SEVENTH ANNUAL REPORT

OFFICE

of the

QUEENSLAND
INFORMATION COMMISSIONER

1 JULY 1998 TO 30 JUNE 1999

PRESENTED TO PARLIAMENT

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18 October 1999

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 1998/99 Annual Report to State Parliament.

The report marks my Office's seventh 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 301 external review applications during the year - the highest output in seven years. Further inroads were made into the large accumulated backlog of cases which has been reduced to 207 cases - the lowest case backlog in the past six years.

The reporting period has seen the highest number of applications for external review ever received in the Office of the Information Commissioner - 291 (an increase of 81 cases or 38.6% as compared to the previous year). More importantly, a significant improvement in the timeliness of resolution of cases occurred in 1998/99 with some 65% of cases resolved in the reporting period being finalised within six months of lodgment.

I anticipate that a continuation of the funding increase provided in 1999/2000 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 1998/99, the Office of the Information Commissioner achieved a significant increase in its output, with the finalisation of 301 external review applications, as compared to 270 in the previous reporting period (an increase of approximately 11%). This increased output was achieved with a small increase in professional staff (from the equivalent of 8.5, to 8.8, 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). There was also a considerable increase in timeliness, with almost two-thirds (65%) of cases resolved during the reporting period being finalised within 6 months of lodgment.

Table 1 - Applications for review under Part 5 of the FOI Act - 1998/99

Pending at start of reporting period (1/7/98)	217
Opened during the reporting period	291
Completed during the reporting period	301
Pending at end of reporting period (30/6/99)	207

Note 1: a table showing the distribution of applications for review made in 1998/99, across the categories of decision subject to investigation and review by the Information Commissioner (as specified in s.71 of the FOI Act), appears at Appendix 1.

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

In my previous annual reports, I have discussed efforts being made to reduce 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. If the number of new cases received during the reporting period had remained within the range experienced in the preceding four years (i.e., in the range of 210-230 new cases), the reduction in the backlog achieved during the reporting period would have exceeded the reduction of 60 achieved in 1997/98. However, the significantly increased output of my Office was offset by a substantial rise in the number of new cases received in the reporting period (from 210 in 1997/98 to 291). Notwithstanding that additional workload, my Office again managed to reduce the backlog of cases, although in this reporting period by only 10 cases. Notwithstanding the increased demand for the dispute resolution services of the Office, my Office will continue its concerted effort to finalise delayed cases involving large numbers of documents and complex issues, while still attempting to turn over new cases as quickly as possible.

The Office of the Information Commissioner has accumulated substantial experience and expertise in the resolution of FOI disputes, having (in the 6½ years from when it commenced operations, up to 30 June 1999) dealt with a total of 1558 applications for review, and resolved 1351. While there have been many recurring areas of dispute, there has been no shortage of novel cases, posing new problems in the interpretation and application of the FOI Act, as citizens seek to make use of it to access government-held information over a wide variety of areas of state and local government administration. My office continues to accord prime importance to its responsibility to provide authoritative guidance for FOI administrators on the correct interpretation and application of the provisions of the FOI Act, not only by publishing formal decisions of a high standard, but also, in the mediation/negotiation phase of the review process, by explaining to agencies, whether in conference or in correspondence, the basis on which my office considers that an agency may have misunderstood or misapplied the FOI Act in a particular case. With a view to disseminating the Information Commissioner's formal decisions to government agencies and interested members of the public, as quickly and as cheaply as possible, a web-site has been established to provide free access, via the Internet. The Information Commissioner's web-site address is http://www.slq.qld.gov.au/infocomm and our monitoring indicates that the web-site 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 1998/99, 231 (or 77%) of the 301 applications finalised were resolved without the need for a formal decision.

Table 2 - Outcome of external reviews completed during 1998/99

No jurisdiction	39
Decision not to review/review further under s.77 of the FOI Act	3
Agency granted further time to deal with application	8
Resolved/Withdrawn following mediation	193
Decision issued - affirming decision under review	26
Decision issued - varying decision under review	21
Decision issued - setting aside decision under review; making decision in substitution	11
TOTAL	301

Of the 193 cases resolved or withdrawn following mediation, six involved questions 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 three of those cases. One hundred and fifty-one external review applications challenging agency decisions to refuse access to documents were resolved by informal means, with 104 (or 69%) resulting in the applicant obtaining access to documents or matter previously withheld. The remaining 31 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. Twenty-two of those 31 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.

CHAPTER 1

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 web-site (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 Civil and Administrative Tribunal (the VCAT) 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 VCAT, 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.

Financial 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 Managing for Outcomes budgeting arrangements for the Office of the Parliamentary Commissioner. The Office of the Information Commissioner also 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. The audited financial statements for 1998/99 for both offices have been certified and will be published in the 25th Annual Report of the Parliamentary Commissioner. In 1998/99, $674,329 was expended on salaries and related costs (e.g., payroll tax, superannuation contributions) attributable to the Office of the Information Commissioner. It was possible to identify administrative expenses directly attributable to the running of the Office of the Information Commissioner amounting to $123,290. Additional costs of accommodation and shared facilities are subsumed in the budget of the Office of the Parliamentary Commissioner.

1.14 The performance output for the offices of Parliamentary Commissioner and Information Commissioner is "*Independent review of complaints and appeals about Government administration*". The suboutput for the Office of the Information Commissioner is "*Independent review by the Information Commissioner of decisions made by Government in the administration of the* Freedom of Information Act 1992". 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 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) 3005 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*. Since then I have been reappointed on a number of occasions, most recently for a two year term from 16 May 1999 to 15 May 2001. By virtue of that appointment, I also hold office as Information Commissioner pursuant to s.61(2) of the FOI Act.

1.17 The permanent staffing structure of the Office of the Information Commissioner, as at 30 June 1999, was as follows:

1 Deputy Information Commissioner
2 Assistant Information Commissioners (at level A08)
2 Senior Administrative Review Officers (at level A07)
3 Administrative Review Officers (at level A06)
1 Executive Officer (at level A04)
1 part-time Research Officer (at level A03)
2 Administrative Assistants (at level A02).

As at 30 June 1999, the permanent staffing structure was supplemented by the following additional temporary staff:

1 Senior Administrative Review Officer (at level A07)
1 Administrative Review Officer (at level A06).

CHAPTER 2

Overview of Operations During the Reporting Year

2.1 In 1998/99, the Office of the Information Commissioner significantly increased its output, with the finalisation of 301 external review applications, as compared to 270 in the previous reporting period (an increase of 11%). This is the sixth consecutive year in which the office has significantly increased its outputs, and the third consecutive year in which it has managed to finalise more cases than it received during the year. The history of performance of the office, in terms of numbers of applications dealt with, is set out in Table 3 below. In my 1997/98 Annual Report, I stated that, provided the numbers of new cases received remained relatively steady (as they had done, in the range of 210-230, over the previous 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. However, a substantial increase in the number of new applications for external review received in the reporting period (291 compared to 210 in 1997/8, an increase of 38.6%) has meant that, despite finalising a record number of cases, the backlog remains higher than I hoped for as at 30 June 1999. Nevertheless, efforts will continue to reduce the backlog as quickly as possible.

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
1/7/98 - 30/6/99	291	301	207	8.8
Total	1558	1351		

2.2 The reporting period saw a significant improvement in the timeliness of resolution of cases, with some 65% of cases resolved in the period being finalised within six months of lodgment. 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 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. 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 1998/99

Under 1 month	73	12 - 18 months	20
1 - 3 months	64	18 - 24 months	10
3 - 6 months	60	24 - 30 months	6
6 - 9 months	25	30 - 36 months	4
9 - 12 months	8	over 36 months	31
		TOTAL	301

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
1998/99	120	104

The performance of my office in 1998/99 demonstrates that, absent the significant 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 1998/99. 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 decision. 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 1998/99 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 Code of Conduct for staff is being finalised, having reached the stage of mandatory consultation with staff and associations representing staff. As the Code has not been finalised, requirements relating to access, inspection, *et cetera*, concerning the Code are not yet relevant.

Goals & Performance in 1998/99

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 1998/99, I set my professional staff a goal of resolving 290 cases (which represented an increase of 7.5% on the figure of 270 cases resolved in 1997/98). 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 exceeded (with 301 cases resolved), notwithstanding the time taken to train a number of new staff to become proficient in what is a highly specialised field, and considerable resources taken up in the last quarter of the period in preparing an extensive submission to the Legal, Constitutional and Administrative Review Committee of the Legislative Assembly for the purposes of its review of the FOI Act.

2.10 Approximately three-quarters (76%) of cases finalised in 1998/99 were resolved within 12 months of lodgment (a significant increase from 61% in 1997/98). I consider that this figure can be further increased to somewhere in the range of 80-90% when the backlog of complex cases requiring formal decisions has been eliminated. There was a significant decrease in the average time for finalisation of cases completed during the reporting period, from 478 days (i.e., approximately 68 weeks) in 1997/98 to 309 days (i.e., approximately 44 weeks) in 1998/99. This is a significant reduction, particularly given the concerted effort made during the reporting period to resolve older cases.

Performance against Goal 2

2.11 The proportion of total cases assessed for investigation and review during 1998/99 in which informal dispute resolution methods were undertaken was, again, high at 90% (the figure was 94% in 1997/98). A total of 231 cases were resolved informally compared to 70 cases resolved by formal written decision, making a proportion of 77% resolved by informal methods. This represents an increase on the 1997/98 figure of 66%, and is in line with, or better than, outcomes achieved in previous years. 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 1998/99. 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 1998/99 was 70 (compared to 91 in 1997/98). During the reporting period, two judicial review applications were heard in the Queensland Supreme Court, alleging legal error in two decisions which I made during 1997/98. In each case, the judicial review application was dismissed, i.e., my decision was upheld. The earlier of the two Supreme Court judgments has been reported: see *Queensland Law Society v Albietz and Hewitt* (1998) 4 QAR 387. The other judgment was *Mentink v Albietz and Queensland Corrective Services Commission* (Sup Ct of Qld, No. 630 of 1998, Muir J, 28 January 1999, unreported). In terms of the performance indicator for Goal 3, the proportion of formal decisions overturned for legal error was nil.

CHAPTER 3

General Observations on the FOI Process in Queensland

In previous 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. During the reporting period, it was announced that the Legal, Constitutional and Administrative Review Committee of the Legislative Assembly had received a reference to undertake a comprehensive review of the FOI Act and its administration, in accordance with terms of reference that are broad and, in effect, open-ended. The Committee placed advertisements calling for the lodgment of written submissions by 14 May 1999. I have taken the opportunity to lodge, for consideration by the Committee, an extensive submission canvassing my concerns (both major and minor, and relating both to broad policy issues and technical legal/statutory interpretation issues) with the drafting and practical operation/administration of the FOI Act. Nearly all submissions received by the Committee have now been tabled, and are available to interested Members of the Legislative Assembly, and interested members of the public (on request to the Committee's Research Director). I will not, therefore, attempt to reproduce or summarise my submission. I have been informed that the Committee intends to publish a Discussion Paper, highlighting key issues, and invite a further round of written submissions. I have read with interest other tabled submissions to the Committee, although I have noted many suggestions or proposals (including in relation to the conduct of the Information Commissioner's function of undertaking independent review of the merits of agency decisions) that are impractical and/or whose consequences for the administration of the FOI Act have not been carefully thought through or fully appreciated. It is more appropriate that I address those issues in a further submission to the Committee, rather than in this Annual Report.

Who uses the external review processes available under Part 5 of the FOI Act?

At a time when the FOI Act, including the functions of the Information Commissioner under Part 5 of the FOI Act, are subject to scrutiny by the Legal, Constitutional and Administrative Review Committee, I thought it might prove an interesting exercise to compile a statistical profile of those who invoke the Information Commissioner's external review jurisdiction under Part 5 of the FOI Act. In previous Annual Reports, I have provided statistical information in respect of the categories of decisions subject to external review (see Appendix 1 to this report), and the number of external review applications by respondent agency (see Appendix 2 to this report). I thought it might be instructive to gauge any patterns of usage among applicants for external review, and the kinds of information they were seeking.

The sample chosen for this statistical profile was all cases finalised during 1998/99 (301), less those which involved applications for amendment of information (5), making a sample of 296 cases. In some of those cases, the dispute at external review level was over fees and charges, but this still necessitated examination of the kind of information which the applicant for access was seeking. Some of the cases were 'reverse FOI' applications, which have been classified according to the identity of the applicant for access (and where relevant, the nature of the information being sought) who was the person in dispute with the 'reverse FOI' applicant for external review (i.e., the person who sought external review in an effort to resist disclosure of information requested under the FOI Act).

The results of the statistical profile are tabulated in table 6. Of the categories of applicant set out in table 6, only a few (e.g., the first three listed) were determined for use from the outset, with most categories evolving during the course of a survey of the finalised cases, from which statistically significant categories began to emerge.

Table 6 - Profile of Applicants in external review cases finalised in 1998/99

Type of Applicant	No.
Politicians or political staffers	11
Journalists	4
Citizens groups/lobby groups	6
Individuals seeking information about public health and safety issues	5
Public servants (or former public servants) seeking information about workplace disputes e.g., grievance/disciplinary proceeding/termination of employment Sub-categories: • Professional employee, e.g., salaried medical practitioner • Teacher • Police officer or ex-police officer • University academic	75 (31) (9) (2) (1)
Businessmen or business organisations seeking information for purposes related to their business	42
Professionals seeking information about their dealings with a professional regulatory body	14
Individuals seeking information about the treatment of their complaints to a professional regulatory body	6
Individuals seeking information relating to their treatment (or the treatment of a relative) by the QPS, the CJC or the courts (i.e., where the access applicant, or his/her relative, was the subject of investigation)	22
Individuals seeking information about how their complaint to the QPS or CJC was dealt with	11
Prisoners or former prisoners (or relatives thereof) seeking information relating to the prisoner's treatment by prison authorities	7
Individuals seeking access to their own medical records or records of a dependent child	6
Individuals seeking access to the medical records of a deceased relative	3
Individuals seeking information relating to their treatment under the Mental Health Act, or by mental health authorities (e.g., Patient Review Tribunal)	3
Individuals seeking information about the treatment of themselves or a family member by welfare agencies	3
Individuals seeking information related to persons involved with an adopted child	8
Individuals seeking access to information concerning treatment by relevant agencies (e.g., local Council/Department of Families, Youth and Community Care) of a neighbourhood dispute or a family dispute; including - Individuals seeking the identity of a complainant against them	21 (4)
Individuals seeking information about how a proposed government decision or policy will affect them, or about a government decision or policy which has affected them Sub-category: Planning and development decisions	30 (5)
Individuals or business organisations seeking access to information for use in pending or proposed legal proceedings	9
Individuals seeking information about an individual public servant who has had dealings with them	7
Agency seeking review of another agency's decision	3
TOTAL	296

It is notable that the use of the external review mechanism by politicians/political staffers, and by journalists, is quite low in Queensland, in contrast to the Commonwealth and Victorian jurisdictions where members of the Parliamentary Opposition (especially in Victoria), and journalists, have historically been major users of the avenues for seeking independent external review of decisions made under the freedom of information legislation in those jurisdictions. Similarly, the use of the external review mechanism by citizens groups/lobby groups is perhaps surprisingly low.

The largest user group identified in this sample was that of public servants (or former public servants) seeking information about workplace disputes, e.g., grievance/disciplinary proceeding/termination of employment. At one level, this is perhaps not so surprising, since public servants as a group are likely to be far more aware of the availability of the FOI Act and its potential uses than most other sectors of society. On the other hand, it is somewhat surprising that established procedures for dealing with workplace disputes of the kind described do not result in disclosure to the participants of all relevant information, especially given the existence of legislative provisions such as s.15 and s.16 of the *Public Service Regulation 1997* Qld. I should note that the number of cases falling into this category was perhaps exceptionally high on account of the efforts of one person (a salaried medical practitioner), who was the subject of an investigation of possible official misconduct in relation to expenses incurred on overseas travel for study purposes, and who was involved in 24 external review applications seeking information (mostly about similar expenses incurred by other salaried medical practitioners) to assist him to answer the allegations against him.

The next highest category was that of businessmen or business organisations seeking information for purposes related to their business. Some of the applications in this category involved attempts to seek access to information held by government agencies relating to business competitors, but most of the applications sought information about how a proposed government decision or policy would affect them or about a government decision or policy that had affected them. I note that a category for individuals (rather than businessmen or business organisations) seeking information of that kind accounted for the third highest number of external review applications.

Only 9 (or 3%) of the cases in the sample involved applications by individuals or business organisations seeking information for use in pending or proposed legal proceedings, a statistic which tends to run counter to the often heard argument that lawyers (and their clients) seeking cheaper and less formal access to government-held information, as an alternative to court-based disclosure, are disproportionate beneficiaries of the public resources devoted to the administration of the FOI Act. This is clearly not the case so far as use of the external review mechanism is concerned (although it must be acknowledged that table 6 tells us nothing about proportionate use of the FOI Act by different categories of applicant at primary decision-making levels).

Table 6 clearly supports the conclusion that the vast majority of users of the external review mechanism are citizens seeking access to documents about matters of personal concern to them.

Inappropriate Methods of Amending the FOI Act

The *Coal Mining Safety and Health Act 1999* Qld was recently passed by the Legislative Assembly. Section 229 of that Act provides that Schedule 1 to the Act amends the Acts mentioned in it. Schedule 1 is titled "Consequential Amendments". However, it makes an amendment to the FOI Act which is substantive, not consequential, in nature. It amends s.42 of the FOI Act to introduce a new exemption provision, of general application, as follows:

FREEDOM OF INFORMATION ACT 1992

After section 42(1)—

insert—

*'**(1A)** Matter is also exempt matter if—*

(a) it consists of information given in the course of an investigation of a contravention or possible contravention of the law (including revenue law); and

(b) the information was given under compulsion under an Act that abrogated the privilege against self-incrimination.'.

The *Coal Mining Safety and Health Act* contained provisions requiring persons to provide information to inspectors appointed under the Act, and abrogating the privilege against self-incrimination in certain circumstances. If the new s.42(1A) of the FOI Act had been drafted in terms which confined it to investigations under the *Coal Mining Safety and Health Act*, and to information given under compulsion under the provisions of the *Coal Mining Safety and Health Act* that abrogated the privilege against self-incrimination, then perhaps it could properly have been described as a consequential amendment to the FOI Act.

However, the new s.42(1A) is framed in broad terms, and clearly introduces a significant new exemption provision of general application. It is capable of applying to information given in the course of an investigation by any agency which has responsibility for the enforcement of a law containing offence provisions (or indeed any law imposing legal duties, even though civil rather than criminal sanctions are the prescribed enforcement measure: see *Re "T" and Queensland Health* (1994) 1 QAR 386 at paragraphs 16 to 19), provided that the information was given under compulsion pursuant to statute, where the statute also contained provisions abrogating the privilege against self-incrimination.

In my view, it is not appropriate that a substantive change to the FOI Act, introducing a new exemption provision of broad and general application, should be made in a Schedule of "consequential amendments" to an Act of the Parliament that the casual reader would assume was confined to matters relating to the regulation of health and safety for workers in the coal-mining industry. This new exemption provision has implications for many agencies, and for users of the FOI Act. In my view, it should have been introduced in a *Freedom of Information Act Amendment Bill*, that would have attracted the attention of interested persons who may have wanted to consider the implications and consequences of, and express views to the government or their elected representatives about, the proposed amendment.

One aspect of the drafting of the new exemption provision immediately strikes me as warranting serious consideration of its appropriateness. As paragraph (b) is presently drafted, it is arguable that exemption extends to any information (falling within the terms of paragraph (a)) that was given under compulsion pursuant to statutory provisions which also provided for the abrogation of the privilege against self-incrimination, irrespective of whether or not the information is actually of a kind that would have entitled the information-provider to invoke the privilege against self-incrimination. A great deal of information may be given to law enforcement or regulatory agencies pursuant to statutory coercive powers, with no issue as to privilege against self-incrimination ever arising. Is there any real justification for exempting information given under statutory compulsion that would not, in any event, have attracted the application of the privilege against self-incrimination?

Are such issues liable to be seriously considered or debated when a new exemption provision, of broad and general application, is introduced into a statute of broad and general application (i.e., the FOI Act) by means of a "consequential amendment" in a schedule to an Act that appears from its title to be confined to the regulation of a specific industry?

APPENDIX 1

**Applications for external review received in 1998/99,
by category (as per s.71 of the FOI Act)**

STATEMENT OF AFFAIRS (PART 2)	
❑ Refusal to publish, or to ensure compliance with Part 2	0
❑ Deemed refusal	0
ACCESS TO DOCUMENTS (PART 3)	
❑ Refusal to grant access	120
❑ Deletion of exempt matter	7
❑ Combination - refusal to grant access/deletion of exempt matter	18
❑ Deemed refusal to grant access	60
❑ Deferred access	0
❑ Charges	14
❑ Combination - refusal to grant access/charges	0
❑ Third party consulted; objects to disclosure	27
❑ Third party not consulted; objects to disclosure	0
AMENDMENT OF RECORDS (PART 4)	
❑ Refusal to amend	3
❑ Deemed refusal to amend	3
ISSUANCE OF CONCLUSIVE CERTIFICATE	
❑ Cabinet matter	0
❑ Executive Council matter	0
❑ Law enforcement/Public safety matter	0
MISCELLANEOUS	
❑ No jurisdiction or misconceived application	39
TOTAL	**291**

APPENDIX 2

Applications for external review received in 1998/99, by respondent agency or Minister

Ministers	No.
Education	2
Health	1
Departments	
Police	31
Education	17
Corrective Services	14
Families, Youth and Community Care	12
Health	12
Justice	10
Natural Resources	8
Environmental Protection Agency	7
Premier and Cabinet	5
Equity and Fair Trading	4
Mines and Energy	4
Transport	4
Primary Industries	3
Public Works	3
Emergency Services	2
State Development	2
Treasury	2
Local Government and Planning	1
Sport and Racing	1
Training and Industrial Relations	1
Health agencies	
District Health Services	
—Princess Alexandra Hospital	7
—Gold Coast	6
—Redcliffe-Caboolture	4
—Royal Brisbane Hospital	3
—Bundaberg	2
—Prince Charles Hospital	2
—Rockhampton	2
—Tablelands	2
—Toowoomba	2
—West Moreton	2
—Cairns	1
—Central West	1
—Logan-Beaudesert	1
—Sunshine Coast	1
Medical Board of Queensland	4
Health Rights Commission	2
Qld Divisions of General Practice*	1
Qld Institute of Medical Research	1

Other agencies	No.
Queensland Law Society	10
Criminal Justice Commission	8
Ombudsman	5
Building Services Authority	3
Qld Abattoir Corporation	3
Qld Livestock and Meat Authority	3
James Cook University	2
Patient Review Tribunals	2
Public Trustee	2
Queensland Rail	2
Surveyors Board of Qld	2
University of Queensland	2
WorkCover Queensland	2
Anti-Discrimination Commission	1
Catholic Education Office*	1
Energex	1
Far North Qld Electricity Board	1
Griffith University	1
Office of the Public Service	1
Qld Fisheries Management Authority	1
Qld Rural Adjustment Authority	1
Qld Tourist and Travel Corp	1
University of Southern Queensland	1
University of Sunshine Coast	1
Local authorities	
Gold Coast City Council	8
Redland Shire Council	5
Brisbane City Council	4
Cairns City Council	4
Cooloola Shire Council	4
Rockhampton City Council	4
Gatton Shire Council	2
Logan City Council	2
Toowoomba City Council	2
Atherton Shire Council	1
Cardwell Shire Council	1
Fitzroy Shire Council	1
Ipswich City Council	1
Maroochy Shire Council	1
Mt Morgan Shire Council	1
Murgon Shire Council	1
Tiaro Shire Council	1
Warwick Shire Council	1

* These bodies are not subject to the application of the FOI Act

APPENDIX 3

Notes on significant issues dealt with in formal decisions published by the Information Commissioner in 1998/99

Re Murphy and Queensland Treasury
(Decision No. 98009, 24 July 1998, unreported)

The Department claimed that a number of communications between the Department and its legal advisers (the Crown Solicitor, counsel and an in-house adviser) were subject to legal professional privilege and so exempt under s.43(1). After analysing a number of cases which considered the point, I found that parts of bills for legal services and related matter, which did not disclose the substance of legal advice, were not privileged matter qualifying for exemption under s.43(1).

I found that the other documents in issue were *prima facie* privileged, subject to consideration of the claim by the applicant that the communications had been made in preparation for, or furtherance of, an illegal or improper purpose. I discussed the principles discernible from the case authorities in respect of the 'improper purpose exception' to legal professional privilege. I was not satisfied that there was *prima facie* evidence that the other documents in issue were created in preparation for, or furtherance of, an improper or illegal purpose, and I found that those documents were exempt under s.43(1) of the FOI Act.

Re Dalrymple Shire Council and Department of Main Roads
(Decision No. 98010, 28 September 1998, unreported)

The matter in issue in this review comprised unit rates, and lump sum amounts, in a lengthy schedule of items in a tender submitted to the Department by a successful "in-house" bidder (i.e., Road Transport Construction Services (RTCS) - the Department's commercial arm) for road construction works. The Department claimed that the matter in issue was exempt under s.45(1)(b) or s.45(1)(c) of the FOI Act.

I decided that the matter in issue did not have a current commercial value and therefore was not exempt from disclosure under s.45(1)(b) of the FOI Act. In respect of the application of s.45(1)(c), I decided that all of the matter in issue concerned the business affairs of RTCS, but that only disclosure of the unit rates could reasonably be expected to have an adverse effect on RTCS's business affairs, and hence only the unit rates could qualify for exemption under s.45(1)(c) of the FOI Act. I was not satisfied that disclosure of the quoted prices for lump sum items in the schedules to RTCS's tender, could reasonably be expected to impose any competitive disadvantage on RTCS in future tenders for the award of roadworks construction contracts.

As to the public interest balancing test contained in s.45(1)(c), I discussed the concerns raised by the applicant regarding compliance with National Competition Policy Principles, and the need to create a "level playing field" as between "in-house" bidders and other potential contractors. I also discussed the accountability of the Department in respect of the awarding of the particular contract in question. However, I was not satisfied that the concerns raised by the applicant necessitated the disclosure of the unit rates. I decided that the public interest considerations favouring disclosure were not sufficiently strong to warrant a finding that disclosure of the unit rate prices would, on balance, be in the public interest. I therefore found that the unit rate prices were exempt matter under s.45(1)(c) of the FOI Act.

Re Swickers Kingaroy Bacon Factory Pty Ltd and Department of Primary Industries (respondent) and McNaught (third party)
(Decision No. 98011, 27 November 1998, unreported)

This was a 'reverse-FOI' application challenging the decision of the Department to give the third party access to two documents. One of the documents was a consultancy report prepared for Swickers by officers of the Department, concerning a proposed effluent irrigation scheme at Swickers' Kingaroy premises. I found that information in the report which was supplied by Swickers, or which would reveal information supplied by Swickers, was the subject of an express written contractual term as to confidentiality, and was exempt matter under s.46(1)(a) of the FOI Act. I discussed the possible application of the public interest exception to an action for breach of confidence, as referred to in the judgments of the High Court of Australia in *Esso Australia Resources Ltd v Plowman & Ors* (1995) 183 CLR 10, but found that it did not apply in this case. I found that there was no implied contractual obligation, and no equitable obligation, that would restrain the Department from disclosing other parts of the consultancy report to the third party.

Further, I decided that, at a time when the effluent irrigation scheme was already operating, disclosure of the consultancy report (subject to deletion of the matter I found to be exempt under s.46(1)(a) of the FOI Act) could not reasonably be expected to prejudice the business, professional, commercial or financial affairs of any person or agency, and hence a case for exemption under s.45(1)(c) could not be established. I also found that no part of the report concerned the personal affairs of any person, and so rejected a claim that it was exempt matter under s.44(1).

The other document in issue was an Environmental Management Program (EMP), based in part on the consultancy report. The EMP had already been provided to a local authority for the purposes of obtaining rezoning approval, and had been placed on public display. I rejected Swickers' claim that the EMP was exempt under s.44(1), s.45(1)(c) or s.46(1) of the FOI Act.

Re Chambers and Department of Families, Youth and Community Care
(Decision No. 99001, 7 April 1999, unreported)

The applicant was a managerial level officer in a public sector agency, against whom a grievance had been lodged about the way certain complaints by an employee were handled. The applicant sought access to a record of interview between the grievance investigators and a union officer, which referred to the approach the applicant had taken to the grievances of the complainant. The grievance investigators had given an assurance of confidentiality to the union officer.

I discussed the effect of s.99 of the *Public Service Management and Employment Regulation 1988* Qld (which was in force at the time the record of interview was created), which required that certain documents concerning the performance of an officer be shown to the officer before being placed on any official file or record relating to the officer. In the circumstances of the case, I concluded that any understanding of confidentiality between the grievance investigators and the union officer must be subject to an exception which would allow the Department to comply with that provision. I also noted a number of written procedures of the Department which suggested that any understanding of confidentiality would be subject to an exception to accord procedural fairness to a person who was the subject of adverse comment in the course

of the grievance process. I found that the record of interview with the union officer was not exempt from disclosure to the applicant under s.46(1) of the FOI Act.

In rejecting a claim that the record of interview was exempt under s.40(c), I noted the concern of the Department regarding the potential for prejudice to the future supply of information from staff members, particularly junior staff. However, in this case, the information in issue was provided by a union officer, not a staff member, and I did not consider that the nature of the information was such that a significant number of union officers could reasonably be expected to refrain in future from openly representing staff concerns, due to disclosure of the document in issue. I also found that none of the matter in issue concerned the personal affairs of the complainant, or any other person, so that a case for exemption under s.44(1) could not be established.

Re "JLC" and Legal Ombudsman & Ors
(Decision No. 99002, 29 April 1999, unreported)

The matter in issue was of the identity of a solicitor who had provided the Queensland Law Society Inc (the QLS) with his professional opinion concerning a particular issue that arose in connection with the QLS's consideration of a complaint made by the applicant regarding the conduct of another solicitor.

I decided that the matter in issue did not qualify for exemption under s.46(1)(b). I found that there was no evidence of an express assurance about confidential treatment by the QLS of the solicitor's identity (or opinion) being sought or given. Having regard to the material circumstances attending the relevant communication between the solicitor and the QLS, I also was not satisfied, on the balance of probabilities, that at the time the solicitor communicated his advice to the QLS, there existed an implicit mutual understanding that the advising solicitor desired, and the QLS accepted, that the identity of the solicitor should be treated in confidence by the respondent.

As a further ground for finding that the matter in issue did not qualify for exemption under s.46(1)(b), I was not satisfied that a substantial number of solicitors available to the QLS to assist it in the discharge of its regulatory functions, by providing professional legal advice or assistance, could reasonably be expected to be inhibited from doing so because their identities may be disclosed. I therefore found that disclosure of the matter in issue could not reasonably be expected to prejudice the future supply of such information.

I also rejected claims that the matter in issue qualified for exemption under s.40(a), s.41(1), s.42(1)(e) or s.43(1) of the FOI Act.

Re Price and Nominal Defendant
(Decision No. 99003, 30 June 1999, unreported)

The central issue in this case was whether documents held by a firm of solicitors, and by a firm of loss assessors, both of which had acted for the Nominal Defendant, were "documents of the agency" (i.e., the Nominal Defendant) as defined in s.7 of the FOI Act, and hence whether the Nominal Defendant was obliged to deal with those documents when responding to the applicant's FOI access application for all documents relating to his claim file with the Nominal Defendant. I stated that the ruling test imposed by the definition of "document of an agency" is comprised in the words "in the possession or under the control of an agency", with the remaining words of the definition illustrating, rather than extending, the ruling test. I indicated

that the words "under the control" convey the concept of a present legal entitlement to control the use or physical possession of the document, and that for a document to be under the control of an agency, the agency must have a present legal entitlement to take physical possession of the document.

With regard to documents on the solicitors' file, I distinguished between documents in respect of which the Nominal Defendant had rights of ownership, and documents in respect of which the Nominal Defendant merely had a right to obtain copies, on payment of a charge for provision of copies. In doing so, I took guidance from the judgment of the New South Wales Court of Appeal in *Wentworth v De Montfort & Ors* (1988) 15 NSWLR 348 where it was held that, applying principles that are referable to the relationship between a professional person and his/her client, the client has a legal right of ownership to certain documents on a solicitors' file. I found that any document on the solicitors' file, in respect of which the Nominal Defendant had legal rights of ownership, was a "document of the agency" (i.e., of the Nominal Defendant) and hence subject to the application of the FOI Act, but that other documents on the solicitors' file were not.

Applying that principle, I found that a number of documents (correspondence, and records of telephone communications, between the solicitors and the Nominal Defendant, internal records and memoranda as to work to be done, accounts and receipts pertaining to Counsel, and to town agents of the solicitors) were not "documents of the agency", but that documents involving counsel (apart from accounts and receipts), communications with third parties and communications with town agents (apart from accounts and receipts) were "documents of the agency", and subject to the application of the FOI Act.

As to the loss assessor's file, I found that considerations governing the relationship of principal and agent applied, so that all documents brought into existence by the agent during the agency relationship belonged to the principal, apart from documents prepared by the loss assessors for their own purposes: *McIlwraith McEacharn Operations Limited v C.E. Heath Underwriting & Insurance (Australia) Pty Limited (No.2)* [1995] 1 Qd R 363 at p.376. I concluded that most of the documents on the loss assessors' file were "documents of the agency", and subject to the application of the FOI Act.

Apart from a small amount of matter which I found to be exempt under s.44(1) or s.46(1)(a) of the FOI Act, I found that all of the documents in issue which were subject to the application of the FOI Act attracted legal professional privilege and were exempt matter under s.43(1) of the FOI Act. In making that finding, I rejected the applicant's contention that there was *prima facie* evidence that the communications comprised in the matter in issue were made in furtherance of an illegal or improper purpose, so as to disqualify them from attracting legal professional privilege.

Re "BKR" and Queensland University of Technology
(Decision No. 99004, 30 June 1999, unreported)

In this 'reverse FOI' application, the applicant challenged the decision of the University to give the Queensland Nursing Council access to documents concerning his clinical performance (as an enrolled nurse, nearing the end of a course of study at the University which would give him a qualification necessary for accreditation as a registered nurse), and documents concerning his relationships with other persons at the University.

I found that the documents in issue did concern the applicant's personal affairs, as they concerned his performance in a course of private study which he was undertaking, or

concerned his relationships with other individuals. The documents in issue were therefore *prima facie* exempt from disclosure under s.44(1) of the FOI Act, and it was necessary to consider whether the public interest in disclosure of some or all of the documents in issue outweighed the public interest in protecting the privacy of information concerning the applicant's personal affairs.

The University and the Council argued that the balance of public interest favoured the Council obtaining access to information which would assist it in determining whether it should enrol or register a person to practise as a nurse, since the Council has a duty under the *Nursing Act 1991* to ensure that only fit and competent persons are so accredited. (The Council had concerns about the applicant's fitness to practise as a nurse.) The applicant argued that adequate provision was made in the *Nursing Act* for the Council to satisfy itself on such matters, and that the Council should not be able to obtain access, under the FOI Act, to material which it could not obtain under the *Nursing Act* for that purpose.

I found that disclosure to the Council of matter which related directly to the applicant's clinical abilities and competence would, on balance, be in the public interest. In respect of the other matter in issue, I said that I could readily foresee instances where disclosure to the Council of information about serious misconduct outside of nursing practice, but touching on considerations relevant to the functions of the Council, might warrant disclosure. However, I indicated that there was a distinction to be drawn between the weight to be accorded to information about matters arising in a professional context and those arising in a personal context, and that not every private aspect of a person's life should necessarily be made available to the Council, given the balancing exercise inherent in s.44(1). In this case, I found that the information in issue concerning the applicant's relationships with other individuals at the University was not so serious as to justify disclosure to the Council, and that that information was exempt matter under s.44(1) of the FOI Act.

APPENDIX 4

Summaries of Decisions Issued by Means of Letters to Participants in 1998/99

Copland and Queensland Health & Ors
(S 111 - S 118/98, 5 August 1998)

This was a contested application brought by Queensland Health (and by seven other District Health Services to which the applicant's FOI access application had been part-transferred) for an extension of time under s.79(2) of the FOI Act to deal with the applicant's FOI access application. The FOI access application was divided into some 120 distinct sections, covering 23 closely typed pages, and accompanied by a six page letter containing material necessary to the understanding of the FOI access application itself. It sought access to what was arguably an excessive number and volume of documents. However, on the face of the application, one would not have expected any excessive difficulty in identifying, locating or collating the requested documents within the filing systems of the relevant agencies. This effectively precluded resort by the agencies to s.28(2) of the FOI Act. In deciding, under s.79(2) of the FOI Act, to grant each agency an additional six weeks in which to deal with the relevant FOI access application, I made the following observations:

> *The terms of s.28(2) mean that considerations such as the time involved in consulting (as required by s.51 of the FOI Act) with a large number of* [third parties] *who are likely to have substantial concerns with disclosure to* [the applicant] *of information concerning them, and in examining a vast number of documents with a view to assessing whether they contain exempt matter and whether or not access should be refused to exempt matter (and in formulating reasons for decision accordingly), cannot be taken into account as grounds for refusing to deal with an FOI access application under s.28(2). However, such considerations are quite appropriate to be taken into account in the exercise of the discretion conferred on me by s.79(2) to grant an agency additional time to deal with an FOI access application which, on its face, is certain to make excessive demands in terms of consultation, decision-making time, and related demands in its processing.*
>
> ...
>
> [The applicant] *has elected to make demands that, in my view, the relevant agencies could not reasonably be expected to accommodate within the ordinarily appropriate time-frames stipulated in s.27(4) and s.27(7) of the FOI Act.*

Associated Meat Exports Pty Ltd and Queensland Abattoir Corporation
Associated Meat Exports Pty Ltd and Queensland Livestock & Meat Authority
(S 115/97 and S 116/97, 17 August 1998)

I found that certain records of communications between the Queensland Livestock and Meat Authority (the QLMA) and its solicitor(s) satisfied the legal tests to attract legal professional privilege, and hence exemption under s.43(1) of the FOI Act. Applying the principles explained in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, I found that parts of a QLMA briefing note concerning a slaughter agreement, operational difficulties and costings, and part of a QLMA document concerning the cessation of AME's

slaughtering operations, comprised exempt matter under s.45(1)(c) of the FOI Act. However, I rejected claims for exemption by the QLMA for other segments of information, because I could see no reasonable basis for expecting prejudice to its business or commercial affairs, under s.45(1)(c), and no prejudice to the public interest under s.41(1) of the FOI Act. Applying the principles applicable to 'sufficiency of search' cases, as explained in *Re Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464 at pp.469-470, I found that there were no reasonable grounds for believing that additional documents falling within the terms of the relevant access applications, existed in the possession or control of the QLMA or the Queensland Abattoir Corporation.

"HUD" and Criminal Justice Commission
(S 74/94, 19 August 1998)

The documents in issue were reports concerning a CJC investigation into possible connections between the applicant (a former Police officer) and prostitutes. I rejected a claim that one of the documents in issue (a memorandum prepared by a qualified lawyer, who was employed by the CJC as the leader of a multi-disciplinary investigative team) qualified for exemption under s.43(1) of the FOI Act. I found that the memorandum could not be properly characterised as a communication for the purpose of giving legal advice, or professional legal assistance, on a professional matter referable to a relationship of lawyer and client (rather, it was a communication made in an administrative capacity as an employee of the CJC), and further that the memorandum did not, in any event, satisfy the 'sole purpose' test to attract legal professional privilege.

I found that much of the matter in issue was exempt under one or more of s.42(1)(b), s.44(1) or s.46(1)(b) of the FOI Act, on the basis that it would disclose the identity of confidential sources of information, or information communicated pursuant to a mutual understanding that it would be treated in confidence, or information concerning the personal affairs of persons other than the applicant. I rejected some claims for exemption under s.42(1)(e), but upheld others on the basis that disclosure could reasonably be expected to prejudice certain lawful methods or procedures (not widely known to the public) for detecting or investigating possible contraventions of the law. I rejected a claim that the balance of the matter in issue was exempt under s.41(1) of the FOI Act, because much of it was either routine administrative detail or merely factual matter (not eligible for exemption under s.41(1) of the FOI Act) and none of it was of such a sensitive nature as to warrant the conclusion that the public interest would be damaged by its disclosure.

Harris and Queensland Police Service
(S 98/94, 31 August 1998)

The applicant sought access to documents relating to a number of incidents in which the applicant was involved in his former employment as a police officer. During the course of my review, the QPS progressively withdrew its claims for exemption in respect of the bulk of the documents in issue, until only a small portion of information remained in issue. I found that that information was exempt from disclosure under s.44(1) of the FOI Act. The matter concerned the personal affairs of persons other than the applicant, and I was unable to identify any public interest considerations favouring disclosure which were of sufficient weight to overcome the public interest considerations telling against disclosure that were inherent in the satisfaction of the test for *prima facie* exemption under s.44(1).

R J Lucas (for Pearliza Pty Ltd and Lucas Management Pty Ltd) and Department of Tourism, Sport & Racing
(S 9/94, 31 August 1998)

In this 'reverse FOI' application, the matter in issue comprised part of a report lodged with the Department in support of an application for the grant of a liquor licence for a proposed tavern. I found that there was no basis for a claim that any part of the report was prepared solely for the purpose of seeking or giving legal advice, or for use in pending or anticipated legal proceedings, and hence that a claim for exemption under s.43(1) could not be maintained. With respect to the claimed exemption under s.45(1)(b), I found that, taking into account the age of the information contained in the report and the fact that the applicants' concept of a family-based neighbourhood tavern could no longer be regarded as novel or unique, the information did not have a current commercial value so as to qualify for exemption under s.45(1)(b). With respect to s.45(1)(c), I was not satisfied that disclosure of the report could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the applicants or any other person, or to prejudice the future supply of like information to government.

"PAR" and Queensland Police Service
(S 109/93, 31 August 1998)

The matter in issue was contained in witness statements and reports concerning allegations made to the QPS against the applicant (a former security officer), and complaints made by the applicant concerning the handling by QPS officers of the investigation of those allegations. The applicant had indicated that she did not seek access to certain matter, including names of, and some personal information about, witnesses. Much of the information recorded in the documents in issue had already been disclosed in court proceedings. I found that the criminal history of a person other than the applicant was exempt matter under s.44(1) of the FOI Act, and that a small amount of matter in one witness statement was exempt matter under s.46(1)(b). I rejected other claims by the QPS for exemption under s.40(c), s.41(1), s.42(1)(b), s.42(1)(c), s.44(1) and s.46(1)(b) of the FOI Act.

"BSTH" and Department of Family Services and Aboriginal and Islander Affairs
(S 23/93, 31 August 1998)

I affirmed the Department's decision to refuse access to information relating to a mother and her children leaving a situation of domestic violence, relying principally upon s.42(1)(b), s.42(1)(h) and s.44(1) of the FOI Act.

Griffiths and Building Services Authority
(S 75/96, 31 August 1998)

In this 'reverse FOI' case, the applicant objected to disclosure of two questionnaires completed by him as part of the assessment of his eligibility to be licensed as a builder in Queensland, the assessment by a building inspector of the applicant's answers to the questionnaires, and a small amount of related matter. I decided that the applicant's decision to apply for a builder's licence, and the time and effort expended in its pursuit, must be properly characterised as part of his personal affairs, rather than his business or employment affairs. Generally speaking, I consider that an individual's efforts to obtain a particular trade or professional qualification fall within the realm of personal affairs, whereas that individual's conduct of his/her trade or profession

(having obtained the necessary qualification) does not. I found that the applicant's answers to the questionnaires, and the comments thereon by the assessor, comprised information concerning the applicant's personal affairs. I referred to a number of factors which diminished the weight of any public interest in accountability of the Building Services Authority that might be served by disclosure of the matter in issue, and ultimately found that most of the matter in issue qualified for exemption under s.44(1) of the FOI Act. I did, however, find that there was a small amount of matter in issue which it was in the public interest to disclose. I decided that s.45(1)(c) of the FOI Act did not apply in the circumstances of the case.

Claes and Queensland Rail
(S 10/98, 4 September 1998)

The applicant sought access to statements by a fellow Queensland Rail engine driver, in relation to an altercation between the applicant and the other driver. I determined that the matter in issue was exempt from disclosure under s.40(c) of the FOI Act, as its release could reasonably be expected to have an adverse effect on Queensland Rail's ability to investigate and deal with future cases involving alleged violence or harassment in the workplace. I stated that the reporting and proper investigation of incidents of physical altercations between staff raises particularly difficult management issues for most agencies, and I accepted that the apparent breach of trust involved in the release of information given in confidence, would make it difficult to obtain the co-operation of staff in similar investigations in the future. I note that Queensland Rail is not subject to the *Public Service Act 1996* Qld and the *Public Service Regulation 1997* Qld, so that the effect of provisions like s.15 and s.16 of the *Public Service Regulation* had no relevance to my decision.

O'Grady and Veterinary Surgeons Board of Queensland
(S 81/98, 10 September 1998)

The applicant was a veterinary surgeon who sought access to a complaint against him made to the respondent Board by a complainant whose name was specified in the applicant's FOI access application. The complainant objected to the release of the letter of complaint on the basis that it had been made in confidence. The terms of the Board's response to the applicant's FOI access application had confirmed the complainant's identity (although this would have been obvious to the applicant in any event on account of the complainant's past conduct). I found that there was no equitable obligation of confidence binding the Board not to disclose the substance of the complaint to the applicant, as it must have been clear that it would be necessary for the Board to reveal the substance of the complaint to the applicant in order to properly investigate the complaint. I found that no part of the letter of complaint qualified for exemption from disclosure to the applicant under s.46(1)(a) or s.46(1)(b) of the FOI Act.

"CLA" and Gold Coast District Health Service
(S 77/98, 11 September 1998)

This case involved the application of the principles set out in *Re "P" and Brisbane South Regional Health Authority* (1994) 2 QAR 159. The matter in issue consisted of a three page letter concerning the applicant, written for the purpose of assisting staff of the Gold Coast Hospital in the care and treatment of the applicant, who had been a psychiatric patient. The author of the letter objected to its release on the ground that it was given in confidence. I found that the letter was exempt matter under s.46(1)(a), as its disclosure would found an action for breach of confidence.

GSA Industries (Aust) Pty Ltd and Brisbane City Council; G S Technology Pty Ltd (Third Party)
(L 9/94, 30 September 1998)

The case involved the application of s.45(1)(c) of the FOI Act and the principles discussed in *Re Cannon* to the tender (and tender-related information) submitted to the Council by the third party for the supply to the Council of water meters. I found that the bulk of the matter in issue was exempt under s.45(1)(c). I was satisfied that its disclosure to a competitor of the third party could reasonably be expected to have an adverse effect on the third party's business, commercial or financial affairs. I did not consider that disclosure of the matter in issue would assist in scrutinising the fairness or propriety of the Council's tender processes, and I was not satisfied that its disclosure would, on balance, be in the public interest.

Marrinon and Health Rights Commission
(S 148/98; 14 October 1998)

I affirmed a decision that a $30 application fee was payable in respect of an application which sought access to employment-related documents of the access applicant.

"STA" and Queensland Police Service
(S 139/95; 19 October 1998)

The applicant was the mother of a police officer who had committed suicide subsequent to an investigation into allegations that he had committed rape. During the course of the review, the QPS exercised its discretion to release to the applicant matter in issue which solely concerned the personal affairs of her deceased son (notwithstanding that it may have qualified for exemption under s.44(1) of the FOI Act). I found that the matter remaining in issue concerned the personal affairs of a number of persons other than the applicant (including the complainant in the investigation of the allegations of rape) and that a strong privacy interest attached to it. I considered that the large amount of matter already disclosed to the applicant in the course of the review satisfied any public interest consideration based on enhancing the accountability of the agency for its investigations. I found that disclosure of the matter remaining in issue would not, on balance, be in the public interest, and that it was exempt matter under s.44(1) of the FOI Act.

"HOW" and Queensland Police Service
(S 39/98; 20 October 1998)

The applicant, who had complained to the QPS that he had been assaulted, sought access to personal information (such as residential address, telephone number, age and physical description) about the alleged offender, and to matter which would identify persons who had supplied information to the QPS about the incident. The applicant has already been given access to those parts of the witness statements that dealt directly with the alleged assault. I found that the matter remaining in issue concerned the personal affairs of persons other than the applicant for access, and that, considering the extent of the information already disclosed to the applicant, I was not satisfied that disclosure of the matter remaining in issue would, on balance, be in the public interest. I decided that the matter remaining in issue was exempt matter under s.44(1) of the FOI Act.

Ellis and Department of Environment
(S 46/98; 20 October 1998)

The matter in issue was parts of an invoice for legal services provided to the Department by the Crown Solicitor. Applying the principles set out in *Re Murphy and Queensland Treasury (No. 2)* (see Appendix 3 above), I decided that the matter in issue was not subject to legal professional privilege and therefore was not exempt matter under s.43(1) of the FOI Act. With respect to other exemption claims relied on by the Department, I was not satisfied that any reasonable basis existed for expecting that disclosure of the matter in issue could have any of the prejudicial consequences contemplated by s.40(c), s.42(1)(a) or s.42(1)(e) of the FOI Act.

"KON" and Queensland Corrective Services Commission
(S 163/97; 27 October 1998)

The applicant was a former prisoner who sought access to records of concerns expressed by third parties about the placement of the applicant (while a prisoner) on a Work Outreach Camp. Some matter also recorded concerns about persons other than the applicant. I found that the matter remaining in issue (after concessions made during the course of the review) was exempt matter under s.44(1) of the FOI Act.

"CMN" and Education Queensland
(S 158/98; 28 October 1998)

This case resulted in the affirmation of the Department's decision that a $30 application fee was payable in respect of an FOI access application for employment-related documents of the access applicant. The decision refuted the applicant's claim that, because the documents were contained on the applicant's "rehabilitation file", and concerned a workplace dispute which had affected her health, they must concern her personal affairs, notwithstanding that the documents themselves contained no matter that could be properly characterised as information concerning the personal affairs of the applicant.

"FAR" and Department of Families, Youth and Community Care
(S 25/94, 10 November 1998)

The applicant sought access to matter comprising the name of the town of residence of the individual identified by the applicant's birth mother (in documents relating to the applicant's adoption) as being the applicant's natural father. (The name of that individual (the 'putative father') had been disclosed to the applicant by the respondent.) 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 '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.

"HRG" and Department of Families, Youth and Community Care
(S 106/95, 16 November 1998)
"GMS" and Department of Families, Youth and Community Care
(S 120/95, 18 November 1998)
"VTN" and Department of Families, Youth and Community Care
(S 130/95, 1 December 1998)

Each of these cases raised similar issues, in that they involved an application for access to information (contained in documents relating to the applicant's adoption) comprising the name of the individual identified by the applicant's birth mother as being the applicant's natural father. Applying the principles set out in *Re "KBN" and Department of Families, Youth and Community Care* (Information Commissioner Qld, Decision No. 98008, 30 June 1998, unreported), I found in each case that the matter in issue was exempt matter under s.44(1) of the FOI Act.

Althaus and Department of Public Works and Housing
(S 78/97, 4 December 1998)

The applicant sought access to documents relating to complaints about his behaviour (e.g. foul language, harassment, verbal abuse) towards other tenants of public housing. A considerable amount of matter about the substance of the complaints had already been disclosed to the applicant. I found that the matter remaining in issue concerned the personal affairs of persons other than the applicant, and that its disclosure would not, on balance, be in the public interest, meaning that it was exempt matter under s.44(1) of the FOI Act.

"HIC" and Queensland Police Service
(S34/96, 7 December 1998)

The applicant was a QPS officer who had been in charge of a two-person station but had voluntarily transferred to a larger station after concerns had been raised about his health. I found that information obtained by the District Officer from the other officer at the station, for the purpose of considering the applicant's ability to carry out his duties, qualified for exemption under s.40(c) of the FOI Act. The junior officer made it clear at the time he was

interviewed by the District Officer that he was reluctant to provide any information concerning the applicant's general health and well-being, and only answered questions when he was directed to do so. I found that disclosure of the matter in issue in the particular circumstances of the case could reasonably be expected to have a substantial adverse effect on the management by the QPS of its staff. I went on to find that disclosure would not, on balance, be in the public interest, noting that a considerable amount of information had already been given to the applicant about how the QPS managed the issues raised by his illness.

Price and Queensland Police Service
(S 167/98, 11 December 1998)

I affirmed a decision that a $30 application fee was payable in respect of an application for access to documents, a number of which were found, on examination, to contain no information concerning the personal affairs of the applicant.

Veenstra and Department of Public Works and Housing
(S 163/96, 14 December 1998)

The applicant sought access to documents relevant to an investigation conducted by the respondent agency into a grievance lodged by the applicant alleging discrimination against him by staff of the respondent agency. The documents in issue comprised working notes made by the appointed grievance investigator. The applicant had already been given access to the final report of the grievance investigator. The evidence before me established that each staff member interviewed was given an undertaking by the grievance investigator that information provided in the course of the investigation would be kept confidential. I commented that it was unwise for grievance investigators to make blanket promises of confidentiality, because the legal duty to accord procedural fairness may require disclosure to the parties to the grievance of critical evidence (although that was not the case in respect of the matter remaining in issue). Applying principles stated in *Re Pemberton and The University of Queensland* (1994) 2 QAR 293, and *Re McCann and Queensland Police* (1997) 4 QAR 30, I found the matter remaining in issue to be exempt matter under s.40(c) of the FOI Act. I note that this was not a case in which s.15 and s.16 of the *Public Service Regulation 1997* Qld (or their predecessor provisions) had any application: *cf. Re Chambers*, summarised in Appendix 3.

"RSL" and Department of Families, Youth and Community Care
(S 69/95, 22 December 1998)

The applicant sought access to information concerning the daughter she gave up for adoption more than 20 years earlier. The Department provided the applicant with a large amount of information but refused to grant access to any identifying or personal information concerning her daughter, or the adoptive parents, on the basis that the daughter had objected to contact, or disclosure of such information, under the *Adoption of Children Act 1964* Qld. I found that the matter in issue concerned the personal affairs of the daughter, or of her adoptive parents, and was exempt matter under s.44(1) of the FOI Act. In determining that there were no public interest considerations of sufficient weight to overcome the public interest considerations favouring non-disclosure, I took into account the fact that s.59(3) of the *Adoption of Children Act* did not permit the Department to disclose identifying information in cases where an objection had been made. This provision was one of the handful of secrecy provisions in Queensland legislation whose efficacy, *vis-à-vis* the application of the FOI Act, has been preserved by the operation of s.48 of the FOI Act.

Redcliffe City Council and Queensland Police Service
(S 127/98, 28 January 1999)

The applicant sought external review of the QPS's deemed refusal of access to documents relating to the investigation, by the QPS, of a complaint by the applicant against the *Redcliffe Star*, a publication of the Redcliffe Ratepayers Association. The QPS was prepared to disclose to the applicant all relevant documents in its possession, but an objection was lodged by a third party (a representative of the Redcliffe Ratepayers Association) to the disclosure of a transcript of an interview between the third party and an officer of the QPS. The third party claimed that the interview was conducted in confidence, and that information provided by the third party was to be used only if the QPS laid charges in relation to the publication of the *Redcliffe Star*. I found no evidence that the information provided by the third party was provided in confidence; indeed, some of it (barbed comments and counter-threats in what appeared to be an ongoing 'tit-for-tat' political controversy) appeared to have been communicated by the third party with the understanding, intention or desire that it be relayed to the applicant. I decided that the transcript of the interview with the third party was not exempt matter under s.46(1) of the FOI Act, but that a small amount of matter in the transcript did qualify for exemption under s.44(1) of the FOI Act.

McMahon and Department of Primary Industries
(S 171/97, 16 February 1999)

I found that a draft Cabinet submission on whistleblowers, an extract from a Cabinet decision, and a briefing note on the Cabinet submission (which included references to the applicant) were respectively exempt under s.36(1)(a), s.36(1)(g) and s.36(1)(c)(i) of the FOI Act. The case also involved a 'sufficiency of search' issue. Applying the principles set out in *Re Shepherd*, I found that, while it was likely that additional documents did at one time exist in the possession of the DPI, those documents no longer existed, and that the searches by the DPI for additional documents had been reasonable in all the circumstances of the case.

Morgan and Brisbane City Council
(L 25/98, 17 February 1999)

I found that three records of communications between a Council employee and the Council's in-house legal advisers satisfied the legal tests to attract legal professional privilege, and hence exemption under s.43(1) of the FOI Act. Applying the principles set out in *Re Murphy (No.2)* (see Appendix 3), I rejected a claim that privilege could not subsist because the documents were created in preparation for, or in furtherance of, an illegal or improper purpose.

Price and Criminal Justice Commission
(S 7/98, 17 February 1999)

The only issue in this review was a 'sufficiency of search' question. Applying the principles set out in *Re Shepherd*, I found that there were no reasonable grounds to believe that any documents described in the applicant's access application existed as documents of the CJC, and that the search efforts undertaken by the CJC to locate documents falling within the terms of the access application had been reasonable in all the circumstances of the case.

Price and Department of Justice
(S 79/96, 19 February 1999)

The applicant wished to obtain access to birth certificates which he considered might be of relevance in legal proceedings, and to records of an attempt to have a dispute between himself and a third party mediated by the Community Justice Program. Applying the principles in *Re Shepherd*, I found that the searches conducted to locate two birth certificates (of persons who may or may not have been born in Queensland) were reasonable in all the circumstances of the case. I found that the matter in issue (including a birth certificate of a person other than the applicant, and information relating to the personal affairs of the third parties contacted in the course of attempts to initiate mediation with the applicant) was exempt matter under s.44(1) of the FOI Act.

Knowles and Gold Coast District Health Service
(S 169/98, 23 February 1999)

This was a 'sufficiency of search' case that was resolved in accordance with the principles established in *Re Shepherd*.

Smith and James Cook University
(S 126/98, 24 February 1999)

The documents in issue related to action taken by the University to improve the quality of teaching in its Department of Law (as the School of Law then was) in 1995. The University agreed to give the applicant access to the majority of the documents sought, but objected to disclosure of parts of one document. I found that the matter remaining in issue was exempt from disclosure to the applicant under s.40(c) of the FOI Act, as its disclosure could reasonably be expected to have a substantial adverse effect on the management or assessment by the University of its personnel.

McMahon and Department of Natural Resources
(S 130/97, 24 February 1999)

I found that two documents (comprising handwritten notes of instructions received, and legal advice given, by a salaried lawyer employed by the Department) were exempt matter under s.43(1) of the FOI Act. Applying the principles set out in *Re Murphy (No.2)*, I rejected a claim that legal professional privilege could not subsist because the documents were created in preparation for, or in furtherance of, an illegal or improper purpose.

"RTF" and Department of Families, Youth and Community Care
(S 133/95, 25 February 1999)
"TRD" and Department of Families, Youth and Community Care
(S 122/97, 26 February 1999)
"DNL" and Department of Families, Youth and Community Care
(S 123/97, 26 February 1999)

Each of these cases involved an application for access to information (contained in documents relating to the applicant's adoption) comprising identifying particulars concerning the individual identified by the applicant's birth mother as being the applicant's natural father. Applying the principles set out in *Re "KBN" and Department of Families, Youth and Community Care* (Information Commissioner Qld, Decision No. 98008, 30 June 1998, unreported), I found in each case that the matter in issue was exempt matter under s.44(1) of the FOI Act.

Stubberfield and Department of Communication and Information, Local Government and Planning
(S 87/93, 12 March 1999)

I found that copies of Cabinet submissions were exempt matter under s.36(1)(g) of the FOI Act, being copies of matter which qualified for exemption under s.36(1)(a) (matter submitted to Cabinet); that copies of Cabinet Minutes were exempt matter under s.36(1)(g) of the FOI Act, being copies of matter which qualified for exemption under s.36(1)(d) (official record of Cabinet), and that a draft Cabinet submission was exempt matter under s.36(1)(f), being a draft of matter which qualified for exemption under s.36(1)(a).

McMahon and Department of Natural Resources
(S 131/97, 15 March 1999)

This case raised 'sufficiency of search' issues which were resolved in accordance with the principles set out in *Re Shepherd*.

Henderson and Department of Families, Youth and Community Care
(S 190/98, 31 March 1998)

This decision involved the application of principles set out in *Re Young and Workers' Compensation Board of Qld* (1994) 1 QAR 543 concerning the discretion conferred on the Information Commissioner by s.73(1)(d) of the FOI Act, to extend the time for lodgment of an application for external review. The application for review (which was lodged well outside the 60 day time limit) sought to raise a 'sufficiency of search' issue only. I was not persuaded that the 'sufficiency of search' issue had any merit or reasonable prospects of success, and I decided not to exercise the discretion to extend time in favour of the applicant for review.

Higgins and Education Queensland
(S 200/1998, 31 March 1999)

In this 'reverse FOI' case, Mr Higgins objected to the Department's decision to give the access applicant access to documents concerning Mr Higgins' employment with the Department. Applying the principles concerning employment-related matter discussed in *Re Stewart*, *Re Pope* and *Re Murphy*, I held that the matter in issue concerning the applicant's employment

(whether that employment was outside Queensland, or outside the Queensland government) did not concern his personal affairs, and so was not exempt matter under s.44(1) of the FOI Act.

I rejected an argument raised by Mr Higgins that some documents were owned by him and so were not "documents of the agency". I stated that while documents are in the physical possession of an agency, they are "documents of the agency" for the purposes of the FOI Act (applying principles stated in *Re Holt and Education Queensland* (1998) 4 QAR 310). In addition, I discussed the application of s.30(3)(c) of the FOI Act. I stated that a valid claim of copyright does not afford a ground of exemption under the FOI Act, or a ground for withholding access (other than by way of provision of a copy). However, I stated that any issue in relation to the form of access which an agency can or should permit in respect of non-exempt matter, is an issue which must be taken up directly with the relevant agency, as I have no jurisdiction to deal with such issues.

"FMG" and Queensland Police Service
(S 176/98, 9 April 1999)

The matter in issue in this external review was identical to that dealt with in my decision in *"FMG" and Queensland Police Service* (S 69/97, 24 April 1998 - summarised at pp 49-50 of my 1997/98 Annual Report) in which I had determined that audio tapes and transcripts of an interview between police and two children, concerning allegations of child neglect, were exempt from disclosure to their father under s.44(1) of the FOI Act. This application was brought in the names of the children themselves. However, after considering all the material available to me, and the conduct of the application itself (which was clearly undertaken by the father), I was not satisfied that it was a *bona fide* application by the children in their own interests. As it involved the same matter in issue as in the previous external review application by the father, I decided, under s.77(1) of the FOI Act, not to review the matter further on the basis that the application for review was vexatious, misconceived and lacking in substance.

Ferguson and Criminal Justice Commission
(S 98/93, 13 April 1999)

I rejected claims that three memoranda prepared by officers in the Official Misconduct Division of the CJC, containing advice and recommendations in relation to the handling of complaints made to the CJC by the applicant, were exempt matter under s.43(1) of the FOI Act. Although they were prepared by legal officers of the CJC who were qualified to provide independent legal advice to the CJC, it was necessary to determine whether each memorandum was created solely for a purpose attracting legal professional privilege: see *Re Hewitt and Queensland Law Society Inc and Legal Ombudsman* (1998) 4 QAR 328, I found that the memoranda were created predominantly for an executive or administrative purpose, and not solely for a privileged purpose. I made a similar finding in relation to matter in another memorandum which recorded information provided by a legally qualified officer of the CJC. However, I found that a small amount of matter in issue was exempt matter under s.41(1) of the FOI Act.

"SIM" and Queensland Police Service
(S 13/95, 15 April 1999)

The applicant's husband died unexpectedly, and the sister of the deceased (the third party) subsequently wrote to the QPS, urging further investigation of the circumstances of her brother's death. The applicant was interviewed by an officer of the QPS in relation to certain matters raised in the third party's letter, and subsequently applied to the QPS for access to the letter. The third party objected to disclosure of any part of the letter, or of the attachments to it. The third party and the QPS contended that the letter and attachments were exempt from disclosure under s.42(1)(a), s.46(1)(b) and s.44(1) of the FOI Act. I found that the matter in issue was not exempt from disclosure under s.42(1)(a), as the QPS had concluded its investigation, and the Coroner had decided that an inquest would not be held. I found that those parts of the letter and attachments which comprised information that had been put to the applicant by the QPS, or which would already be known to the applicant, did not qualify for exemption from disclosure to the applicant under s.46(1)(b), but that the remaining matter, which was not known to the applicant, was exempt from disclosure under s.46(1)(b) of the FOI Act. I also found that certain segments of matter, which concerned the personal affairs of persons other than the applicant, were exempt from disclosure to the applicant under s.44(1) of the FOI Act, but that information concerning the shared personal affairs of the applicant and her late husband did not qualify for exemption from disclosure to the applicant under s.44(1) of the FOI Act.

Devine and Queensland Police Service
(S 78/98, 27 April 1999)

This was a 'sufficiency of search' case in respect of e-mails sent and received by a QPS officer for the purposes of a coronial investigation. I found that such documents once existed but that, having regard to evidence that they had been deleted without hard copies being retained, there were no reasonable grounds to believe that further copies of the e-mails existed in the possession or control of the QPS. I also found that the searches conducted by the QPS had been reasonable in all the circumstances of the case.

Verrall and Ipswich City Council
(L 31/97, 19 May 1999)

In 1997, a complaint was made to the Council concerning breaches of health regulations on property owned by the applicant, who sought access to details of the person who had made the complaint. I applied principles established in *Re McEniery and the Medical Board of Queensland* (1994) 1 QAR 349 and *Re Bussey and Council of the Shire of Bowen* (1994) 1 QAR 530 in finding that the identity of the complainant was exempt matter under s.42(1)(b) of the FOI Act.

Offord and Rockhampton City Council
(L 28/98, 24 May 1999)

This was a 'sufficiency of search' case, which was resolved in accordance with the principles established in *Re Shepherd*.

Randle and Department of Equity and Fair Trading

(S 177/98, 25 May 1999)

The matter in issue consisted of documents relating to the sale and purchase of a block of land by a number of different parties over a period of time. The applicant was not referred to in the matter in issue, nor was he involved in the various sale/purchase transactions in any way, nor had he ever had any connection with the land. I found that the third parties were acting in their personal and private capacities in entering into the sale/purchase contracts, or in giving their consent to applications for exemption under the *Land Sales Act 1984* Qld, or in engaging solicitors to act on their behalf in respect of those transactions. I held that a person's decision to sell or purchase residential land in his/her private capacity, and documentation evidencing or relating to such a transaction is properly characterised as information concerning the personal affairs of the relevant individuals, under s.44(1) of the FOI Act. I also found that there did not exist any identifiable public interest considerations favouring disclosure of the matter in issue, which were of sufficient weight to warrant a finding that disclosure to the applicant would, on balance, be in the public interest. I found that the matter in issue was exempt under s.44(1) of the FOI Act.

Niall and Queensland Police Service
(S 118/99; 3 June 1999)

Mr Niall had sought internal review by the QPS of an initial decision requiring him to pay a $30 application fee in respect of an FOI access application. The internal reviewer overturned the initial decision, finding that a $30 application fee was not payable. Inexplicably, Mr Niall applied to me for review of the internal review decision, which was entirely in his favour. Under s.77(1) of the FOI Act, I decided not to deal with Mr Niall's application for review because it was frivolous, vexatious, misconceived and lacking in substance.

Thompson & Royds and Cairns City Council
(L 16/99, 16 June 1999)

I found that three letters to the Council from the Council's solicitor, together with a file note of a telephone conversation between the CEO of the Council and the Council's solicitor, satisfied the legal tests to attract legal professional privilege, and were exempt matter under s.43(1) of the FOI Act.

"PCL" and Queensland Police Service; Zane (third party)
(S 57/99; 17 June 1999)

In this 'reverse FOI' application, the applicants (a juvenile who was charged with wounding the third party, and the juvenile's mother) challenged the decision of the QPS to give the third party access to matter which would identify them. I found that parts of the documents concerned the personal affairs of the applicants (i.e., the juvenile's residential address, date of birth, racial appearance and occupation) and parts of the documents concerned the shared personal affairs of the applicants and the third party (i.e., details of the QPS investigation of the incident which would identify the applicants, including a reference to an interview with the juvenile and his response to the complaint made by the third party). Following principles set out in *Re Willsford and Brisbane City Council* (1996) 3 QAR 368, I decided that the public interest in the third party obtaining access to the matter in issue to enable him to assess the potential for, or pursue, a legal remedy (i.e., a civil claim for damages) outweighed the public interest in protecting from disclosure the identity of the juvenile as a person charged with a criminal

offence. I therefore found that the matter in issue was not exempt from disclosure to the third party under s.44(1) of the FOI Act. I also found that the matter in issue was not exempt from disclosure to the third party under s.48(1) of the FOI Act, because it fell within the terms of the exception provided for in s.48(2) of the FOI Act.

Ubaldi and Royal Brisbane Hospital and District Health Service
(S 109/99, 17 June 1999)

Ms Ubaldi sought external review of a decision refusing access to medical records held by the Health Service concerning a deceased relative of Ms Ubaldi. However, both the initial access application, and the subsequent application for internal review (which led to the decision in respect of which external review was sought) had been lodged by a person other than Ms Ubaldi, and there was no indication that that person had been acting as agent for Ms Ubaldi. I decided that, in the circumstances, the applicant had no legal entitlement to pursue an application for external review in respect of the particular internal review decision she sought to have reviewed. I decided that the external review application was misconceived or lacking in substance, within the meaning of s.77 of the FOI Act, and that I would not proceed further with the review application.

Liberty Station Pty Ltd and Department of Tourism, Sport and Racing
(S 48/99; 30 June 1999)

In this 'reverse FOI' application, Liberty Station Pty Ltd objected to the disclosure to the access applicant of documents relating to a liquor licensing application lodged with the Department. I applied the principles explained in *Re Cannon* in affirming the Department's decision that the matter in issue was not exempt from disclosure to the applicant under s.45(1)(b) or s.45(1)(c) of the FOI Act.