined within proper (and, in my view, much tighter) bounds, any need to examine motives for bringing documents within those bounds is significantly diminished. For reasons that I hope were adequately explained in chapter 3 of my 1994/95 Annual Report, I consider that the correct balance would be achieved simply by amending the FOI Act to return s.36 to its original form (as first enacted in 1992), and preferably by repealing s.37, or else returning s.37 to its original form (as first enacted in 1992).

### **Privacy and freedom of information**

The Legislative Assembly's Legal, Constitutional and Administrative Review Committee tabled its Report No.9, *Privacy in Queensland*, in Parliament on 9 April 1998. In it, the Committee concluded that Queensland's current privacy laws are inadequate and recommended that measures be introduced to ensure that individuals' privacy is better protected. The Committee recommended that a set of information privacy principles based on those contained in the *Privacy Act 1988* Cth be implemented to apply to personal information held by Queensland government departments and agencies, and that a new officer of the Parliament, the Queensland Privacy Commissioner, be established.

The Report was preceded by an Issues Paper released by the Committee in May 1997 to engender public discussion and debate. The Committee invited submissions on the various issues outlined in the paper. I took the opportunity to lodge a brief submission in which I made some observations on the relationship between the FOI Act and any proposed privacy legislation, drawing attention to the unavoidable overlap between the two and stressing that the practical problems of bringing them into harmony should not be underestimated.

There would be an area of overlap between the FOI Act (in particular s.44 and Part 4 of the FOI Act) and any Queensland privacy statute that is broadly modelled on the *Privacy Act 1988* Cth. It would not be possible to completely eliminate that overlap by a measure such as removing all rights of access to, or amendment of, personal information (concerning a particular applicant) from the FOI Act into a proposed privacy statute. If the FOI Act were to be confined to requests for government information, rather than personal information of the particular applicant (assuming that could be practicably achieved, which I doubt) many requests for government information will encompass personal information concerning persons other than the applicant for access, and privacy considerations would have to be taken into account in deciding whether access should be given to that information under the FOI Act. Moreover, on the reverse side of the coin, if a regime for access to personal information were contained in a new privacy statute, it would still need exemption provisions similar to those in the FOI Act. Many applicants for personal information under the FOI Act are refused access where the information is exempt under provisions such as s.36, s.37, s.38, s.40, s.41, s.42, s.45 and s.46.

There will always be a fundamental tension between privacy laws and freedom of information laws. Governments are in the business of policing and regulating the activities of individuals and corporations, providing services and benefits to individuals and corporations, and collecting taxes and charges from individuals and corporations to fund government operations. The FOI Act seeks to enhance greater public scrutiny of, and greater accountability for, the performance by government of its functions, which will inevitably encompass the performance of those functions in respect of particular individuals. In many instances, the objects of the FOI Act can be achieved without intruding into the privacy of individuals, but, in other instances, achievement of the objects of the FOI Act may justifiably be considered to warrant some intrusion into the privacy of individuals. The way the balance is presently struck under s.44(1) of the FOI Act means that the privacy interest in respect of information concerning an individual's "personal affairs" (a term which, I note, is not as broad in scope as the term "personal information" used in the *Privacy Act 1988* Cth) must prevail,

unless there exist identifiable public interest considerations favouring disclosure of the particular information in issue which are of such weight as to warrant a finding that disclosure of the information would, on balance, be in the public interest.

I consider it important that a roughly similar balance be preserved, and that privacy legislation should be so framed that it does not unduly inhibit public scrutiny of the performance of government functions.

One key issue, for example, is whether the FOI Act and the proposed privacy statute should be harmonised around the central concept of privacy protection attaching to "information concerning a person's personal affairs" or to "personal information". As interpreted by a Full Court of the Federal Court of Australia in *Re Colakovski and Australian Telecommunications Corporation* (1991) 100 ALR 111 and by the New South Wales Court of Appeal in *Commissioner of Police v District Court of New South Wales and Perrin* (1993) 31 NSWLR 606 (both of which I have endorsed and followed in Queensland), the term "information concerning a person's personal affairs" is not as broad in scope as the term "personal information". I have interpreted the former term to mean information about the private aspects of a person's life, and it has been established that the term does not extend to information which merely concerns the performance by a government employee of his or her employment duties (see *Re Pope and Queensland Health* (1994) 1 QAR 616 at pp.658-660). This approach harmonises with the object of promoting greater scrutiny and accountability, in respect of the performance of government functions. In jurisdictions like the Commonwealth of Australia and Western Australia, which have in recent years based their privacy exemption in FOI legislation on the phrase "personal information", special provision has had to be made in respect of information concerning the performance by a public sector employee of his or her duties of employment.

In my submission to the Committee, I stressed the need to ensure that the relevant provisions of the FOI Act and any privacy legislation are brought into harmony so far as practicable (so as to avoid achieving inconsistent results when applying each statute to essentially identical information). I considered that it was impossible, in a written submission to the Committee, to anticipate and address all of the possible difficulties in that respect, and I therefore respectfully suggested that the Committee recommend that I and my senior staff be consulted in the drafting of any new privacy legislation and any consequential amendments to the FOI Act, and that we be given opportunities for consultation and comment upon any draft Bills that are produced. I am pleased to note that the Committee adopted my suggestion in Recommendation 10 of its Report. I would welcome the opportunity to assist the drafters of any proposed new Privacy Bill based on the Committee's recommendations, and any consequential amendments to the FOI Act.

### **Need for powers of entry and search**

In my first Annual Report (1992/93) at paragraph 4.9 - 4.11, I recommended that (in order to permit the more efficient and effective discharge of my functions in 'sufficiency of search' cases) the Information Commissioner be conferred with powers equivalent to those conferred on the Parliamentary Commissioner by s.20 of the *Parliamentary Commissioner Act 1974* Qld, i.e., the power to enter any premises occupied or used by an agency subject to the FOI Act, and power to inspect those premises or anything for the time being therein. I cautioned that it would constitute a significant shortcoming in the FOI Act, capable of manipulation or exploitation by an unprincipled agency official, if an agency could escape thorough scrutiny merely by maintaining a claim that documents, to which access has been requested, do not exist. I could see no objection in principle to a government 'watchdog' agency being given intrusive powers with respect to other government agencies for the purposes of ensuring that those other government agencies are not permitted to frustrate the rights conferred on citizens by the FOI Act. However, no action has been taken to amend the FOI Act to confer powers of entry and search on the Information Commissioner, similar to those conferred on the Parliamentary Commissioner.

I dealt with a case during 1997/98 in which the applicant asserted that a local authority had not identified and dealt with all documents in its possession or control which fell within the terms of his FOI access application. I received two written assurances from officers of the local authority that it had in fact done so. Subsequently, in court proceedings involving the applicant and the local authority, the local authority tendered additional documents which clearly fell within the terms of the applicant's FOI access application. I am presently investigating whether officers of the Council deliberately breached the duties imposed by the FOI Act, with a view to assessing whether I should recommend disciplinary action in accordance with s.96 of the FOI Act. However, I consider that this case reinforces the need to confer powers of entry and search on the Information Commissioner, so that I can deal more efficiently and effectively with the substantial number of 'sufficiency of search' cases I receive each year, rather than relying on questioning of, and assurances received from, agency officials.

### **Contracting out of government services**

Although it has not yet become a significant issue in cases that have worked their way through to external review under Part 5 of the FOI Act, a subject that is generating considerable interest and concern in other FOI jurisdictions is that of how FOI legislation should accommodate the escalating trend of governments seeking to 'contract out' the performance/delivery of government services.

The issue is thoroughly canvassed in two publications by the Commonwealth Administrative Review Council ("The Contracting Out of Government Services", Issues Paper, February 1997, and "The Contracting Out of Government Services - Access to Information", Discussion Paper, December 1997) and in the Second Report by the Senate Finance and Public Administration References Committee on its inquiry into the contracting out of government services, presented on 14 May 1998. Both the Administrative Review Council and the Senate Committee have endorsed the view that accountability, through rights of access to information relating to the performance of government services, should not be lost or diminished because of the contracting out process. They favour an amendment to the *Freedom of Information Act 1982* Cth deeming documents in the possession of the contractor, that relate directly to the performance of the contractor's contractual obligations, to be in the possession of the government agency, and therefore accessible under the FOI Act by application to the government agency, subject to the current exemption provisions. The success of this approach would be dependent on all such contracts imposing obligations on the contractors to create appropriate records and to provide them to the government agency, with periodic auditing of the contractor's adherence to its record-keeping obligations.

It appears that any amendments to the Queensland FOI Act to meet this problem must be co-ordinated with corresponding adjustments to the standard conditions of contract employed by all agencies subject to the Queensland FOI Act which contract out, or may in future contract out, the performance/delivery of some government services. This appears to be an issue which requires early attention to the development of appropriate solutions.

## APPENDIX 1

### Applications for external review received in 1997/98, by category (as per s.71 of the FOI Act)

<b>STATEMENT OF AFFAIRS (PART 2)</b>	
<input type="checkbox"/> Refusal to publish, or to ensure compliance with Part 2	0
<input type="checkbox"/> Deemed refusal	0
<b>ACCESS TO DOCUMENTS (PART 3)</b>	
<input type="checkbox"/> Refusal to grant access	101
<input type="checkbox"/> Deletion of exempt matter	17
<input type="checkbox"/> Combination - refusal to grant access/deletion of exempt matter	18
<input type="checkbox"/> Deemed refusal to grant access	19
<input type="checkbox"/> Deferred access	0
<input type="checkbox"/> Charges	2
<input type="checkbox"/> Combination - refusal to grant access/charges	1
<input type="checkbox"/> Third party consulted; objects to disclosure	22
<input type="checkbox"/> Third party not consulted; objects to disclosure	0
<b>AMENDMENT OF RECORDS (PART 4)</b>	
<input type="checkbox"/> Refusal to amend	3
<input type="checkbox"/> Deemed refusal to amend	0
<b>ISSUANCE OF CONCLUSIVE CERTIFICATE</b>	
<input type="checkbox"/> Cabinet matter	0
<input type="checkbox"/> Executive Council matter	0
<input type="checkbox"/> Law enforcement/Public safety matter	0
<b>MISCELLANEOUS</b>	
<input type="checkbox"/> No jurisdiction or misconceived application	27
<b>TOTAL</b>	<b>210</b>

## APPENDIX 2

### Applications for external review received in 1997/98, by respondent agency

<u>Departments</u>	<u>No.</u>	<u>Other agencies</u>	<u>No.</u>
Police	20	Qld Corrective Services Commission	10
Education	19	Criminal Justice Commission	5
Families, Youth and Community Care	7	Building Services Authority	4
Health	7	Anti-Discrimination Commission	2
Mines and Energy	6	Griffith University	2
Primary Industries	6	James Cook University	2
Public Works and Housing	6	Qld Corrections	2
Environment	5	Qld Law Society	2
Justice	4	Queensland Rail	2
Local Government and Planning	4	Queensland University of Technology	2
Natural Resources	4	WorkCover Queensland	2
Treasury	3	Barristers Board	1
Emergency Services	2	Canegrowers	1
Transport	2	Crowley Vale Water Board	1
Economic Development and Trade	1	Legal Aid Office (Qld)	1
Premier and Cabinet	1	Qld Abattoir Corporation	1
Training and Industrial Relations	1	Qld Fisheries Management Authority	1
		Qld Livestock & Meat Authority	1
		Suncorp Insurance	1
		Surveyors Board of Qld	1
		University of Qld	1
		Veterinary Surgeons Board of Qld	1
<u>Health agencies</u>		<u>Local authorities</u>	
Medical Board of Queensland	12	Gold Coast City Council	9
District Health Services		Laidley Shire Council	5
—Gold Coast	5	Redland Shire Council	5
—Prince Charles Hospital	2	Maryborough City Council	4
—Royal Brisbane Hospital	2	Ipswich City Council	2
—Cairns	1	Rockhampton City Council	2
—Charleville	1	Brisbane City Council	1
—Logan-Beaudesert	1	Burnett Shire Council	1
—Princess Alexandra Hospital	1	Caboolture Shire Council	1
—Redcliffe-Caboolture	1	Emerald Shire Council	1
Health Rights Commission	3	Jondaryan Shire Council	1
Psychologists Board of Queensland	1	Mt Morgan Shire Council	1
Queensland Nursing Council	1	Pine Rivers Shire Council	1
		Townsville City Council	1

## APPENDIX 3

### Notes on significant issues dealt with in formal decisions published by the Information Commissioner in 1997/98

#### **Re McCann and Queensland Police Service**

(Decision No. 97010, 10 July 1997, unreported)

*Re McCann* was one of a group of four key test cases published between March and August 1997 which explored the application of exemption provisions in the FOI Act to documents created in the course of law enforcement/disciplinary investigations, the other cases being:

- *Re Prisoners' Legal Service Inc and Queensland Corrective Services Commission* (Information Commissioner Qld, Decision No. 97004, 27 March 1997, unreported) - for a summary, see my fifth Annual Report (1996/1997) at pp.32-33;
- *Re Godwin and Queensland Police Service* (Information Commissioner Qld, Decision No. 97011, 11 July 1997, unreported) - for summary, see below;
- *Re Griffith and Queensland Police Service* (Information Commissioner Qld, Decision No. 97013, 15 August 1997, unreported) - for summary, see below.

The applicant in *Re McCann* was a serving police officer who sought access to documents concerning an investigation by the Queensland Police Service (the QPS) of the applicant's conduct, when the applicant was Officer in Charge of a rural police station. Following the investigation, the applicant had been charged with assault, and with a firearms offence, and the charges had been dealt with in the Magistrates Court. During the course of the external review, the QPS agreed to disclose documents related to those charges. The documents remaining in issue concerned other complaints against the applicant, which were investigated but did not result in the laying of charges. Information had been obtained by the police investigator from other serving police officers, from civilian administrative staff employed by the QPS, and from members of the public.

The significance of the case lies in its analysis of the circumstances in which those various classes of witnesses might be properly found to have given information to police investigators pursuant to an implicit mutual understanding that their identities, and/or the information they provided, was to be treated in confidence, and in its analysis of the nature and operation of any necessary qualifications or exceptions to such an understanding. The case includes analysis of the different considerations pertaining to informers, as opposed to mere witnesses, and police officer witnesses (who can be compelled to answer questions by an investigator) as opposed to civilian witnesses.

At paragraph 58 of my reasons for decision, I observed that there would ordinarily be implicitly authorised exceptions to any express or implicit mutual understanding that the identity of, or the information given by, a witness had been communicated in confidence, namely:

- (a) where selective disclosure is considered necessary for the more effective conduct of relevant investigations;
- (b) where the investigation results in the laying of charges, which are defended, and in accordance with the applicable rules or practice, the prosecutor must disclose to the person charged the evidence relied upon to support the charges;
- (c) where selective disclosure is considered necessary:

- (i) for keeping a complainant, especially a victim of crime, informed of the progress of the investigation; and
- (ii) (in cases where the investigation results in no formal action being taken) for giving an account of the investigation, and the reasons for its outcome, to a complainant, especially a victim of crime.

In relation to the third element of the test for exemption under s.46(1)(b), i.e., prejudice to the future supply of like information to the QPS, I noted that there were difficulties in establishing that element, where the sources of information are police officers or civilian employees of the QPS, who are legally obliged to provide information to their employer about a breach of discipline by a police officer. However, I also discussed the circumstances in which the identities of, or information provided by, witnesses who are police officers or civilian employees of the QPS, might qualify for exemption from disclosure under s.40(c) of the FOI Act (on the basis that disclosure could reasonably be expected to have a substantial adverse effect on the management or assessment by the QPS of its personnel).

I also assessed the application of s.40(c), s.41(1) and s.42(1)(e) of the FOI Act to the conclusions and recommendations in the investigating officer's reports on his investigations of the complaints against the applicant.

#### **Re Godwin and Queensland Police Service**

(Decision No. 97011, 11 July 1997, unreported)

The document in issue was a statement given to a QPS officer by a witness to an altercation between the applicant and another person, which ended in significant physical injury to the applicant. The applicant complained to the QPS, after which the witness in question and another witness (who consented to disclosure of his statement to the applicant under the FOI Act, subject to minor deletions) were interviewed. The QPS subsequently decided to take no action against any person in relation to the incident. The QPS contended that the statement in issue was wholly exempt under s.44(1) and s.46(1) of the FOI Act.

In my reasons for decision, I discussed difficulties in the application of s.46(1)(a) of the FOI Act (which turns on whether disclosure would found an action for breach of confidence) to information provided for the purposes of law enforcement investigations, referring to Australian and English cases which show a marked reluctance to restrain disclosure to, and use by, law enforcement agencies of such information. I said that a court would be unlikely to find an enforceable equitable obligation of confidence unless there was evidence of express assurances of confidential treatment, or evidence of compelling circumstances which warranted such a finding, e.g., that disclosure would pose a substantial threat to the safety or livelihood of the supplier of the information. On the evidence before me, I found that the QPS was not bound by an equitable obligation of confidence such that disclosure of the document in issue could found an action for breach of confidence.

With respect to the s.46(1)(b) exemption, I found that there had been no express assurance that either the identity of the witness, or the information supplied by him, would be treated in confidence as against the applicant. I found that the witness' identity, and the information he provided to police, were liable to be disclosed to the applicant in the course of the police investigation (if the police saw fit to do so), and were liable to be disclosed to the applicant on either possible outcome of the investigation (i.e., whether police decided to lay charges against the alleged offender, or to take no formal action in respect of the applicant's complaint). In those circumstances, I was not satisfied that the scope of any implicit mutual understanding of confidence between the QPS and the witness could have been properly understood as extending to confidential treatment of the witness' statement and identity, as against the

applicant. Moreover, given that the statement was exculpatory of the alleged offender, and there was no other indication that the witness was likely to face any recriminations for having made the statement, I also found that disclosure of the statement could not reasonably be expected to prejudice the future supply of like information to the QPS. I therefore found that the statement was not exempt from disclosure to the applicant under s.46(1)(b).

With regard to s.44(1), I found that disclosure of information which would identify the witness would disclose information concerning his personal affairs, i.e., that he had co-operated with the QPS in providing a statement. However, I found that, given the particular circumstances of the case, it was in the public interest that the applicant be made aware of the witness' identity. In addition, I found that the signature, and personal details of, the witness were exempt matter under s.44(1), but that the occupation of the witness was not information concerning his personal affairs. I found that the balance of the statement contained information that concerned the shared personal affairs of the applicant and one or more of the witness, the alleged offender, and the person whose statement had already been disclosed. I found that there was a public interest in the balance of the statement being made available to the applicant, which was recognised in s.6 of the FOI Act. I also discussed the public interest in the accountability of the QPS to a complainant (and especially a victim of crime) in respect of the investigation of his or her complaint. I determined that disclosure to the applicant was, on balance, in the public interest.

**Re a Member of the Legislative Assembly (applicant) and Queensland Corrective Services Commission (respondent); a Prisoner (third party)**

(Decision No. 97012, 25 July 1997, unreported)

In this 'reverse FOI' application, I rejected a claim by the MLA that the FOI Act did not apply to a letter in the hands of the respondent, which the MLA had written to the respondent, passing on concerns raised by members of the public about a prisoner. I decided that s.11(1)(b) of the FOI Act does not exclude a document from the application of the FOI Act merely because it was created by, or refers to, an MLA; rather, the letter in the hands of the respondent was a "document of an agency" and subject to the application of the FOI Act.

The letter did not identify the members of the public who had complained to the MLA. Applying the principles discussed in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, I determined that the letter was not exempt under s.46(1)(b) of the FOI Act. I found that there was no evidence to support an express or implied mutual understanding that the letter would be treated in confidence. Nor could it reasonably be expected that disclosure of the particular letter would prejudice the future supply of like information. I also discussed the application of s.42(1)(f) of the FOI Act, indicating that, even if a relevant method or procedure for protecting public safety could be identified, disclosure of the letter in question could not reasonably be expected to prejudice its maintenance.

**Re Griffith (applicant) and Queensland Police Service (respondent); Thorpe (third party)**

(Decision No. 97013, 15 August 1997, unreported)

I applied the principles discussed in *Re Stewart* in finding that information concerning allegations of wrongdoing by a police officer while on duty was not information concerning the officer's personal affairs. I stated that where a disciplinary proceeding relates to conduct which occurred while an officer was on duty, and in the performance of his or her duties of employment, information relating to the incident and subsequent disciplinary proceedings cannot ordinarily be said to concern the personal affairs of the officer.

I found that the bulk of the matter in issue was merely administrative in nature relating to the disciplinary process, and that the substance of the allegations and outcome had already been made known to the applicant through official sources. The matter in issue did not identify the complainant or any confidential source of information. I rejected claims that the matter in issue was exempt under s.40(c), s.41(1), s.42(1)(b), s.42(1)(e) or s.46(1)(b) of the FOI Act.

### **Re Orr and Bond University**

(Decision No. 97014, 8 October 1997, unreported)

I determined that Bond University was not a "public authority" within the terms of s.9 of the FOI Act, and hence that it was not subject to the application of the FOI Act. I decided that it was neither "*established ... by an enactment*", nor "*established by government*", and so did not fall within either limb of s.9(1)(a) of the FOI Act. I found that Bond University was the name under which a private company (Bond University Limited) operated, and that even if Bond University could be said to be distinct from the company (which I did not believe to be the position), Bond University must have been created by the company and not by an enactment or by government. I rejected a claim that Bond University was established by the *Bond University Act 1987 Qld*, indicating that that Act did no more than confer additional powers and restrictions on the pre-existing company.

### **Re Jesser and University of Southern Queensland**

(Decision No. 97015, 8 October 1997, unreported)

This case involved seven applications for amendment of information (contained in two documents) under Part 4 of the FOI Act. I discussed and applied the principles set out in *Re Doelle and Legal Aid Office (Queensland)* (1993) 1 QAR 207. I held that the mere presence of information relating to an applicant's personal affairs in a document was not sufficient to allow the applicant to apply for amendment of other information in the document which did not relate to the applicant's personal affairs. I rejected the claim of the applicant that the whole of both documents comprised information relating to her personal affairs. I also indicated that the form of any amendment was a matter for me to determine, taking into account the purpose for which the document was created or held by the respondent, and the views of both the applicant and the respondent.

Considering each application individually, I found that two of the seven applications sought amendment of information which did not relate to the applicant's personal affairs. I found that the subject matter of five applications for amendment (comprising information concerning the circumstances, and substance, of a complaint by the applicant of discrimination in the handling of her application for a job with the respondent) did relate to her personal affairs. I decided that the information sought to be amended in three of those applications was inaccurate and in one other application, misleading. I decided that three notations should be added to one document, and that the other document should be altered in one respect.

### **Re Price and Director of Public Prosecutions**

(Decision No. 97016, 24 October 1997, unreported)

This case involved consideration of the application of s.43(1) of the FOI Act (the legal professional privilege exemption), as well as the principles outlined in *Re Shepherd and Department of Housing, Local Government & Planning* (1994) 1 QAR 464 in respect of 'sufficiency of search' issue. In respect of the application of s.43(1), I addressed the applicant's contention that the documents in issue were the subject of an exception to legal professional privilege, because they had been brought into existence for the furtherance of an illegal purpose. I was not satisfied of the existence of a *prima facie* case that any

of the documents in issue had been brought into existence for an illegal or improper purpose. I found that they were subject to legal professional privilege, and exempt under s.43(1) of the FOI Act.

In respect of the 'sufficiency of search' issue, I took into account the searches conducted by the respondent, and found that no further documents, falling within the terms of the applicant's FOI access application, existed in the possession or control of the respondent.

I further considered some procedural matters relating to the conduct of reviews under Part 5 of the FOI Act. I discussed my authority to convey preliminary views to participants on the issues for determination in a review, and the basis on which I did so. I explained that the terms of the FOI Act imposed no obligation on an agency to produce, for the benefit of an access applicant, a schedule of documents to which access had been granted. However, I indicated that, in the circumstances of a particular case, I may consider it appropriate to direct an agency to prepare such a schedule, where that would be of assistance in the conduct of a review under Part 5 of the FOI Act.

**Re Price and Surveyors Board of Queensland**  
(Decision No. 97017, 24 October 1997, unreported)

The issues for determination in this review were:

- (1) whether the respondent was entitled to refuse the applicant's request that he be given access to the respondent's offices, with his own photocopier, to personally photocopy documents to which he had been granted access; and
- (2) whether charges were payable by the applicant for the provision to him of photocopies of the documents to which the applicant had been granted access.

Issue (1): Requested form of access

I found that requiring an agency to provide an applicant for access with a requested document, so that the applicant could make a photocopy of the document using his or her own photocopier, was not a form of access contemplated or provided for by the FOI Act, and therefore was not a form of access which the applicant was entitled to require of the respondent. I considered that the use of the word "providing" in the phrase "providing a copy of the document", in s.30(1)(b) of the FOI Act, was consistent only with the relevant agency making a copy of a document in its possession, and providing that copy to the applicant for access.

Issue (2): Imposition of charges

I held that s.7 of the *Freedom of Information Regulation 1992 Qld* (the FOI Regulation) requires an assessment of whether a document to which access has been requested contains some information which can be properly characterised as information concerning the personal affairs of the applicant for access. If so, it will be a document that concerns the applicant's personal affairs, and no charge will be payable for access to the document, by virtue of s.7(2) of the FOI Regulation. If not, it will be a document that does not concern the applicant's personal affairs, and the applicant must pay any charge that is prescribed for obtaining access to the document (see s.7(1) of the FOI Regulation).

I determined that the applicant was not required to pay a photocopying charge for one of the pages remaining in issue as it formed part of a document which contained at least some matter which concerned the applicant's personal affairs. I determined that the balance of the documents remaining in issue did not contain any information which would be properly characterised as information concerning the applicant's personal affairs, and hence access charges were payable.

### **Re Curtin and Pine Rivers Shire Council**

(Decision No. 97018, 18 December 1997, unreported)

This case illustrates the distinction between an individual's "personal affairs" and "business affairs". I found that names and motor vehicle registration numbers of licensed itinerant food vendors, appearing in a Council register, did not comprise information concerning the personal affairs of those licensees, for the purposes of the s.44(1) exemption in the FOI Act.

I also found that the matter in issue was not exempt under s.42(1)(g) of the FOI Act as I was not satisfied that there was any reasonable basis for expecting that disclosure of the matter in issue could endanger the security of a vehicle. In addition, I was not satisfied that the matter in issue had a "commercial value" to any third parties so as to attract the application of s.45(1)(b) of the FOI Act, nor that disclosure of the matter in issue could reasonably be expected to have an adverse effect on the business affairs of the licensees, or to prejudice the future supply of like information to government, as required by s.45(1)(c) of the FOI Act.

Moreover, I observed that it was difficult to see how it could serve the purposes of having a regulatory scheme (like the one in question) for the benefit and protection of the public, if basic information as to who was, and who was not, licensed to provide services to the public, under that regulatory scheme, were not available to any interested member of the public.

### **Re Burke and Department of Families, Youth and Community Care**

(Decision No. 97019, 19 December 1997, unreported)

The applicant for access was a journalist with the ABC who sought access to matter held by the Department of Families, Youth and Community Care (the Department) in relation to the Cairns Anglican Youth Shelter and any other material in relation to Gordon Virgo King, a former Anglican Minister and Director of the shelter. The matter in issue concerned allegations of misconduct against Mr King. The Department decided to give access to the matter, but to defer access until after the trial of a number of charges against Mr King. At paragraph 7 of my reasons for decision, I explained that the FOI Act conferred no legal authority to defer access on that basis. By the time the charges had been heard, and Mr King had been acquitted, Mr King had been joined as a third party participant in the external review, and he objected to disclosure of the matter which the Department was prepared to disclose.

Mr King claimed that the matter was exempt under s.45(1)(c) of the FOI Act, on the basis that the matter concerned his business or professional affairs under s.45(1)(c) of the FOI Act. I decided that the matter in issue did not concern his business affairs. I also decided that divinity/theology would not be covered by the meaning of the phrase "professional affairs" in the context of s.45(1)(c) of the FOI Act. Moreover, since Mr King had been removed from his former profession by the Anglican Church, he no longer had any 'professional affairs' which were capable of being adversely affected.

I found that most of the matter in issue was properly to be characterised as information concerning Mr King's personal affairs, for the purposes of s.44(1) of the FOI Act, since the matter concerned allegations of wrongdoing on the part of Mr King, and/or concerned his alleged sexual conduct. However, I decided that the public interest in accountability of the Department, for its supervision of the expenditure of public funds for child welfare/child protection, outweighed the *prima facie* exempt status of the matter in issue, and its disclosure would, on balance, be in the public interest.

## **Re Allanson and Queensland Tourist and Travel Corporation**

(Decision No. 97020, 30 December 1997, unreported)

The applicant made two extremely broad-ranging access applications to the Queensland Tourist and Travel Corporation (the QTTC). One access application sought access to 50 separate categories of documents, and the other to 29 separate categories of documents. The QTTC did not process either access application, and the applicant applied to me seeking external review, on the basis of a deemed refusal of access (see s.79(1) of the FOI Act). The QTTC submitted that I did not have jurisdiction to deal with the application for external review, because the applicant's FOI access applications were invalid, the applicant having failed to pay a required \$30 application fee at the time each access application was made.

I held that the QTTC's objection to jurisdiction was invalid, in circumstances where the QTTC had not complied with the obligations imposed on it by s.27(2)(c) and s.27(5) of the FOI Act to decide whether a \$30 application fee was payable in respect of each FOI access application, and, if so, to notify the applicant in writing of its decision. In such circumstances, the applicant must still have the right to invoke the jurisdiction of the Information Commissioner under s.79 of the FOI Act, in order to ensure that her FOI access applications were properly processed. I summarised the practical effect of my decision at paragraphs 18 and 19 as follows:

18. *In practical terms, this means that if an applicant applies to an agency for access under the FOI Act to a document that does not concern the applicant's personal affairs, but omits to pay the \$30 application fee required by s.6 of the FOI Regulation at the time the access application is made, the access application is not a mere nullity (as contended in the respondent's submission). The access application will still be one that an agency is obliged to deal with, at least to the extent of discharging the obligations imposed by s.27(2)(c) and s.27(5) of the FOI Act (and perhaps other obligations such as those imposed by s.25(4) or s.28(4) of the FOI Act). And the access application will still constitute "an application [that] has been made to an agency under [the FOI] Act", within the terms of s.79(1)(a) of the FOI Act, for the benefit of an applicant who wishes to invoke s.79(1).*
19. *If, however, the agency gives the applicant written notice, in accordance with s.27(2)(c) and s.27(5) of the FOI Act, of its decision that a \$30 application fee is payable in respect of the access application, the applicant will not be entitled to have the agency process the access application or to obtain access to the requested documents, until the applicant pays the \$30 application fee, or successfully challenges the agency's decision that a \$30 application fee was payable. In the meantime, time would cease to run for the purposes of the application of s.79 of the FOI Act, because the applicant has received notice of a decision on the application, i.e., that the applicant is not entitled to have the agency process the access application, or to obtain access to the requested document(s), until the \$30 application fee required under s.6(1) of the FOI Regulation is paid. In my view, time would commence to run again, for the purposes of the application of s.79 of the FOI Act, from the date when the \$30 application fee is subsequently paid, or from the date on which the decision to require payment of a \$30 application fee is overturned by a decision on a review under s.52, or under Part 5 of the FOI Act.*

The QTTC also submitted that it was entitled to refuse to deal with the applications under s.28(2) of the FOI Act, on the basis that the work involved in dealing with the application would, if carried out, substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions. The QTTC provided a statutory declaration describing the resources

available to the QTTC in processing the access applications, and an estimate of the amount of work required to process the access applications. Taking this into account, together with the statutorily prescribed functions of the QTTC, and the enormous breadth of the access applications, I decided that the QTTC should refuse to deal with the access applications pursuant to s.28(2) of the FOI Act.

**Re L R & L E Bouilly (applicants) and Department of Natural Resources (respondent); Stevenson Finance Corporation & Anor (third parties)**

**Re Stevenson Finance Corporation & Anor (Applicants) and Department of Natural Resources (Respondent); L R & L E Bouilly (Third parties)**

(Decision No. 98001, 3 March 1998, unreported)

These matters arose out of an FOI access application made by Mr and Mrs Bouilly (the applicants) who sought access to documents concerning the licensing process, under the *Water Resources Act 1989* Qld, in respect of the proposed construction by Stevenson Finance Corporation Pty Ltd and H I D Stevenson (Stevenson) of an extremely large dam on Stevenson's property near Dirranbandi.

Stevenson claimed that some of the documents the Department proposed for release were reasonably open to public access, and argued that s.22 of the FOI Act should be applied to refuse access under the FOI Act. At paragraphs 24-26 of my reasons for decision, I found that it was not open to a 'reverse FOI' applicant to raise issues concerning the application of s.22(a) or s.22(b) of the FOI Act.

Stevenson claimed the matter in issue to be exempt under s.41(1) of the FOI Act. I found that some of the matter in issue was "deliberative process matter" within the terms of s.41(1)(a) of the FOI Act, but that most of the matter in issue was excluded from eligibility under s.41(1) because it merely consisted of factual or statistical matter (see s.41(2)(b) of the FOI Act) or expert opinion or analysis (see s.41(2)(c) of the FOI Act). Moreover, I found that the public interest favoured disclosure of the matter in issue in the interests of enhancing the accountability of government agencies and officials for the discharge of their functions in dealing with a large scale development proposal likely to have substantial social, economic and environmental effects on the surrounding district.

Hazard Assessment Reports on the dam proposal, prepared by consulting engineers for Stevenson, were claimed to be exempt under s.45(1)(b). At paragraphs 53-55, I found that, because of their site-specific nature, the reports did not have "commercial value" for the purposes of s.45(1)(b), in either of the senses explained in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at p. 513.

Stevenson also claimed a large number of documents to be exempt under s.45(1)(c), including correspondence between Stevenson and the Department concerning information required by the Department for assessment of the dam licence application, and the Hazard Assessment Reports themselves. I found that most of that matter could not be properly characterised as information concerning Stevenson's business, commercial or financial affairs, since most of it concerned safety issues and the possible consequences of the proposed dam for surrounding property owners. I noted in that regard that Supreme Court decisions in other states had held that it was not sufficient that the matter in issue has some connection with a business, or has been provided to an agency by a business, or will be used by a business in the course of undertaking its business operations: the matter in issue must itself be information about business, commercial or financial affairs, in order to satisfy the first element of the test for exemption under s.45(1)(c)(i). I also found that s.45(1)(c)(ii) was not satisfied, in that no competitive harm could be occasioned by disclosure of safety information concerning a site-specific proposal. Nor would disclosure prejudice the future supply of information which an applicant for a statutory licence was obliged to supply to obtain the licence.

The Hazard Assessment Reports were also claimed to be exempt under s.45(3) of the FOI Act. I doubted whether the reports comprised research of a kind that s.45(3) was intended to protect, but in any case, I was satisfied that disclosure could not be expected to have an adverse effect on Stevenson. I also rejected a claim for exemption under s.46(1)(b) in respect of documents which were not confidential in nature, having previously been tendered as exhibits in the Land Court.

**Re Queensland Community Newspapers Pty Ltd (applicants) and Redland Shire Council (respondent); Civic Projects (Raby Bay) Pty Ltd & Ors (third parties)**  
(Decision No. 98002, 25 March 1998, unreported)

The matter in issue in this case consisted of reports by a firm of geotechnical consultants which had been commissioned by the respondent to investigate and report on revetment (canal wall) stability problems being experienced at the Raby Bay Canal Estate in the Redland Shire. The third parties were involved in the development or construction of the Estate. The reports were claimed by the Council and the third parties to be exempt from disclosure to the applicant (the proprietor of the *Redland Times* newspaper) under s.45(1)(c) of the FOI Act, and also under s.41(1) and s.42(1)(d). I decided that the reports did not qualify for exemption under any of those provisions.

With respect to s.45(1)(c), I applied the principles explained in *Re Cannon* in deciding that only some segments of the reports concerned the third parties' business, professional, commercial or financial affairs and could, if disclosed, be reasonably expected to have an adverse effect on those affairs. In any event, I decided that the public interest considerations favouring disclosure of the contents of the reports (to enable interested members of the public to gain an understanding of the technical aspects of the problems experienced at Raby Bay, what has been done to overcome them, and the recommendations for future management of the problems, including an estimate of the rectification costs involved) were of such substantial weight as to overwhelm those considerations said to tell against disclosure.

With respect to s.41(1), I applied the principles established in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 in deciding that virtually all of the reports comprised matter excluded from eligibility for exemption under s.41(1), because it merely consisted of factual or statistical matter (see s.41(2)(b) of the FOI Act) or expert opinion or analysis (see s.41(2)(c) of the FOI Act). I stated that even if I were satisfied that all of the contents of the reports fell within s.41(1)(a), and that none was excluded by s.41(2), it would be my finding that disclosure of the reports would not, on balance, be contrary to the public interest.

With respect to s.42(1)(d), I found that there was no reasonable basis for an expectation that disclosure of the reports could prejudice the impartial adjudication of legal actions which a number of residents of the Estate had commenced against the respondent, and one of the third parties, in the Supreme Court of Queensland.

**Re "KT" and Brisbane North Regional Health Authority**  
(Decision No. 98003, 26 March 1998, unreported)

The applicant sought access to identifying information concerning an individual who had provided foster care for the applicant's birth child prior to the child's placement for adoption. Applying the principles in *Re Stewart and Department of Transport* and *Re "B" and Brisbane North Regional Health Authority*, I held that the matter in issue concerned the personal affairs of the individual who had provided foster care, but did not concern the personal affairs of the access applicant, and thus was *prima facie* exempt under s.44(1) of the FOI Act, subject to the application of the public interest balancing test in s.44(1). I held that the matter in issue was exempt under s.44(1), on the basis that the public interest considerations favouring disclosure of the matter in issue were not strong enough

to outweigh the public interest (inherent in the satisfaction of the test for *prima facie* exemption under s.44(1) of the FOI Act) in safeguarding the privacy of information concerning the personal affairs of the person whose name was in issue.

I also decided that the matter in issue was exempt under s.48(1) of the FOI Act, on the basis that its disclosure would contravene s.144(3) of the *Children's Services Act 1965* (one of the prescribed secrecy provisions listed in Schedule 1 to the FOI Act), and that there was no compelling reason in the public interest which required disclosure.

**Re Holt and Reeves (applicants) and Education Queensland (respondent); McNaught & Ors (third parties)**

(Decision No. 98004, 20 April 1998, unreported)

The matter in issue in this case comprised audiotapes, and written notes, of a meeting between a school principal and parents concerning teacher behaviour at the school. There were two issues for my consideration:

- whether the audiotapes were "documents of an agency" as defined in s.7 of the FOI Act, and hence subject to the application of the FOI Act; and
- whether the tapes and notes comprised exempt matter under s.46(1) of the FOI Act.

In relation to the first issue, I discussed the evidence before me relating to ownership of the tapes and the circumstances in which, and the purpose for which, they passed into the possession of the respondent. I also considered the meaning of the word "possession" as it appears in the definition of "document of an agency" in s.7 of the FOI Act. I decided that it was clear that the tapes were in the physical possession of the respondent, and that they were received by the principal in the performance of his duties as principal of the school. I found that regardless of who owned the tapes, they were presently "documents of an agency" within the meaning of that term as defined in s.7 of the FOI Act, and that they were subject to the application of the FOI Act for so long as they remained in the possession of the respondent.

In relation to the second issue, I applied the principles in *Re "B" and Brisbane North Regional Health Authority* in deciding that the matter in issue satisfied all of the criteria necessary to found an action in equity for breach of confidence. I found that it was exempt matter under s.46(1)(a) of the FOI Act.

At paragraphs 49-53 of my reasons for decision, I made some observations as to how the new s.15(1) and s.16(2) of the *Public Service Regulation 1997* Qld might affect the application of s.46(1)(a) of the FOI Act to documents recording complaints against, or documents created in the course of a grievance or disciplinary procedure against, an employee of an agency which is subject to the application of the *Public Service Regulation 1997*. I expressed the view that it is arguable that it is now impossible for an agency subject to the application of the *Public Service Regulation 1997* to receive information about an employee's performance, that could reasonably be considered to be detrimental to the employee's interests, on the basis of any agreement or understanding that it would be treated in confidence as against the employee.

**Re Hewitt and Queensland Law Society Inc**

**Re Queensland Law Society Inc (applicant) and Legal Ombudsman (respondent); Sir Lenox Hewitt (third party)**

(Decision No. 98005, 24 June 1998, unreported)

These cases arose out of three applications made by the applicant to obtain access to documents concerning the handling by the Queensland Law Society Inc (the QLS) of formal complaints of

unprofessional conduct made to it by the applicant against a solicitor who had acted on the applicant's behalf in a number of matters. Three main issues concerning the application of s.43(1) of the FOI Act arose for my determination:

- (a) whether disclosure by the QLS to the applicant of a summary of a legal opinion obtained by the QLS, and which the QLS said it had "adopted" in resolving to take no formal action in respect of the applicant's complaint, gave rise to an imputed waiver of the legal professional privilege that would otherwise attach to that legal opinion;
- (b) whether certain opinions and recommendations expressed in five memoranda prepared by a salaried legal officer of the QLS, were communications for the purpose of providing legal advice or assistance on a professional matter referable to the relationship of a lawyer and client, or communications made merely in the capacity of an employee; and
- (c) to the extent that those communications fell into the first category described in (b), whether the communications satisfied the 'sole purpose' test to attract legal professional privilege.

With respect to (a), I decided, after an analysis of relevant authorities, that the principles of imputed waiver of privilege could apply in the context of extra-curial disputes, by reference to some act or omission of the privilege holder which, though falling short of intentional waiver, is inconsistent with maintenance of the privilege, and by reference to what ordinary notions of fairness require having regard to all of the relevant circumstances attending the extra-curial dispute.

Having regard to the responsibilities of the QLS in discharging its functions as a regulatory authority in dealing with complaints against solicitors, I decided that the conduct of the QLS in purporting to "adopt" a privileged legal opinion (while disclosing only a summary of its conclusions) as the basis for its decision that Sir Lenox Hewitt's complaint did not disclose a case of unprofessional conduct against his former solicitor, should not in fairness be allowed to make the QLS's adopted reasons for decision effectively unexaminable. I decided that it would be unfair not to impute a waiver of the privilege otherwise attaching to the legal opinion in issue.

Turning to the five memoranda prepared by the salaried legal officer of the QLS, I found that there was some matter in the memoranda that was not properly referable to a professional relationship of solicitor and client as between the legal officer and the QLS, but rather was provided by her in her administrative capacity as an employee.

While I found that some of the information contained in three of the memoranda did consist of legal opinion or advice, I decided that none of those memoranda was brought into existence for the sole purpose of providing legal advice or professional legal assistance. Each memorandum, considered as a whole document, was brought into existence for at least one non-privileged purpose. In reaching this conclusion, I found myself constrained to follow the majority view in *Waterford v Commonwealth* (1987) 163 CLR 54 which requires a consideration of the purpose(s) for the creation of a document as a whole, rather than any severable part of a document. Consequently, neither the segments of legal advice, nor any other matter contained in the memoranda, attracted legal professional privilege.

I further found that none of the matter in issue contained in the five memoranda qualified for exemption under s.41(1) of the FOI Act. Some of it merely consisted of factual matter which was not eligible for exemption under s.41(1) by virtue of s.41(2)(b). The balance of the matter in issue in the five memoranda was "deliberative process" matter within the terms of s.41(1)(a) of the FOI Act. However, I found that disclosure of that matter would not be contrary to the public interest in the efficient and effective performance of the QLS's regulatory functions, and hence that it did not qualify for exemption under s.41(1) of the FOI Act. I also dismissed claims by the QLS that the

matter in issue in the five memoranda qualified for exemption under s.40(a), s.42(1)(a), s.42(1)(e) or s.42(1)(h) of the FOI Act.

The QLS lodged an application for judicial review which was confined to that part of my decision which dealt with the issue of imputed waiver of privilege. The judicial review application was heard in the Supreme Court on 15 October 1998 by Williams J, who reserved his judgment.

**Re Vynque Pty Ltd (applicant) and Department of Primary Industries (respondent); Mario Urzi Sand & Gravel (third party)**

(Decision No. 98006, 24 June 1998, unreported)

The matter in issue in this case consisted of information relating to the terms of sale set by the respondent for the extraction by the third party (a commercial operator) of sand and gravel from the Fitzroy River. The applicant wished to obtain access to figures showing the total amounts of material permitted by the respondent to be extracted, the minimum amounts of material required by the respondent to be extracted annually, and the actual amounts extracted by the third party.

Both the respondent and the third party claimed that the matter in issue was exempt from disclosure under s.45(1)(c) of the FOI Act. Applying the principles in *Re Cannon and Australian Quality Egg Farms Limited*, I decided that the second requirement for exemption under s.45(1)(c) was not satisfied - that disclosure of the matter in issue could not reasonably be expected to have an adverse effect on the business, commercial or financial affairs of either the respondent or the third party, and that it therefore was not exempt from disclosure under the FOI Act. Although it strictly was not necessary for me to do so, given that finding, I went on to discuss the public interest balancing test contained in s.45(1)(c). I decided that even if I had found that the matter in issue satisfied the second requirement for exemption under s.45(1)(c), the public interest considerations favouring disclosure (i.e., to enable monitoring of the Department's management of a public resource) would, in my opinion, have warranted a finding that disclosure of the matter in issue would, on balance, be in the public interest.

**Re Hobden and Ipswich City Council**

(Decision No. 98007; 25 June 1998; unreported)

The documents in issue in this case related to an incident in which the applicant, then aged 16, was injured when he fell from his bicycle while riding on a footpath. The documents in issue included communications between the Council and its insurer, and between a Councillor and the Council officer responsible for dealing with public liability insurance claims, together with copies of letters from the applicant's mother to the Council, and a report and draft statement by a Council officer.

The Council claimed that the documents in issue were exempt under s.41(1) or s.43(1) of the FOI Act. In support of its claim for exemption under s.41(1), the Council argued that the public interest of the ratepayers of Ipswich in ensuring that the Council avoided loss in a matter of litigation outweighed the interests of the applicant. I commented that the Council's submission was misconceived. While the Council has an obligation to its ratepayers to ensure that public monies are not wasted, that does not mean that the public interest necessarily favours withholding of relevant information from a person who potentially has a legal entitlement to compensation from the Council. In such circumstances, the relevant duty of the Council would be more correctly described as a duty to ensure that a claimant receives no more than the claimant's proper entitlement (if any) to compensation under the applicable law. The greater public interest lies in ensuring that individuals receive fair treatment in accordance with the law in their dealings with government. Having regard also to the principles stated in *Re Willsford and Brisbane City Council* (1996) 3 QAR 368 at p.373, I

decided that disclosure of certain of the documents in issue would not be contrary to the public interest, and hence that those documents did not qualify for exemption under s.41(1) of the FOI Act.

With respect to the claims for exemption under s.43(1), I was not satisfied that any of the documents in issue had been brought into existence for the sole purpose of seeking or giving legal advice or professional legal assistance, or for the sole purpose of use, or obtaining material for use, in pending or anticipated legal proceedings. The Council argued that copies of documents on a particular file had been created or collated for the sole purpose of defending possible litigation. That argument may have been intended to invoke reliance on one of the principles established by the High Court decision in *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501; 71 ALJR 327, i.e., that legal professional privilege may attach to a copy document, the original of which does not itself attract legal professional privilege, provided the copy was brought into existence solely for the purpose of obtaining or giving legal advice, or solely for use in litigation that is pending or reasonably anticipated. I observed that there is limited utility for an agency in invoking exemption on that ground, since the agency would be obliged to grant access to the non-privileged originals (and any other non-privileged copies of them) provided they were (a) in the possession or control of the agency, (b) covered by the terms of the relevant FOI access application, and (c) not exempt from disclosure on other grounds. However, it is possible that an agency may wish to avoid disclosing the contents of a file (or perhaps attachments to a brief to counsel) comprising copies of non-privileged documents that have been copied solely for a privileged purpose, because to do so would disclose its process of selection of material considered relevant for the purpose of submission to legal advisers. In such circumstances, the agency can avail itself of the principle established in the *Propend Finance* case, and I expect that most reasonable applicants would not even wish to challenge a claim for exemption made on that basis, provided the applicant was assured that access had been granted to all non-privileged originals, and non-privileged copies thereof, covered by the terms of the relevant FOI access application.

**Re "KBN" and Department of Families, Youth and Community Care**  
(Decision No. 98008, 30 June 1998, unreported)

The applicant sought access to portions of adoption records held by the respondent agency which contained identifying information concerning the individual identified by the applicant's birth mother as being the applicant's natural father.

Applying the principles in *Re Stewart and Department of Transport* and *Re "B" and Brisbane North Regional Health Authority*, I held that the matter in issue concerned the 'shared personal affairs' of the access applicant and the individual named as being her 'putative father', and thus was *prima facie* exempt under s.44(1) of the FOI Act, subject to the application of the public interest balancing test in s.44(1).

I held that the matter in issue was exempt under s.44(1), on the basis that the public interest considerations favouring disclosure of the matter in issue were not strong enough to outweigh the public interest (inherent in the satisfaction of the test for *prima facie* exemption under s.44(1) of the FOI Act) in safeguarding the privacy of information concerning the personal affairs of a person other than the access applicant.

## APPENDIX 4

### Summaries of Decisions Issued by Means of Letters to Participants in 1997/98

#### **Henderson and Department of Education**

(S 121/96; 22 July 1997)

This was a 'reverse FOI' application by Mrs Henderson, who objected to the disclosure to the access applicant of documents relating to her employment with the Department. I rejected the applicant's contention that the documents in issue were exempt under s.43(1) of the FOI Act, because it was clear from my examination of them that all of the documents in issue were sourced from Mrs Henderson's personnel file and had been created in the course of the Department carrying out its routine administrative functions. None of the documents in issue was brought into existence for the purpose of obtaining professional legal advice, or for use in anticipated or pending litigation. I also rejected the applicant's contention that the documents in issue were exempt under s.50(a) of the FOI Act (contempt of court), having regard to a pending Supreme Court action involving the applicant and the respondent. I was not satisfied that disclosure of the documents in issue would tend to interfere with the fair trial of the pending action.

#### **Bakharia and Department of Education**

(S 109/96; 25 July 1997)

This was a 'reverse FOI' application by Mr Bakharia, who objected to the disclosure to the access applicant of documents relating to his employment with the Department. The case concerned the application of s.44(1) of the FOI Act to the documents in issue, which included documents sourced from the applicant's personnel file. I found that some information contained in seven of the folios in issue, which concerned Mr Bakharia's net salary and deductions, was exempt matter under s.44(1) of the FOI Act. However, I found that the Department was correct in holding that the balance of the matter in issue did not qualify for exemption under s.44(1) of the FOI Act (principally on the basis that it merely concerned the performance by a public servant of his employment duties).

#### **Breslin and Department of Justice and Attorney-General; Qld Police Service (Third Party)**

(S 93/95; 1 August 1997)

In this case, I applied the principles explained in *Re McEniery and Medical Board of Queensland* (1994) 1 QAR 349 in finding exempt, under s.42(1)(b) of the FOI Act, the identity of a person who had provided information for the purposes of a police investigation, pursuant to an express mutual understanding that his identity would not be disclosed to the applicant for access.

#### **Smith (Mr B A) and Queensland Corrective Services Commission**

(S 24/93, 8 August 1997)

In this case, I applied the principles explained in *Re Stewart and Department of Transport* (1993) 1 QAR 227 in finding that information concerning the probation details of another individual was exempt from disclosure to the applicant under s.44(1) of the FOI Act. In response to a 'sufficiency of search' issue raised by the applicant, I applied the principles stated in *Re Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464 at pp.469-470 (paragraphs 18-19) in finding that there were no additional documents in the possession or control of the agency that fell within the scope of the applicant's FOI access application, and that the respondent had made reasonable and well directed search efforts to locate all documents falling within the scope of that FOI access application.

### **York and Queensland Police Service**

(S 79/95, 15 August 1997)

The matter in issue concerned complaints made against the applicant by a third party, most of which had already been disclosed to the applicant by police officers in the course of their investigation of the complaints. Although objection to disclosure was taken by the third party, I could find no basis for exempting information the substance of which had already been put to the applicant during the course of the police investigation. I found some matter which had not previously been disclosed to the applicant, and some matter which solely concerned the personal affairs of the third party, to be exempt under s.44(1) of the FOI Act. I also found that certain documents claimed to be exempt actually fell outside the terms of the applicant's FOI access application.

### **Croll and Department of Justice**

(S 98/96, 25 August 1997)

I found that the matter remaining in issue, being documents created for the sole purpose of use in the prosecution of a criminal charge laid against the applicant, was exempt matter under s.43(1) of the FOI Act. The applicant argued that legal professional privilege did not apply because the documents were brought into existence for the purpose of guiding or helping in the commission of a crime or fraud, or for the furtherance of an illegal purpose, or for the purpose of frustrating the process of the law itself. I found that there was no *prima facie* evidence that the particular documents in issue had been created in furtherance of an illegal or improper purpose.

### **"RFD" and Queensland Police Service**

(S 107/96, 1 September 1997)

The applicants sought access to information concerning allegations of child abuse involving their daughter (including the identities of the notifier, and the alleged abuser) that were investigated by police, but not substantiated. The QPS agreed to disclose information indicating that neither parent was alleged to be the abuser. Applying *Re McEniery*, I decided that matter in issue which would identify the notifier was exempt matter under s.42(1)(b) of the FOI Act. Applying *Re Stewart*, I decided that the balance of the matter in issue was exempt matter under s.44(1) of the FOI Act. In response to a 'sufficiency of search' issue raised by the applicants, I found that there were no reasonable grounds for believing that any additional documents of the type sought by the applicant, existed in the possession or control of the QPS.

### **"FGD" and Queensland Police Service**

(S 57/97, 3 September 1997)

The applicant sought access to documents concerning the police investigation into the death of her son, apparently by self-inflicted gunshot wound. After concessions by some persons interviewed by police investigators, the only matter remaining in issue comprised two statements provided to police by a woman with whom the deceased had had a relationship prior to his death. I found that the matter in issue concerned the personal affairs of persons other than the applicant, and that its disclosure would not advance the public interest in the accountability of the QPS for its investigation. I decided that the matter in issue was exempt matter under s.44(1) of the FOI Act.

### **Smith (Mr B A) and Queensland Corrective Services Commission**

(S 200/93, 5 September 1997)

In this case, I found that information concerning the probation details of a person other than the applicant was exempt matter under s.44(1) of the FOI Act. I also found that certain matter contained in the documents in issue was exempt under s.46(1)(a) of the FOI Act on the basis that it had been communicated in confidence by a third person to the QCSC in circumstances which fixed the QCSC

with an equitable obligation of conscience not to use the information in a way not authorised by the confider.

Certain other matter, which had been recorded in case notes by QCSC officers, was found to be subjective opinion and advice recorded for deliberative processes pertaining to the management and supervision of persons subject to probation orders and, therefore, 'deliberative process matter' within the terms of s.41(1)(a) of the FOI Act. I held that where disclosure of such candid assessments to the subject of assessment would be likely to prejudice or compromise a case officer's ability to effectively manage and supervise the subject of the assessment, there would exist a sufficient basis (subject to the relative weight of any competing public interest considerations which favoured disclosure) to support a finding that disclosure of such an assessment would be contrary to the public interest, in terms of s.41(1)(b) of the FOI Act. I found that to be the case with respect to the matter in question, and that the public interest telling against disclosure outweighed competing public interest considerations (e.g., enabling scrutiny of the methods used in, and the effectiveness of, the QCSC's management and supervision of persons subject to probation orders). I found the matter in question to be exempt under s.41(1) of the FOI Act.

**"F & K" and Queensland Police Service**  
(S 90/96, 5 September 1997)

The applicants sought access to documents concerning the police investigation into the death (apparently by suicide) of their sister/sister-in-law. The matter in issue consisted of a "suicide note" addressed by the deceased to her husband, and a statement given to police by the husband. The applicants made it clear that they considered the police investigation (which concluded that the death was suicide) to be deficient. I considered that disclosure of the matter in issue would constitute a significant invasion of privacy, and found that the matter in issue was exempt under s.44(1) of the FOI Act. In considering the application of the public interest balancing test, I recognised that there was a public interest in the QPS being accountable for the conduct of a sufficiently thorough investigation. I found that, given the extent of the information to which the applicants had already been given access, the public interest in the accountability of the QPS for its investigations would not be advanced by the disclosure of the matter in issue.

**Hendy and Mackay City Council**  
(L 15/97, 15 September 1997)

The applicants sought access to information held by the respondent which would identify the person(s) (whom I will refer to as the "third party") who had trapped the applicant's cat and delivered it to the respondent. The respondent subsequently destroyed the cat. Applying the principles stated in *Re Stewart*, I decided that the third party's actions in obtaining the trap from the respondent and trapping the cat, were the third party's personal affairs. I therefore found that the matter in issue was *prima facie* exempt under s.44(1) of the FOI Act. I was not satisfied that disclosure of the matter in issue would, on balance, be in the public interest, and I therefore found it to be exempt matter under s.44(1) of the FOI Act.

**Israel and Department of Education**  
(S 82/97, 15 September 1997)

The applicant raised a 'sufficiency of search' issue which I dealt with according to the principles stated in *Re Shepherd*. One further document was located during the course of the review. Following the location of that document, I found that there were no reasonable grounds to believe that the Department had possession or control of any further documents falling within the terms of Mr Israel's FOI access application, nor, in particular, any document of the kind referred to in Mr Israel's application for review.

### **Smith (Mr C R) and Queensland Police Service**

(S 162/96, 15 September 1997)

In this case, I applied the principles stated in *Re Godwin and Queensland Police Service* (Information Commissioner Qld, Decision No. 97011, 11 July 1997, unreported) in finding that information that would identify members of the public who had provided information to the QPS which was adverse to the applicant, comprised exempt matter under s.44(1) of the FOI Act.

### **Lockhart and Toowoomba City Council**

(L 8/97, 18 September 1997)

After some concessions by the Council, the matter remaining in issue related to complaints made to the Council by a third party about Mr Lockhart's property, and to a dispute between the third party and the Council. Applying the principles set out in *Re McEniery*, I found that the matter relating to the complaints was exempt under s.42(1)(b). I found that there was a common implicit understanding that the identity of the third party would be treated in confidence and that, despite a conviction on Mr Lockhart's part that he knew the identity of the third party, the confidentiality of the third party's identity as a source of information had not been lost or abandoned. I determined that the information communicated related to the enforcement or administration of the law (the Council's enforcement of building and town planning laws, and by-laws regarding environmental matters), and that disclosure of the matter in issue could reasonably be expected to identify the source.

I found that the matter relating to the dispute between the third party and the Council was exempt under s.44(1) as it concerned the personal affairs of persons other than Mr Lockhart, and the public interest considerations favouring disclosure were not sufficient to outweigh the public interest considerations favouring non-disclosure.

### **Jesser and University of Southern Queensland**

(S 77/94, 23 September 1997)

The applicant raised 'sufficiency of search' issues which I dealt with according to the principles stated in *Re Shepherd*. I found that there were reasonable grounds to believe that a number of the requested documents did exist, or had at one time existed, as documents of the agency. However, following inquiries undertaken at the University by a member of my staff, and extensive searches undertaken by the University at my direction, all of which proved fruitless, I was satisfied that the University had undertaken all searches and inquiries that could reasonably be required of it in an effort to locate the relevant documents.

### **Campbell and Intellectually Disabled Citizens Council of Queensland**

(S 49/96, 8 October 1997)

The applicant sought access to documents held by the Council concerning her adult daughter. Applying the principles stated in *Re Stewart, Re McEniery and Re "B"*, I found that the matter remaining in issue was exempt matter under s.44(1) or s.42(1)(b) or s.46(1)(b) of the FOI Act, with the exception of a small amount of matter on one page which I found was not exempt under any of those provisions. I recognised the public interest in the accountability of the Council to the public for its services to its "clients". However, in the circumstances of this case, I did not consider that disclosure of the matter in issue would advance that public interest in any substantive way.

### **Slynko and Department of Education**

(S 43/97, 8 October 1997)

I considered two issues: first, whether the documents sought would, if they existed, fall within the terms of the relevant FOI access application; and, second, whether the Department had failed to

locate and deal with all documents falling within the terms of that access application. In respect of the first issue, I referred to my discussion of the interpretation of the terms of an FOI access application in *Re Cannon* at paragraphs 8-16, and found that many documents requested by the applicant during the review did not, on a fair reading of his FOI access application, fall within its scope. As to the 'sufficiency of search' issue, in accordance with the principles set out in *Re Shepherd*, I found that, following the location of three further documents (pursuant to an agreed amendment to the access application), there were no reasonable grounds to believe that the Department had possession or control of any further documents falling within the terms of the relevant FOI access application.

### **Bogdanoff and Sunshine Coast Regional Health Authority**

(S 96/93, 27 October 1997)

This case involved the application of the principles stated in *Re "B" and Brisbane North Regional Health Authority*(1994) 1 QAR 279 to information about the applicant communicated to health professionals by a third party, and to information that would identify the third party. I decided that both the details of the information supplied, and the identity of the third party, were exempt matter under s.46(1)(a) of the FOI Act.

### **Price and Department of Mines and Energy**

(S 33/97, 27 October 1997)

I dealt with 'sufficiency of search' issues raised by the applicant in accordance with the principles stated in *Re Shepherd*. I also applied the principles stated in *Re McEniery* in finding that matter in issue which would identify the sources who provided information that prompted action to suspend the applicant's shotfirer's licence, was exempt matter under s.42(1)(b) of the FOI Act.

### **Stewart (Mr R K) and Queensland Police Service**

(S 132/94, 27 October 1997)

The matter in issue related to the investigation of complaints made to the QPS and the CJC. I advised Mr Stewart that some of the matter had no relevance to him as it related to completely separate police administrative and investigative matters. Mr Stewart did not pursue access to that matter. Applying the principles stated in *Re Stewart, Re Byrne and Gold Coast City Council* (1994) 1 QAR 477 and *Re Godwin*, I found that all matter remaining in issue was exempt under s.44(1), as it concerned the personal affairs of persons other than Mr Stewart, and that the public interest considerations favouring disclosure did not outweigh the public interest in the protection of the privacy of those individuals.

### **Baxendell and Health Rights Commission**

(S 171/95, 10 November 1997)

The applicant was a nursing consultant at Wolston Park Hospital who was involved in an incident in which a patient's leg was injured, subsequently requiring amputation. The applicant considered that segments of the Health Rights Commission report into the incident were unfairly adverse to him. To assist his quest for vindication, he sought access to extracts from the medical records of the injured patient. I held that the public interest in protecting the privacy of an individual's medical records is a strong one, which in this instance was not outweighed by the public interest considerations said by the applicant to favour disclosure. I found the matter in issue to be exempt under s.44(1) of the FOI Act.

### **"BWN" and Brisbane North Regional Health Authority**

(S 187/96, 10 November 1997)

The applicant sought access to the identifying particulars of three individuals, together with the information provided by them, relating to the issue of a warrant, and the regulated treatment of the applicant, under the provisions of the *Mental Health Act 1974* Qld. I applied the principles set out in *Re "ROSK" and Brisbane North Regional Health Authority and Ors* (1996) 3 QAR 393 in finding that matter contained in an Information to support a warrant issued under s.25 of the *Mental Health Act* was exempt matter under s.42(1)(h) of the FOI Act. Applying the principles discussed in *Re "B"*, I found that the balance of the matter in issue was exempt matter under s.46(1)(a) of the FOI Act.

### **"DST" and Department of Justice**

(S 136/97, 17 November 1997)

Applying the principles stated in *Re "ROSK"*, I decided that the grounds given by an informant to support the issue of a warrant under s.25 of the *Mental Health Act*, in respect of the applicant, were exempt matter under s.42(1)(h) of the FOI Act, as disclosure could reasonably be expected to prejudice a system for the protection of persons.

### **Burke and Gold Coast City Council**

(L 18/97, 17 November 1997)

The matter in issue comprised one line of information on page 2 of a six page document which had otherwise been disclosed to the applicant. I rejected the Council's contention that the matter in issue was exempt matter under s.41(1) of the FOI Act. I decided that its proper character was that of a statement of fact, and as such it was excluded from eligibility for exemption under s.41(1), by the operation of s.41(2)(b). I would not have been satisfied in any event that its disclosure was contrary to the public interest. I also rejected the Council's contention that the matter in issue was exempt under s.48 of the FOI Act, since the Council could not refer me to any statutory secrecy provision listed in Schedule 1 to the FOI Act, which appeared to have any application to the matter in issue. I was critical of the Council's handling of this case, mainly because:

- The decisions made on behalf of the Council evidenced no attempt to comply with the statutory obligations (imposed on decision-makers by s.34(2)(f) and (g) of the FOI Act and s.27B of the *Acts Interpretation Act 1954* Qld) to provide a written statement of reasons explaining the basis for a refusal of access. The decision under review failed to disclose any meaningful consideration of the questions which must be addressed in the application of s.41(1) and s.48 of the FOI Act.
- Although the Deputy Information Commissioner wrote to the Council explaining that no sufficient basis had been shown for the application of s.41(1) or s.48, and reminding it of the onus which an agency bears under s.81 of the FOI Act to justify its decision, the Council elected to lodge no evidence or submissions in support of its case, but maintained its claims for exemption under s.41(1) and s.48.

In my decision, I commented that the Council's approach was fundamentally alien to the spirit and objects of the FOI Act. I informed the Council that I considered it totally inappropriate for an agency to waste the resources of my office, and cause delays to an applicant in obtaining access to matter (to which the applicant has a legal right of access, if the Council cannot prove it is exempt matter), merely by maintaining an objection to disclosure without putting forward a rational basis to support a finding that the matter in issue is exempt.

### **Bowles and Department of Families, Youth and Community Care**

(S 77/97, 20 November 1997)

The applicant sought access to a letter from a third party to the Chairperson of the Intellectually Disabled Citizens' Council of Queensland (the Council), which the applicant believed might explain, or assist him to understand, why he had not been re-appointed as a member of the Council. The letter had been communicated from the third party to the Chairperson of the Council on the basis of an express mutual understanding that it would be treated in confidence. I was not satisfied that the contents of the letter had played any part in the decision not to re-appoint the applicant to the Council, and I could see no basis on which equity would not enforce the promise of confidential treatment made to the third party (*cf. Re Coventry and Cairns City Council* (1996) 3 QAR 191). I found that the letter in issue was exempt matter under s.46(1)(a) of the FOI Act. I also dealt with a 'sufficiency of search' issue raised by the applicant, finding that there were no reasonable grounds to believe that there were any further documents in the possession or control of the respondent or the Council which fell within the terms of the applicant's FOI access application.

### **"LDW" and Department of Education**

(S 112/97, 27 November 1997)

This was a 'reverse FOI' application in which the applicant, a teacher, objected to the disclosure to another teacher of information the applicant had conveyed to their school principal during the course of a casual conversation. The applicant claimed that the matter in issue was communicated in confidence and therefore was exempt under s.46(1)(a) or (b) of the FOI Act. I applied the principles stated in *Re "B"* in deciding that the matter in issue was not communicated by the applicant in circumstances attended by an express or implicit mutual understanding that the matter would be kept confidential by the respondent. I therefore found that the matter in issue did not qualify for exemption under either s.46(1)(a) or (b) of the FOI Act.

### **Reat and University of Queensland**

(S 50/94, 28 November 1997)

This case involved the application of the principles stated in *Re Pemberton and the University of Queensland* (1994) 2 QAR 293 to a number of academic referee reports pertaining to the applicant, which I found to be exempt under s.46(1)(a) of the FOI Act.

### **Mentink and Queensland Corrective Services Commission**

(S 64/95, 1 December 1997)

The first document in issue was a letter to prison authorities asking that the applicant (then a prisoner) be restrained from attempting to correspond with the juvenile in respect of whom the applicant had been convicted of offences. I found that with the exception of one segment of information which had already been disclosed to the applicant, the letter was exempt matter under s.44(1) of the FOI Act, according to principles stated in *Re Stewart* and *Re "B"* on information concerning shared personal affairs.

The other matter in issue comprised a letter to the Attorney-General (protesting the inadequacy of the sentence imposed on the applicant), as well as the identity of one of its authors. I found that some information in parts of the letter lacked the necessary "quality of confidence", as it was already known to the applicant, and could not qualify for exemption under s.46(1)(a) of the FOI Act, but that the balance of the letter was exempt matter under s.46(1)(a).

The applicant commenced proceedings in the Supreme Court under the *Judicial Review Act 1991* Qld alleging that my decision was affected by several legal errors. The judicial review proceedings have not yet been finalised.

### **Bakharia and Department of Education**

(S 3/96, 3 December 1997)

This was a 'reverse FOI' application by Mr Bakharia, who objected to the disclosure to the access applicant of documents relating to his employment with the Department. I found some information of a personal nature to be exempt under s.44(1) of the FOI Act, but most of it was not exempt because it merely concerned the performance by a public servant of his duties of employment (see *Re Pope and Queensland Health* (1994) 1 QAR 616 at p.660, paragraph 116).

### **"HD" and Department of Families, Youth and Community Care; "HD" and Queensland Police Service**

(S 3/95, S 20/95, 19 December 1997)

In the context of s.44(1), I weighed public interest considerations for and against disclosure of information obtained in the course of an investigation of suspected child abuse by a person, which investigation prompted the suspension of the certificate of approval of his wife as a care provider under the *Child Care Act 1991* Qld. The person was never charged with an offence, and a considerable amount of information had already been provided by both agencies to the person and his wife. The matter remaining in issue was sensitive personal information concerning the child and her family, and I did not consider that its disclosure would assist the wife in complaining about, or seeking redress for, her suspension. Stressing the substantial weight of the privacy interest in protecting information of this nature, I decided that disclosure of the matter in issue would not, on balance, be in the public interest.

### **Matchett and Department of Families, Youth and Community Care**

(S 38/97, 19 December 1997)

I decided that a clause in an agreement between the Department and a former employee, requiring that the terms of the agreement not be disclosed without the written consent of the employee, no longer restrained the Department in its use or dissemination of the matter in issue, because of the extent of prior public disclosure and public discussion of the terms of the agreement. I therefore decided that the matter in issue was not exempt under s.46(1)(a). I found that most of the matter in issue was not exempt under s.44(1), either because it concerned the former employee's employment affairs rather than personal affairs, or because the public interest in accountability of the Department for its decisions to make special payments and provide paid special leave to the employee, warranted disclosure. I found that a small amount of matter relating to the employee's superannuation payout and other leave taken, was exempt under s.44(1).

### **Ferguson and Queensland Corrective Services Commission**

(S 46/93, 24 December 1997)

The applicant sought access to documents concerning his imprisonment. Information concerning other prisoners was found to be exempt under s.44(1). Some sensitive information communicated by other prisoners or prison officers was found to be exempt under s.46(1)(b). A psychiatric diagnosis appearing in one document was found to warrant disclosure under s.44(3), applying the principles endorsed in *Re "S" and The Medical Board of Queensland* (1994) 2 QAR 249.

### **"KNWY" and Department of Education**

(S 139/97, 6 January 1998)

A divorced father sought access to documents that would reveal the names used by his children at their school, and their marks achieved in schoolwork and assignments. The Family Court had made an order for what used to be called "guardianship" by the father in respect of the children. The children's mother pursued a 'reverse FOI' application, objecting to the Department's decision to give

the father access to the information he requested. I applied the principles stated in *Re Stewart* in finding that the matter in issue concerned the personal affairs of the children. However, taking into account the legal responsibilities of a parent in respect of whom a guardianship order has been made, I found that the public interest in disclosure to the father of the matter in issue outweighed its *prima facie* exempt status, and I affirmed the decision under review.

**Queensland Police Service and Department of Education**

(S 114/97, 30 January 1998)

The matter in issue comprised the name of a teacher appearing in a report by police of their investigation into a complaint lodged by the access applicant. The report exonerated the teacher of any wrongdoing. The QPS took it upon itself to pursue a 'reverse FOI' application against the Department's decision to disclose the report, arguing that the teacher's name was exempt matter under s.41(1) and s.40(c) of the FOI Act. The access applicant was aware of the name of the teacher, which in any event was clearly stated in another document that had been provided to him by the CJC. I found that the teacher's name could not properly be characterised as 'deliberative process matter' within the terms of s.41(1)(a) of the FOI Act. I also found that disclosure of the teacher's name could not reasonably be expected to have a substantial adverse effect on the management by the Department of Education of its personnel, and hence that it was not exempt under s.40(c) of the FOI Act. (I expressed surprise that the QPS felt able to second guess the Department's judgment on that issue.)

**Dalitz and West Moreton District Health Service**

(S 67/97, 2 February 1998)

Following consultation with third parties who had provided information to health practitioners to assist in the care of the applicant's late mother, the agency disclosed to the applicant all except one page of the applicant's mother's medical record. The one page in issue recorded a conversation between a health professional and a third party (who could not be contacted) about the relationship between, and health of, the mother and the third party. Applying the principles stated in *Re Summers and Cairns District Health Service* (Information Commissioner Qld, Decision No. 97005, 27 March 1997, unreported), I decided that the page was exempt matter under s.44(1) of the FOI Act.

**Kennedy and Department of Family Services and Aboriginal and Islander Affairs**

(S 134/94, 9 February 1998)

The matter in issue in this external review was identical to the matter in issue in my decision in *Re Burke and Department of Families, Youth and Community Care* (Decision no. 97019, 19 December 1997), and I adopted the same reasons in finding in favour of disclosure.

**Wall and Maryborough City Council**

(L 21/97 & L 23/97, 10 February 1998)

Applying the principles stated in *Re Stewart*, I determined that information about the health and private financial obligations of the applicant's neighbours was exempt matter under s.44(1) of the FOI Act.

**Beaufort and Redland Shire Council**

(L 10/97, 10 February 1998)

This was a complex 'sufficiency of search' case in which the applicant asserted, and the respondent denied, the existence of an agreement between the respondent and neighbouring Councils restricting development within the catchment area of the Leslie Harrison Dam. Following detailed

investigations, I was satisfied that no such formal agreement existed, and I affirmed the decision under review.

**Shute and Queensland Police Service**

(S 181/96, 13 February 1998)

In this case, I found that the applicant was not obliged to pay a \$30 application fee, or access charges, in order to obtain access to documents which the QPS was prepared to release to him. The QPS submitted that the word "concern" in s.6 and s.7 of the FOI Regulation should be interpreted as connoting exclusivity, such that requested documents must 'solely' or 'exclusively' concern the personal affairs of the applicant for access, before the applicant is entitled to obtain access to the documents free of charge. I rejected that submission and affirmed the principles which I stated in *Re Price and Surveyors Board of Queensland* (Information Commissioner Qld, Decision No. 97017, 24 October 1997, unreported) and *Re Bolton and Department of Transport* (1995) 3 QAR 143, to the effect that, provided each document to which an applicant requests access contains some information that can be properly characterised as information concerning the applicant's personal affairs, a \$30 application fee is not payable. Nor are access charges (e.g., photocopying fees) payable in respect of a document which contains some information that concerns the personal affairs of the applicant for access.

**McMahon and Department of Primary Industries / Department of Natural Resources**

(S 135/96, 13 February 1998)

The applicant raised 'sufficiency of search' issues which I dealt with according to the principles stated in *Re Shepherd*, finding that there were no reasonable grounds to believe that a particular document nominated by the applicant ever existed as a document in the possession or control of either Department.

**McMahon and Department of the Premier and Cabinet**

(S 98/97, 18 February 1998)

The applicant raised a 'sufficiency of search' issue, but I found that there were no reasonable grounds for believing that additional documents, falling within the terms of the applicant's FOI access application, existed in the possession or control of the Premier's Department. The applicant also asserted that he was entitled to obtain access to parts of a Cabinet submission which referred to him, and he raised a number of arguments as to why disclosure would be in the public interest. I found that the Cabinet submission clearly comprised exempt matter under s.36(1)(a) of the FOI Act, being an exemption provision that was not qualified by a public interest balancing test.

**"MN" and Queensland Police Service**

(S 111/95, 19 February 1998)

In this case, I found that transcripts of interviews with child victims of sexual assault were exempt from disclosure under s.44(1) of the FOI Act, even though some of the information also concerned the personal affairs of the applicant (who was convicted of the relevant offences).

**Dimitrijevic and Department of Education**

(S 180/96, 23 February 1998)

The applicant raised a 'sufficiency of search' issue which I dealt with according to the principles stated in *Re Shepherd*, in finding that there was no evidence to support the existence, in the possession or control of the Department, of a 'black list', or other document containing adverse information about the applicant, which prejudiced the applicant in obtaining contract teaching positions or permanent appointment with the Department. A second issue concerned the application

of s.30(1)(e) of the FOI Act, and whether the Department was obliged to create a new document for the purpose of attempting to satisfy the applicant's FOI access application (which was incorrectly, and unhelpfully, framed in the form of a series of questions). I found that the equipment usually available to the Department for retrieving or collating stored information was not capable of creating a written document containing the information requested by the applicant.

**Robino & Ors and Townsville District Health Service**

(S 119/96, 4 March 1998)

Following concessions made during the course of my review, the issue which remained for formal decision was whether the applicants, who were the complainants in a formal workplace grievance procedure, were entitled to obtain access to parts of the report prepared by the grievance investigators which contained information supplied by the subject of the grievance complaint. The subject of the grievance argued that the matter in issue was exempt under s.40(c), s.40(d), 44(1), s.46(1)(a) and s.46(1)(b) of the FOI Act. I held that the matter in issue could not have been supplied by the subject of the grievance, to the investigators, on the basis of an implicit mutual understanding that it would be treated in confidence as against the complainants. I also held that the information in issue concerned employment affairs rather than personal affairs, and hence did not qualify for exemption under s.44(1) of the FOI Act. I also dismissed claims for exemption under s.40(c) and s.40(d) which were made by the subject of the complaint, but not supported by the respondent agency.

**Hay and Rockhampton City Council**

(L 22/97, 5 March 1998)

I considered the application of s.42(1)(b) of the FOI Act, and the principles explained in *Re McEniery*, to matter which could reasonably have been expected to enable the applicant to identify complainants to the Council in respect of the applicant's poultry pen.

**Watkins Pacific Limited and Queensland Rail and Gold Coast Bulletin**

(S 99/95, 6 March 1998)

This 'reverse FOI' case involved the application of s.45(1)(c), and the principles set out in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, to parts of a report prepared by consulting engineers retained by Queensland Rail to investigate allegations that unsafe construction practices had been adopted by the applicant on a segment of the Beenleigh-Robina railway line. The matter in issue did not include the findings in relation to the allegations. It was limited to matter recording allegations, discussion of the adequacy of supervision (by Queensland Rail officers) of construction work undertaken by the applicant, and information relating to the commissioning and creation of the report. I found (having regard to the extent to which the allegations had already been made public, the lapse of time since the allegations had been made, and the fact that the rail line had been completed and had operated successfully for some time) that any adverse effect on the applicant's business affairs from disclosure of the matter in issue would be minimal. I found that the public interest in accountability of Queensland Rail for taking steps to assure the quality and safety of a significant public undertaking, outweighed any minimal prejudice to the business affairs of the applicant, and that disclosure of the matter in issue would, on balance, be in the public interest.

**Reynolds and Redland Shire Council**

(L 4/97, 10 March 1998)

This case involved the application of s.44(1) and the principles set out in *Re Byrne and Gold Coast City Council* to matter which would identify complainants to the Council regarding alleged breaches by the applicant of town planning laws. In circumstances where the applicant had already been given access to the substance of all the complaints, I found that there were no public interest considerations

of sufficient weight to justify disclosure of matter which would identify the complainants, and I decided that it was exempt matter under s.44(1) of the FOI Act.

**Reynolds and Redland Shire Council**

(L 28/97, 10 March 1998)

This case required me to determine claims for exemption in respect of parts of a Council report which referred to two witnesses and summarised the evidence they gave in Court proceedings against the applicant. After considering the transcript of those proceedings, and finding that the matter in issue and the identities of the witnesses had been revealed in open court, I found that none of the exemption claims was made out. The two witnesses were not "confidential sources of information" *vis-à-vis* the applicant for the purposes of s.42(1)(b), and the summaries of their evidence were not "confidential in nature" to satisfy the elements of s.46(1)(b).

**McPhillimy and Department of Tourism, Small Business and Industry**

(S 155/96, 12 March 1998)

The applicant sought access to documents concerning the 1992 Gold Coast Indy Car Grand Prix. The issue was whether such documents were "documents of the agency" for the purposes of s.7 of the FOI Act. After making inquiries, I established that the particular documents to which the applicant sought access were located in the Gold Coast office of Gold Coast Motor Events Co (a body not subject to the application of the FOI Act - see *Re McPhillimy and Gold Coast Motor Events Co* (1996) 3 QAR 376). I held that the documents were not in the possession or control of the Department, or of an officer of the Department. After examining the ownership and control of the reconstituted Gold Coast Motor Events Co, I also held that the Department was not entitled to access to the documents, and therefore that the documents were not "documents of the agency" for the purposes of the FOI Act.

**Maurice-Potter and Royal Brisbane Hospital and District Health Service**

(S 133/97, 19 March 1998)

The applicant raised 'sufficiency of search' issues which I dealt with according to the principles stated in *Re Shepherd*. I found that there were no reasonable grounds to believe that the documents falling within the terms of the applicant's FOI access application (i.e., records concerning the applicant's medical treatment at the respondent agency in the period from 1952-1956) still existed in the possession or control of the agency. Accordingly, I affirmed the decision under review.

**"W" and Queensland Police Service**

(S 2/94, 20 March 1998)

Applying the principles stated in *Re "B"*, *Re McCann* and *Re Godwin*, I found that matter which would disclose information supplied to QPS officers for the purposes of an investigation into alleged perjury by a member of the public, and information which would enable the sources to be identified, was exempt matter under s.46(1)(b) of the FOI Act. Applying the principles stated in *Re McEniery*, I found that most of that information would also be exempt under s.42(1)(b). In addition, I found that the names of two individuals appearing in police documents in connection with alleged wrongdoing, and personal information about one of the individuals, was exempt under s.44(1). I also found that a statement given to the QPS by a person who had been an Informant in respect of the issue of a warrant under the *Mental Health Act 1974*, in response to an allegation of perjury by the subject of the warrant, was exempt matter under s.44(1).

### **Reinke and Crowley Vale Water Board**

(S 117/97, 20 March 1998)

This case involved 'sufficiency of search' issues which I dealt with according to the principles stated in *Re Shepherd*. I found that the searches conducted by the Board for a document of the type sought by the applicant had been reasonable in all the circumstances of the case.

### **GSA Industries (Aust) Pty Ltd and Brisbane City Council; G S Technology Pty Ltd (Third Party)**

(L 20/93, 31 March 1998)

This was a 'reverse FOI' application by GSA Industries which objected to disclosure of certain information in a tender lodged with the respondent for the supply of water meters. I decided that certain pricing information which was liable to be read out to interested parties at the opening of the tenders (whether or not it had actually been read out), could not qualify for exemption under either s.45(1)(c) or s.46(1). However, applying the principles stated in *Re Cannon*, I decided that the remainder of the information in issue was exempt from disclosure under either s.45(1)(c) or s.46(1) of the FOI Act.

### **Abaza and Brisbane City Council**

(L 12/97, 31 March 1998)

I considered the application of s.43(1) of the FOI Act and the principles of legal professional privilege (including the head of 'common interest privilege') in deciding that it was clear, on the face of each of the documents in issue, that the sole purpose of its creation was one of the qualifying purposes for attracting legal professional privilege in Australian common law, and that each therefore qualified for exemption under s.43(1).

### **Smith (Mr B A) and Criminal Justice Commission**

(S 25/93, 7 April 1998)

The documents in issue concerned a complaint by the applicant against a police officer. I found statements provided to the CJC investigator by junior police officers, and by civilian employees of the QPS, were exempt under s.40(c) of the FOI Act. However, I found that a letter from the CJC to the officer the subject of the complaint, and a record of interview with the officer, were not exempt under s.40(c) of the FOI Act. I also found that some matter concerning the emotional reaction to particular situations, of a person other than the applicant, was exempt matter under s.44(1) of the FOI Act.

### **Phillips Fox and Education Queensland**

(S 159/95 & S/696, 23 April 1998)

These 'reverse FOI' cases involved the application of s.40(c), s.41(1), s.42(1)(e), s.44(1), s.46(1)(a) and s.46(1)(b) of the FOI Act to documents associated with an investigation which was conducted by the respondent into complaints made by parents against teachers at one of the respondent's schools. I affirmed the respondent's decision that the documents did not comprise exempt matter under any of those exemption provisions.

### **"FMG" and Queensland Police Service**

(S 69/97, 24 April 1998)

The applicant sought access to tape recordings, and transcripts of tape recordings, between a police officer (investigating allegations of child neglect) and two of the applicant's children. Applying the principles described in *Re Stewart*, I found that the documents in issue concerned the personal affairs

of the children. I found that the public interest considerations favouring disclosure to the father did not outweigh the public interest in protecting the privacy interests of the children.

**Reinke and Department of Natural Resources**

(S 95/97, 19 May 1998)

Still unable to obtain the documents he believed to exist (see case-note on p.49), Mr Reinke raised 'sufficiency of search' issues against another agency. I found that there were no reasonable grounds to believe that further documents falling within the terms of the relevant FOI access application existed in the possession or control of the Department, and that the searches conducted by the Department had been reasonable in all the circumstances of the case.

**Dell and Department of Public Works and Housing**

(S 6/98, 20 May 1998)

The matter in issue comprised internal memoranda which the agency claimed to be exempt under s.43(1) of the FOI Act. Applying the principles stated in *Re Potter and Brisbane City Council* (1994) 2 QAR 37, I was satisfied that the authors of the memoranda, although employees of the agency, were providing independent legal advice. I was satisfied that the documents in issue were created for the sole purpose of seeking or providing legal advice, and would therefore be privileged from production in a legal proceeding on the ground of legal professional privilege.

**Kos and Education Queensland**

(S 43/95, 21 May 1998)

The applicant sought amendment, under Part 4 of the FOI Act, of information in a report prepared by a school principal in respect of the applicant's claim for workers' compensation for dermatitis, which the applicant attributed to her work as a cleaner at the school. I held that, under the terms of s.53 of the FOI Act, the applicant could apply to Education Queensland for amendment of information in documents which she had obtained from that agency, but not in respect of documents she had obtained from another agency (in this instance, the Workers Compensation Board). I also held that most of the items of information which the applicant wished to amend related to her employment affairs rather than her personal affairs, and hence fell outside the scope of the entitlement, conferred by s.53 and Part 4 of the FOI Act, to seek amendment of information relating to the applicant's personal affairs. There remained five items of information in the report by the school principal which related to the applicant's personal affairs. Education Queensland agreed to annotations requested by the applicant in respect of two items. After considering evidence lodged on behalf of both participants, I decided that two of the remaining three items of information should be amended, and the third should be annotated.

**Smith and Criminal Justice Commission**

**Smith and Queensland Police Service**

(S 73/93 and S 78/93, 21 May 1998)

In these related cases, the applicant sought access to police files concerning him, and documents created in the course of investigations by the QPS and the CJC of complaints by the applicant against police officers. I applied principles established in *Re Godwin* and *Re McCann* in finding that information concerning third parties was exempt, but statements by police officers which concerned their dealings with the applicant were not exempt from disclosure to the applicant.

**Hookem and Redland Shire Council**

(L 12/98, 22 June 1998)

The applicant sought access to information that would disclose the identities of persons who had lodged complaints to the Council about his dogs. Applying the principles discussed in *Re Bussey and the Council of the Shire of Bowen* (1994) 1 QAR 530, I decided that the information was exempt matter under s.42(1)(b) of the FOI Act.

**"C" and Department of Tourism, Small Business and Industry**

**"D" and Department of Tourism, Small Business and Industry**

(S 9/97 and S 11/97, 23 June 1998)

These 'reverse' FOI applications involved the application of s.42(1)(a), s.42(1)(b), s.42(1)(e), s.44(1), s.45(1)(c) and s.46(1) of the FOI Act, to parts of letters of complaint written by the respective applicants to the Liquor Licensing Division of the Department. The applicants had requested that the Department investigate their complaints, which had necessitated disclosure of most of the matter in issue to the subject of the complaint. Moreover, one of the complainants had pursued the complaint directly with the subject of the complaint. I found that none of the matter remaining in issue qualified for exemption.