



Decision and Reasons for Decision

Application Number: 210644 – Part A

Applicant: Dr M Haneef

Respondent: Department of Police

Third Party: Australian Federal Police

Decision Date: 24 February 2010

Catchwords: **FREEDOM OF INFORMATION – ACTS EXCLUDING OR LIMITING THE FREEDOM OF INFORMATION ACT (QLD) 1992 – whether the *Freedom of Information Act 1992* (Qld) applies to documents sought by the applicant**

FREEDOM OF INFORMATION – DELETION OF IRRELEVANT MATTER – whether matter reasonably considered irrelevant to application – whether agency may delete matter pursuant to section 27(3) of the *Freedom of Information Act 1992* (Qld)

FREEDOM OF INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – MATTER RELATING TO LAW ENFORCEMENT OR PUBLIC SAFETY – whether disclosure of matter could reasonably be expected to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law – whether the matter in issue is exempt under section 42(1)(e) of the *Freedom of Information Act 1992* (Qld)

FREEDOM OF INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – MATTER AFFECTING LEGAL PROCEEDINGS – whether matter would be privileged from production in a legal proceeding on the ground of legal professional privilege – whether the matter in issue is exempt under section 43(1) of the *Freedom of Information Act 1992* (Qld)

FREEDOM OF INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – MATTER AFFECTING PERSONAL AFFAIRS – whether the matter in issue discloses information concerning the personal affairs of a person other than the applicant – whether the matter in

issue is exempt under section 44(1) of the *Freedom of Information Act 1992* (Qld)

FREEDOM OF INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – MATTER DISCLOSURE OF WHICH WOULD BE CONTEMPT OF PARLIAMENT – whether public disclosure of the matter in issue would infringe the privileges of Parliament – whether the matter in issue is exempt under section 50(c)(i) of the *Freedom of Information Act 1992* (Qld)

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REASONS FOR DECISION

Summary

1. To avoid unnecessary delay, I will issue two decisions in this external review:
 - Part A decision which deals with all relevant folios other than folios 147 and 148
 - Part B decision which deals with folios 147 and 148.
2. This decision is the Part A decision.
3. On the information available to me, I find that:
 - the *Freedom of Information Act 1992* (Qld) (**FOI Act**) does not apply to the seventh line of text in folio 145 and lines three to seven of text in folio 146 by virtue of section 11D of the FOI Act
 - information contained in paragraph 15 of folio 78, the last paragraph of 86 and the fifth paragraph of 91 can be deleted from a copy of the matter in issue pursuant to section 27(3) of the FOI Act
 - folio 7 and 63 is not exempt from disclosure under section 42(1)(e) of the FOI Act
 - folios 74, 115-117, 125-127 and 154 are exempt from disclosure under section 43(1) of the FOI Act
 - folio 114 is not exempt from disclosure under section 43(1) of the FOI Act
 - the matter claimed to be exempt under section 44(1) of the FOI Act is exempt from disclosure under section 44(1) of the FOI Act.
 - folios 167-169 are exempt from disclosure under section 51(c)(i) of the FOI Act
4. The decision under review is varied.

Background

5. By letter dated 12 June 2008, the applicant applied to the Department of Police, also known as the Queensland Police Service (**QPS**), for access to (**FOI Application**):

...all documents, created or brought into existence, or received by your Department, on or after 2 July 2007, to the present date, relating to:

1. *the cancellation of his visa subclass 457 Business (long stay) (Class C), which had an expiry date of 30 August 2010;*
 2. *the decision to detain our client, and his ongoing detention;*
 3. *the issue of a Criminal Justice Stay Certificate, or any other Criminal Justice Certificate in relation to our client, and/or any associated criminal justice visa;*
 4. *the making of a residence determination under subdiv.B, Div.7, Part 2 of the Migration Act, in favour of our client;*
 5. *communications with other government Departments or agencies, regarding our client.*
6. On 12 August 2009, QPS advised the applicant that it had located thirty three folios relevant to the request and decided to (**Original Decision**):
 - release folios 8, 9 and 11 to 13 in their entirety
 - release folios 1 to 7 subject to the deletion of matter it considered to be irrelevant to the application pursuant to section 27(3) of the FOI Act
 - fully exempt folios 22 to 23 pursuant to section 36(1)(c) of the FOI Act
 - fully exempt folios 14 to 17 pursuant to section 43(1) of the FOI Act

- release folios 5, 7, 10 and 18 subject to the deletion of matter it considered to be exempt pursuant to section 44(1) of the FOI Act
 - fully exempt folios 19 to 21 pursuant to section 44(1) of the FOI Act.
7. By letter dated 22 August 2008, the applicant applied for internal review of the Original Decision (**Internal Review Application**).
8. On 25 September 2008, AG Davey, Assistant Commissioner of Operations Support Command, advised the applicant that QPS had located additional documents relevant to the request (**Internal Review Decision**), and:
- in relation to part 1 of the Original FOI Application:
 - identified eight folios relevant to this part (folios numbered 1-8); and
 - decided to release folios 1-6 subject to the deletion of material pursuant to section 27(3) of the FOI Act and release folios 7-8 subject to the deletion of material pursuant to section 27(3) and 44(1) of the FOI Act
 - in relation to part 2 of the Original FOI Application:
 - identified eighty seven folios relevant to this part (folios numbered 9-97); and
 - decided to release folios 9, 59, 60, 61, 62, 66, 67, 87, 88, 89 in their entirety; release folios 10-58, 63-65, 68-86, 90-95 subject to the deletion of material pursuant to section 27(3) of the FOI Act; and refuse access to folios 96 and 97 pursuant to section 46(1)(b) of the FOI Act
 - in relation to part 3 of the Original FOI Application:
 - identified one folio relevant to this part (folio numbered 98); and
 - decided to release this folio subject to the deletion of material pursuant to section 27(3) of the FOI Act
 - in relation to part 4 of the Original FOI Application:
 - did not locate any documents and refused access pursuant to section 28A of the FOI Act
 - in relation to part 5 of the Original FOI Application:
 - identified seventy five folios relevant to this part (folios numbered 99-174); and
 - decided to release folios 99, 100, 101, 103, 104, 133, 134, 135 in their entirety; refuse access to folios 161-174 pursuant to section 36(1) and 111-122 and 124-130 pursuant to section 43(1) of the FOI Act; and release the remaining folios subject to the deletion of material pursuant to sections 27(3), 42(1)(e), 43(1), 44(1) and 46(1)(b) of the FOI Act.
9. By facsimile dated 23 October 2008, the applicant applied to this Office for external review of the Internal Review Decision (**External Review Application**).
10. The full background to the applicant's involvement with government agencies is set out in the Full Court of the Federal Court decision in *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203.

11. In making my decision, I have taken into account the following:

- the FOI Application, Internal Review Application and External Review Application
- the Original Decision and Internal Review Decision
- written correspondence and submissions received from the applicant, QPS and the AFP during the course of the review¹
- file notes of various telephone and in-person conversations between staff members of this Office and QPS during the course of the review
- file note of the telephone conversation between a staff member of this Office and the applicant during the course of the review
- file note of the telephone conversation between a staff member of this Office and the AFP during the course of the review
- relevant provisions of the FOI Act as referred to in this decision
- legislation, case law and previous decisions of the Information Commissioner as referred to in this decision
- content of the material claimed to be exempt
- publicly available information, including The Report of the Clarke Inquiry into the case of Dr Mohamed Haneef and information available on the Australian Federal Police (AFP) website.

Decision under review

12. The decision under review is the Internal Review Decision.

Applicable legislation

13. The FOI Act was repealed by the *Right to Information Act 2009 (RTI Act)*² which commenced on 1 July 2009.³ However, because the FOI Application was made under the FOI Act and has not yet been finalised, for the purposes of this decision, I am required to consider the application of the FOI Act (and not the RTI Act) to the matter in issue.⁴

Matter in issue

14. During the conduct of this external review it became apparent that the applicant intended to apply for all documents which QPS held about the arrest of the applicant and subsequent events, including what occurred between the agencies involved. In this regard, QPS identified 1923 folios as relevant to the external review (which included the 174 folios identified in the Internal Review Decision).

15. As there was some uncertainty as to whether the scope of the FOI Application would capture what was intended to be captured, the applicant requested that I not make a determination as to whether all 1923 folios fall within scope. The applicant has subsequently made an application to QPS for these additional documents and accordingly, only those documents considered in the Initial Decision and Internal Review Decision are in issue in this review.

¹ While I have not set out the footnotes to the parties' submissions in this decision, I have taken the full submissions into account including the matters set out in footnotes.

² Section 194 of the RTI Act.

³ With the exception of sections 118 and 122 of the RTI Act.

⁴ Section 199 of the RTI Act.

16. In the Original Decision, QPS identified 33 folios as responsive to the FOI Application. On internal review, QPS identified 174 folios as falling within scope of the FOI Application.
17. The following folios (which were not fully released to the applicant) were considered in the Initial Decision but were not subsequently reviewed in the Internal Review Decision:⁵
 - ID2, ID5, ID7, ID19, ID20, ID21
18. These folios form part of the matter in issue in this review.
19. The folios detailed below (some in part and some in full) no longer form part of the matter in issue for the following reasons:
 - of the 174 folios considered in the Internal Review Decision, folios 9, 59-62, 66, 67, 87, 88, 89, 99-101, 103, 104, 134 and 135 were released to the applicant in full. Accordingly, these folios no longer form part of the matter in issue.
 - during the course of the review, QPS agreed to release the following folios in full to the applicant:⁶
 - 1-6, 10-39, 42-58, 69, 71, 73, 75, 77, 79, 81-84, 90, 93, 95, 96, 98, 107, 111-113, 119-122, 129, 130 (copy of information contained in 120), 142-144, 151, 152, 159, 161-164, 166, 170-174

Accordingly, these folios no longer form part of the matter in issue.

- in its submissions dated 9 January 2009, the applicant's legal representative confirmed that the applicant did not seek access to information comprised solely of telephone numbers, email addresses, home and/or business addresses, signatures or birth dates. The information claimed to be exempt by QPS in the following folios is solely comprised of:
 - mobile telephone numbers – 102, 118, 124, 128 (copy of 118), 131, 153, 165
 - dates of birth – 105, 106
 - personal email addresses – 108-110
 - home and/or business addresses – 155, 156
- Accordingly, these folios can be released to the Applicant with the relevant information removed and no longer form part of the matter in issue.
- in its submissions dated 6 April 2009, the applicant's legal representative confirmed that the applicant did not pursue information relating to the private medical condition of a Federal Agent contained in the second line of folio 145. Accordingly, this part of the folio no longer forms part of the matter in issue. The remaining information contained in the folio is considered later in this decision.

⁵ I have referred to the folio numbers with the letter 'ID' (Initial Decision) to distinguish these folio numbers from the folio numbers given to the documents considered in the Internal Review Decision.

⁶ Pursuant to section 81 of the FOI Act, QPS did not wish or could not establish that the Information Commissioner should give a decision adverse to the applicant in respect of these folios.

20. Therefore, the matter in issue for the purpose of this decision (Part A)⁷ is the deleted and exempt matter in those documents among the 174 documents that have not already been fully released to the applicant and the deleted and exempt matter in the documents considered in the Initial Decision but not reviewed by the internal reviewer.
21. The matter in issue comprises the following folios:
- ID2, ID5, ID7, ID19, ID20, ID21
 - 7, 8, 40, 41, 63 (copy of 7), 64 (copy of 8), 65, 68, 70, 72, 74, 76, 78, 80, 85, 86 (copy of information contained in 78), 91 (copy of information contained in 78 & 86), 92, 94, 97, 114, 115-117, 123, 125-127 (copy of 115-117), 132, 133, 136, 137, 138 (copy of 137), 139-141, 145, 146, 149, 150, 154, 157, 158, 160, 167-169

Issues for consideration

22. The issues for consideration in this decision are whether:
- the FOI Act applies to the deleted matter in folios 145 and 146
 - it is reasonable to consider the deleted matter contained in folios 78, 86 and 91 is irrelevant to the FOI Application pursuant to section 27(3) of the FOI Act
 - the remaining matter in issue is exempt from disclosure under sections 42(1)(e), 43(1), 44(1) and 50(c)(i) of the FOI Act.

Findings

Section 11D of the FOI Act

23. The AFP submits that the following matter is excluded from the application of the FOI Act by virtue of section 11D of the FOI Act:
- the seventh line of text in folio 145; and
 - lines three to seven of text in folio 146.

24. Section 11D of the FOI Act states:

11D Application of Act to other Acts

- (1) *Schedule 3 lists provisions of other Acts that exclude or limit the operation of this Act.*
- (2) *Schedule 3 is included for information purposes.*

25. Schedule 3 of the FOI Act relevantly provides:

Schedule 3 Application of Act to other Acts

Section 11D

...

Police Powers and Responsibilities Act 2000, sections 281, 325, 539 and 663

⁷ Part A decision does not deal with folios 147 and 148 which are the subject of Part B decision.

26. Section 325(8) of the *Police Powers and Responsibilities Act 2000* (Qld)⁸ (**PPR Act**) provides that the FOI Act does not apply to activities and records under Chapter 13 of the PPR Act. Chapter 13 of the PPR Act primarily concerns the procedures, requirements and use of surveillance device warrants, devices and operations.

Analysis

27. I am constrained in the level of detail I can provided in this analysis given the nature of the information in issue.⁹ However, I have carefully considered the matter claimed to be exempt in folios 145 and 146 and find that:
- the relevant information discloses activities and/or records under Chapter 13 of the PPR Act
 - section 325 of the PPR Act excludes the operation of the FOI Act to activities and records under Chapter 13 of the PPR Act

Conclusion

28. I find that the FOI Act does not apply to the seventh line of text in folio 145 and lines three to seven of text in folio 146 pursuant to section 325 of the PPR Act.¹⁰

Section 27(3) of the FOI Act

29. QPS and/or AFP submit that it is reasonable to consider that the deleted matter contained in the following folios is irrelevant to the FOI Application:
- paragraph 15 – folio 78
 - the last paragraph – folio 86 (copy of 78)
 - the fifth paragraph – folio 91 (copy of 78 & 86)

30. Section 27(3) of the FOI Act states:

27 How applications are dealt with

...

- (3) *If giving access to a document will disclose to the applicant matter the agency or Minister reasonably considers is not relevant to the application, the agency or Minister may delete the irrelevant matter from a copy of the document before giving access to the document.*

Application of section 27(3) of the FOI Act

31. The FOI Application seeks access to all documents **relating** to a list of decisions and activity. The word 'relate' means 'to bring into or establish association, connection, or relation'.¹¹ In the context of the FOI Application, and with particular reference to

⁸ I note that the RTI Act amended the PPR Act by omitting section 325(8). However, this section was in operation at the date of the FOI Application and until the FOI Act was repealed by the RTI Act on 1 July 2009.

⁹ I cannot disclose information that is claimed to qualify for exemption under the FOI Act: section 87 of the FOI Act.

¹⁰ Given my finding that the FOI Act does not apply to this information, it is unnecessary for me to consider the application of section 42(1)(e) of the FOI Act (as submitted by QPS and AFP).

¹¹ Macquarie Dictionary, 2nd Ed., 1992, Macquarie Library: Macquarie University.

section 4(5) of the FOI Act, 'relating to' should be interpreted to give a broad scope to the FOI application.

32. Section 27(3) of the FOI Act gives an agency a discretion to delete matter it reasonably considers not relevant to the FOI application. 'Relevance' means 'having a bearing upon or connection with the matter in hand'.¹²
33. In the current circumstances, section 27(3) of the FOI Act can only apply when the agency reasonably considers that the matter has no relevance to a matter related to a decision or activity listed in the FOI Application i.e. any matter that has a connection with matter that is connected to the nominated decisions and activity in the FOI Application is relevant matter. The connection may not be direct or causal. This approach supports the requirement in sections 4(5) and (6) of the FOI Act to give members of the community access to information held by government to the greatest extent possible.
34. Section 27(4) of the FOI Act enables an agency to give access to a document with irrelevant matter deleted only if the agency considers, from the application or after consultation with the applicant, that the applicant would accept the copy and it is reasonably practicable to give access to the copy.
35. The deleted matter does not concern a decision or investigation relating to the applicant's arrest, detention, charging, prosecution or the decision to cancel the applicant's visa. Rather it concerns information about a journalist's activities.
36. After careful consideration of this issue, I am satisfied that QPS was entitled to consider from the FOI Application, that the applicant would accept a copy of the documents with the irrelevant matter deleted given that the matter clearly falls outside the scope of the FOI Application.

Conclusion

37. Accordingly, I find that:
 - it is reasonable to consider the deleted matter irrelevant to the FOI Application
 - QPS is entitled to delete the irrelevant matter from a copy of the documents pursuant to section 27(3) of the FOI Act.

Section 42(1)(e) of the FOI Act

38. QPS and/or AFP submits that the deleted matter contained in the following folios qualifies for exemption under section 42(1)(e) of the FOI Act:
 - 7 and 63 (copy of 7).
39. Section 42(1)(e) of the FOI Act states:

42 Matter relating to law enforcement or public safety

(1) *Matter is exempt matter if its disclosure could reasonably be expected to -*

...

¹² Ibid.

- (e) *prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law); or*

40. The Information Commissioner has previously considered the application of section 42(1)(e) of the FOI Act and found that for the provision to apply, the following criteria must be satisfied:¹³

- there is a lawful method or procedure used by the agency
- the lawful method or procedure is used for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law)
- disclosure of the matter in issue could reasonably be expected to prejudice that lawful method or procedure

Application of section 42(1)(e) of the FOI Act

Lawful method or procedure

41. Section 42(1)(e) does not provide a blanket protection for every lawful method or procedure adopted by an agency. The methods and procedures used by an agency must be 'lawful'.¹⁴

42. In *T and Queensland Health*¹⁵ the Information Commissioner stated:

Each agency will have developed (and will probably continue to develop and refine) methods and procedures to assist in the performance of its particular law enforcement responsibilities. Some methods and procedures may depend for their effectiveness on secrecy being preserved as to their existence, or their nature, or the personnel who carry them out, or the results they produce in particular cases. It is not possible to list the types of methods or procedures which may qualify for protection under section 42(1)(e) of the FOI Act. Each case must be judged on its own merits.

43. I cannot describe the methods or procedures which QPS/AFP are seeking to protect.¹⁶ However, I have carefully considered the matter in issue and I am satisfied that it does describe a method or procedure used by QPS/AFP.

Contravention or possible contravention of the law

44. Section 42(5) of the FOI Act states that for the purpose of section 42, the term 'law' includes law of the Commonwealth, another State, a Territory or a foreign country.

45. I am satisfied that the methods or procedures referred to in the matter in issue are used for preventing, detecting, investigating or dealing with a contravention or possible contravention of the criminal law.

Disclosure could reasonably be expected to prejudice the lawful method or procedure

46. In *Attorney-General v Cockcroft*,¹⁷ which dealt with the interpretation of the phrase 'could reasonably be expected to prejudice the future supply of information' in the

¹³ *T and Queensland Health* (1994) 1 QAR 386.

¹⁴ *Ibid* at paragraph 10.

¹⁵ At paragraph 23.

¹⁶ Section 87 of the FOI Act.

context of the section 43(1)(c)(ii) (business affairs) exemption contained in the Commonwealth FOI Act, Bowen CJ and Beaumont J said:¹⁸

In our opinion, in the present context, the words "could reasonably be expected to prejudice the future supply of information" were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act ... To construe s.43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based ...

47. In VHL and Department of Health,¹⁹ I accepted the interpretation of the phrase 'could reasonably be expected to' as set out in Cockcroft and observed that:

...the proposed line of inquiry, while made in the context of the business affairs exemption contained in Commonwealth legislation is relevant in the context of the exemption contained in section 42(1)(h) of the FOI Act.

Accordingly ... I must examine whether it is reasonable as distinct from something that is irrational, absurd or ridiculous to expect that disclosing the [information] will 'prejudice the system or procedure' [in question].

48. Recently, the High Court of Australia interpreted the phrase 'could reasonably be expected to',²⁰ in *K-Generation Pty Limited v Liquor Licensing Court*.²¹ The question for the High Court was whether disclosure of criminal intelligence information could reasonably be expected to prejudice criminal investigations or enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement. In interpreting the phrase, Chief Justice French observed that:

That criterion is objective. It is not satisfied merely by the formation of the Commissioner's opinion to that effect. It is a criterion requiring a non-trivial risk of prejudice or discovery. ... the objective language of the criterion indicates that the assessment must be reasonably open having regard to the content and sources of the information.

49. Although in the context of different legislation, the interpretations of 'could reasonably be expected to' given by the courts in *K-Generation* and *Cockcroft* as set out above are relevant in the context of the exemption contained in section 42(1)(e) of the FOI Act.
50. Accordingly, to determine whether the matter in issue is exempt from disclosure under section 42(1)(e) of the FOI Act, I must examine whether it is reasonable as distinct from something that is irrational, absurd or ridiculous to expect that disclosing the matter in issue will prejudice the effectiveness of the lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the criminal law.

¹⁷ (1986) 64 ALR 97 (**Cockcroft**).

¹⁸ *Cockcroft*, at 106.

¹⁹ (Unreported, Queensland Information Commissioner, 20 February 2009).

²⁰ As the term appears in section 4 of the *Liquor Licensing Act 1997* (SA) in the definition of 'criminal intelligence'.

²¹ [2009] HCA 4.

Submissions

51. The AFP submits that:

The words “could reasonably be expected to” call for the decision maker to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible and expectations which are reasonably based. That is, expectations for the occurrence of which real and substantial grounds exist.

A document may ‘disclose’ methods or procedures either by specifically referring to or describing them, or by providing information from the nature of which the methods or procedures employed may be capable of being inferred.

The AFP accepts that s42(1)(e) will not apply if the methods or procedures are well known to the public. However, even if observers could deduce methods or procedures from everyday experience, media reports and other informal sources, prejudice may still arise from having spelt out publicly in the agency’s own documents what those methods and procedures are. That is because the person will then have “authoritative knowledge” of those methods or procedures. There is a risk disclosure may also lead to modification of behaviour to better avoid detection in the future, using the information obtained.

Similarly, documents may be exempt when they contain information about methods of investigation which would not be commonplace or in as much detail as what might be available to the public through media sources.

A document is more likely to attract s42(1)(e) if it would disclose covert, as opposed to over or routine, methods or procedures. In addition, the fact that a person seeking a document has announced an intention to publish the information, if obtained, may increase the likelihood that disclosure of the document will prejudice the effectiveness of those methods or procedures.

It is submitted that, in determining whether disclosure of methods and procedures is reasonably likely to cause prejudice to the effectiveness of those procedures or methods, it is permissible to have regard to the cumulative prejudice that may occur from the disclosure of different pieces of information, innocuous in themselves. This approach (sometimes called the “mosaic theory” or “cumulative prejudice”) has consistently been given credence in the context of s33(1)(a) of the Cth FOI Act.

...

And Federal Agent Damien Appleby of the AFP also submits, in a signed Affidavit, that:

Folio [7 and 63]

It is apparent from the information toward the bottom of this folio that it is an AFP document cleared by the then National Manager Counter Terrorism with the AFP, Mr Frank Pendergast. The folio is part of a highly classified document, marked ‘HIGHLY PROTECTED’. The marking of the document with these words means, in accordance with the Commonwealth Protective Security Manual, that the disclosure of some of the information in the document could cause serious damage to the Australian Government, commercial entities or members of the public. In my view the classification of this document remains appropriate in relation to the information in the second dot point at the top of the folio.

The release of this paragraph would be harmful to the AFP’s future operations and impair the AFP’s ability to detect and investigate crime. Release of this information would reveal particular circumstances in which the technology referred to in the paragraph has been used. While there may be speculation about the existence of such technology, information concerning its availability to the AFP and the circumstances in which it may be used is not widely known or understood in the community.

I am in a position to provide further confidential evidence concerning the harm to police operations that would be caused by the release of this paragraph, if required.

52. The applicant submits that:

In relation to the comparable exemption under the Commonwealth Act (s37(2)(b)), the Administrative Appeals Tribunal has held that a document which discloses intelligence gathered by the police, but reveals nothing as to the source of that information or as to lawful police methods or procedures, is not within the potential scope of the exemption. Although s42(1)(e) of the FOI Act is in slightly different terms to its Commonwealth counterpart, it is submitted that the same principle applies.

Further, when assessing whether disclosure of a method would be reasonably likely to prejudice the effectiveness of those methods in the future, the IC can have regard to the level of public disclosure which has already occurred in the Clarke Inquiry report regarding the specific methodologies utilised by the respondent and/or the AFP in the applicant's case.

and:

...the AFP places reliance on the 'mosaic theory'. The 'mosaic theory' is not a rule of law determining an outcome. It is no more than a label given to the task of evaluating evidence in order to come to a decision when the evidence comprises that within the documents under consideration and other sources. In most of the cases where the mosaic theory has been given credence, there has been specific evidence adduced which demonstrates (for example, by analysis of samples) how separate pieces of information can be pieced together. No such evidence has been provided to the Information Commissioner in this case.

Further, as Deputy President McPherson observed in Haneef and Australian Federal Police [2009] AATA 51 at [25]:

"It is convenient here to dispose of two other matters that were relied on to support the AFP case for exemptions. One is the 'mosaic' theory that even a single piece of an investigation puzzle may, when aggregated with other pieces, reveal the larger picture. But, like circumstantial evidence, it is the pattern that emerges from the combination of items that lends form and cogency to the mosaic. In isolation, a single isolated piece of evidence is seldom if ever sufficient by itself to demonstrate much, if anything, useful or even to show that a mosaic exists."

Analysis

53. The method or procedure referred to in folios 7 and 63 concerns the use of certain technology. The AFP submits that:

- release of this information would reveal the particular circumstances in which the technology referred to has been used
- there is only speculation about the existence of such technology
- information concerning the availability of the technology to the AFP is not widely known or understood in the community
- information concerning the circumstances in which the technology may be used is not widely known or understood in the community.

54. The AFP also submits that further confidential submissions concerning the harm to police operations that would be caused by the release of this information could be provided to this Office if required. In this regard, I note the AFP made submissions to this Office on 27 January 2009 and again on 11 February 2009 (including confidential

submissions). I consider that the AFP was given sufficient opportunity to make submissions to this Office during the course of the review and that all relevant submissions should have been made within the relevant timeframes.

55. A cursory search of the internet reveals general information about the existence and use of the technology referred to in the documents. In particular, a three page document containing images and text can be found on the AFP website.²² This document:

- identifies the existence of the technology
- confirms that the technology is available to the AFP
- identifies the circumstances in which the technology may be used.

56. The former AFP Commissioner Mick Keelty also refers to the technology and the use to which it is put by the AFP in an address made in May 2005, a hard copy of which is also available on the internet.

Conclusion

57. I have considered the application of section 42(1)(e) of the FOI Act to the matter in issue having regard to the publicly available information and the parties submissions referred to above.

58. On the information available to me, I am satisfied that:

- the public can deduce the relevant method or procedure which is claimed to be exempt from the AFP's own documents available on the internet
- the documents do not contain more detailed information than that which is publicly available (and the information contained in the documents itself does not contain detailed information of the relevant method or procedure)
- there is no evidence to suggest that disclosure of the method or procedure will lead to modification of behaviour to better avoid detection in the future, using the information obtained (and given the nature of the relevant method or procedure, I cannot see how a person could modify their behaviour to avoid detection in the future with this knowledge)
- there is no evidence of a cumulative prejudice that may occur from disclosure of the relevant information, together with a combination of other items
- the third criterion is not satisfied as I have not been able to identify a reasonable basis to form a view that the disclosure of already publicly available information about the technology and the context in which it is used could prejudice the effectiveness of the lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the criminal law.

59. Accordingly, I find that the matter in issue is not exempt from disclosure under section 42(1)(e) of the FOI Act.

Section 43(1) of the FOI Act

60. QPS and/or AFP submits that the deleted matter contained in the following folios qualifies for exemption under section 43(1) of the FOI Act:

²² www.afp.gov.au.

- 74, 114, 115-117, 125-127 (copy of 115-117), 154

61. Section 43(1) of the FOI Act states:

43 Matter affecting legal proceedings

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

Legal Professional Privilege

62. The general principles of legal professional privilege are well settled and were summarised by the High Court of Australia in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*²³ as follows:

It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.

63. The legal professional privilege exemption set out in section 43(1) of the FOI Act reflects the requirements for establishing legal professional privilege at common law. In other words, it protects communications passing between a lawyer and a client where:²⁴

- a) *the communication is made in the course of a professional relationship of lawyer and client; and*
- b) *the communication is confidential; and*
- c) *the communication is:*
 - (i) *from the client to the lawyer for the dominant purpose of seeking legal advice; or*
 - (ii) *from the lawyer to the client for the dominant purpose of providing legal advice; or*
 - (iii) *from a third party at the client's request for the dominant purpose of use in assisting the lawyer to provide legal advice;²⁵ or*
 - (iv) *from the lawyer or the client, or a third party at the request of the lawyer or the client, for the dominant purpose of use in or in relation to existing or anticipated legal proceedings.*

Paragraphs (c)(i)-(iii) above describe the 'advice limb' of legal professional privilege, while paragraph (c)(iv) describes the 'litigation limb'.

64. Section 43(1) of the FOI Act will apply to communications falling under either the 'advice privilege' or 'litigation privilege' limbs, as both types of communication would be privileged from production in legal proceedings.

65. Privilege also extends to documents which directly reveal, or which allow a reader to infer, the content or substance of a confidential communication.²⁶

²³ [2002] HCA 49; (2002) 213 CLR 543 at paragraph 9.

²⁴ Eimilios Kyrou, 'Under Attack: Legal professional Privilege' (2007) 81(3) LIJ 32 at 34.

²⁵ *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357.

²⁶ *AWB Limited v Honourable Terence Rhoderic Hudson Cole* [2006] FCA 571 (**AWB v Cole (No.1)**).

66. Whether a document discloses a privileged communication is a question of objective fact that depends on what the other document actually states or conveys, either explicitly or as a matter of reasonable inference.²⁷

67. In relation to the distinction between a reference to the existence of legal advice and disclosing the substance or content of that advice, Young J in *AWB v Cole (No.1)* stated:

In my view, the distinction between a mere reference to advice having been obtained, and a reference that discloses the content or substance of the advice, has not been eliminated by the High Court's restatement of the relevant principles as to waiver in Mann v Carnell (1999) 201 CLR 1.

Professional relationship

68. The common law recognises that legal professional privilege can attach to professional advice given by salaried legal officers of government agencies acting in their professional capacity.²⁸ The provision of legal advice includes advising on 'what may prudently and sensibly be done in the relevant legal context.'²⁹

Dominant purpose

69. Legal professional privilege will only apply if the relevant communication was made, or the document was prepared, for the dominant purpose of the legal adviser providing legal advice or services.³⁰

70. The dominant purpose has been described as the:

- ruling, prevailing or most influential purpose³¹
- purpose that predominates over other purposes; the prevailing or paramount purpose.³²

71. The purpose for which a document is brought into existence is a question of objective fact to be determined by reference to the evidence, the nature of the document/s and the parties' submissions.³³

Submissions

72. The QPS submits that:

...

[Folio] 154

The QPS objects to the release of the paragraph appearing at time reference 1650 pursuant to s43(1) of the Act. This paragraph concerns legal advice given to Inspector Brendan Keleher of the QPS Forensic Services Branch by Greg Obst, Senior Legal

²⁷ Ibid.

²⁸ *Waterford v Commonwealth of Australia* (1987) 71 ALR 673

²⁹ *AWB v Cole (No.1)* at paragraph 100; see also *Balabel v Air India* [1988] Ch 317 at 330.

³⁰ *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 64.

³¹ *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* [2002] VSCA 59 at 10.

³² *AWB v Cole (No.1)* at paragraph 105.

³³ *Commissioner of Taxation of the Commonwealth of Australia v Pratt Holdings Pty Ltd* [2005] FCA 1247 at 30.

Officer of the QPS Solicitor. The communications were considered to be confidential between the parties and should properly be characterised as a communications between lawyer and client for the dominant purpose of giving legal advice.

...

In Noosa Shire Council and Department of Communication and Information, Local Government and Planning and TM Bourke Estates the Information Commissioner adopted the principles of legal professional privilege espoused by the High Court of Australia in Esso Australia Resources Limited v The Commissioner of Taxation.

In referring to the decision of Esso, the Information Commissioner, at page 7, stated that the basic legal tests for whether a communication attracts legal professional privilege under Australian common law can be summarised as follows.

Legal professional privilege attaches to confidential communications between a lawyer and client (including communications through their respective servants or agents) made for the dominant purpose of –

- (a) seeking or giving legal advice or professional legal assistance; or*
- (b) use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.*

Whether the dominant purpose of the communication was a privileged purpose is a question of fact, to be determined by an examination of the contents of the particular communication or other additional evidence about the circumstances surrounding the making of the communication.

In this instance, it is clear that the communication in issue would attract legal professional privilege. The lawyer consulted was acting in a professional capacity as a Senior Legal Officer for the Queensland Police Service Solicitor for the purpose of providing professional legal assistance. It is submitted that is now well accepted communications to and from salaried employee legal advisers in government agencies are capable of attracting legal professional privilege.

This provision of the Act does not contain a public interest balancing test. Accordingly there is no requirement to identify and weigh any public interest considerations favouring release. There is no evidence to suggest an intentional or implied waiver of privilege.

...

[Folios] 115 to 117

The identified folios contain communications between QPS Inspector Brendan Keleher to QPS Senior Legal Officer Mr Greg Obst for the dominant purpose of obtaining legal advice for anticipated litigation. The communications were considered to be confidential between the parties and properly should be characterised as a consultation between lawyer and client.

...

[Folios] 125 to 127

The QPS objects to the release of these documents for the same reasons outlined at Folios [115-117].

73. The AFP submits that:

FOI Act, s 43(1) – legal professional privilege

...

The AFP submits that paragraph 12 in folio 74, the first paragraph on folio [114] and the parts of folios [116-117] and [126-127] identified ... are exempt from release under s 43(1) of the FOI Act. (...the AFP also notes that folios [115/125] and the balance of [116/126] are also exempt from disclosure and supports the submissions of the QPS in this regard.)

Section 43(1) is very similar to s42(1) of the Cth FOI Act and the case law concerning this section is instructive.

General principles

Section 43(1) will apply when a document would attract privilege under the common law of legal professional privilege. Relevantly, legal professional privilege will attach to a confidential communication between lawyer and client made or created for the dominant purpose of the lawyer providing legal advice, or for the dominant purpose of use in existing or anticipated litigation. Advice given to government agencies by their legal advisers is capable of attracting the privilege.

Privilege is that of the AFP

It is apparent from reading the relevant passages in the documents in question that they concern advice provided to the AFP. It follows that legal professional privilege in these documents is that of the AFP.

Waiver

In Osland v Secretary, Department of Justice, Gleeson CJ, Gummow, Heydon and Kiefel JJ stated that the test for waiver is whether the conduct of the party otherwise entitled to the privilege is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. Such a judgment is to be made in the context and circumstances of the case, and in light of any considerations of fairness arising from that context or those circumstances.

Folio [74] – numbered paragraph 12

The release of this paragraph would disclose confidential legal advice. The evidence of Federal Agent Appleby is that the AFP legal officer who provided the advice contained in the document is a qualified legal practitioner and that the advice was shared with the QPS on a strictly confidential basis.

Folio [114] – first paragraph

In this case, the substance of most of the advice provided to the AFP by the DPP (folios [111-114]) is in the public domain as a result of the Clarke Inquiry. The AFP thus makes no exemption claim in relation to most of this document, although the fact that the privilege is that of the AFP means that only the AFP can waive that privilege.

The first paragraph on folio [114] would if released disclose that advice was provided to the AFP by counsel in relation to the matter there referred to. This advice has not been disclosed, nor has the AFP waived its privilege and it is submitted that the advice is thus exempt under s 43(1). The AFP notes that the fact that the paragraph reveals that advice was sought by the AFP on a particular topic is clear from reading the passage in question.

Folios [116-117] and [126-127]

These folios each contain the same information within an email chain which the AFP maintains is exempt from disclosure under s 43(1).

The material in issue is in the AFP's submission exempt from disclosure because, as is apparent on the face of the document, its release would disclose legal advice provided by an AFP legal officer to an AFP officer and shared confidentially with the QPS. It is apparent from the communication itself that the advice was given for the dominant purpose of providing legal advice. The evidence of Federal Agent Appleby is that the AFP legal officer who provided the advice contained in the document is a qualified legal practitioner. The AFP has not waived privilege and the evidence of Federal Agent Appleby is that the advice was shared with the QPS on a confidential basis only.

...

And Federal Agent Damien Appleby of the AFP also submits, in a signed Affidavit, that:

...

Legal advice

Exemption is claimed over parts of folios [74, 114, 116-117 and 126-127] on the grounds that they are privileged from production in legal proceedings (s43 of the FOI Act).

Release of the relevant information contained in these documents would disclose:

- 1) communications between AFP members and officers of the Commonwealth Director of Public Prosecutions (CDPP) seeking and providing advice on the matters there referred to, or communications between AFP members and officers of the CDPP in the context of criminal proceedings that had been commenced against Dr Haneef; and*
- 2) communications between AFP members and AFP legal officers seeking and providing advice on legal matters in the context of the investigation of Dr Haneef and the subsequent criminal proceedings that were commenced against Dr Haneef.*

My understanding, and that of my colleagues in the AFP, is that all such communications in connection with the provision of legal advice are confidential.

In relation to folios [74, 116, 117, 126, 127] I can confirm that the legal advice was provided by a qualified legal practitioner employed by the AFP.

The legal advice was shared with the Queensland Police Service on a strictly confidential basis.

74. The applicant submits that:

The QPS has asserted legal professional privilege over parts of documents 944(IR154), 558-560 (IR 115-117), 881-883 (IR 125-127) and 887 (IR 130). The basis for the claim is that the documents "concern" legal advice given by a Senior Legal Officer of the QPS Solicitor to Inspector Keleher. We query whether use of the term "concerns" indicates that the documents themselves do not actually reveal the content of the advice.

The party asserting the privilege bears the onus of establishing the factual basis for it. At present, the QPS has done no more than assert, in its submissions, that the necessary factual matrix existed. No evidence has been provided to the Information Commissioner in either statutory declaration or affidavit form.

Finally, in *Re Proudfoot and HREOC (1992) 28 ALD 734*, the Administrative Appeals Tribunal, applying the decision of *Waterford v Commonwealth*, considered the position of government lawyers more extensively and concluded that:

- (c) *Legal advice given by a qualified lawyer employed by the government can be privileged at least where the giver of the advice holds a current practising certificate;*
- (d) *For the privilege to attach, the legal adviser must be acting in his or her capacity as professional legal adviser;*
- (e) *The circumstances in which the advice was given must be attended by the necessary degree of independence. Advice prepared subject to the direction as to its contents or conclusions by a person who was not a lawyer would not be privileged;*
- (f) *The document must be created for the purpose of giving legal advice;*
- (g) *The advice must be confidential.*

...

Submissions in relation to particular documents

...

491 (IR 114) *In its submissions at paragraph 27, the AFP states that the basis for the claim of legal professional privilege over the first paragraph on folio 491 is that it reveals the fact that advice was sought by the AFP on a particular topic. However, a communication to another person, which informs the other person that the AFP has sought legal advice about a particular matter, cannot properly be the subject of a claim for privilege, because a communication of this nature is not, itself, created for the dominant purpose of obtaining legal advice.*

Analysis

75. I have carefully considered the parties' submissions, relevant law and the matter in issue. On the information available to me, I find that:

- the matter claimed to be exempt in folios 74, 115-117, 125-127 and 154 satisfies the requirements for establishing legal professional privilege at common law;
- the matter claimed to be exempt in folio 114:
 - reveals that legal advice was obtained by the AFP;
 - identifies the topic/subject matter of the legal advice sought;
 - does not reveal the substance, nature or content of the advice itself;
 - does not satisfy the requirements for establishing legal professional privilege at common law.

Conclusion

76. Accordingly, I find that:

- folios 74, 115-117, 125-127 and 154 are exempt from disclosure under section 43(1) of the FOI Act
- folio 114 is not exempt from disclosure under section 43(1) of the FOI Act.

Section 44(1) of the FOI Act

77. The relevant folios³⁴ and type of matter claimed to be exempt from disclosure under section 44(1) of the FOI Act is set out below:

Folio number	Particulars/Description
7, 8, 40, 41, 63 (copy of 7), 64 (copy of 8), 65, 68, 123, 132, 133, 136, 137, 138 (copy of 137), 139, 140, 141, 149, ³⁵ 150, 157, ID2, ID5, ID7	Names of individual/s other than the applicant
70	Paragraphs 9, 10 and 11
72	<ul style="list-style-type: none"> • Paragraphs 10 and 12; and • The first dot point under paragraph 13
76	<ul style="list-style-type: none"> • Name of individual other than the applicant in paragraph 12; and • Entire paragraph 13
80	<ul style="list-style-type: none"> • Name of individual other than the applicant in paragraphs 11 and 13; and • Entire paragraph 9
85	Paragraphs 20 and 23
92	<ul style="list-style-type: none"> • Third last paragraph • Name of individual other than the applicant in the sixth last paragraph
94	<ul style="list-style-type: none"> • Name of individual other than the applicant in the second paragraph under the heading "Australian Investigation" • Entire fifth paragraph under the heading "Australian Investigation"
97	<ul style="list-style-type: none"> • Name of individual other than the applicant in paragraph 1.4 • Entire paragraph 1.4B
158	<ul style="list-style-type: none"> • Names of individuals other than the applicant in the top left margin • Fifth and sixth lines of written text
160	<ul style="list-style-type: none"> • Names of individuals other than the applicant in the second and third line of text and the second last line of text • Eighth to tenth line of text
ID19, ID20, ID21	Entire folios

78. Section 44(1) of the FOI Act provides:

44 Matter affecting personal affairs

- (1) *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

³⁴ Please note that I have not included folios 78, 86 and 91 as I have already dealt with the relevant information in these folios in my discussion of the application of section 27(3) of the FOI Act earlier in this decision.

³⁵ I note that folio 149 contains a mobile telephone number which is claimed to be exempt, but as this information is not sought by the Applicant, it does not form part of the matter in issue: see paragraph 17 of this decision.

79. Section 44(1) of the FOI Act therefore requires me to consider the following questions in relation to the matter in issue:

- Firstly, does the matter in issue concern the personal affairs of person/s (other than the applicant)? (**Personal Affairs Question**) If so, a public interest consideration favouring non-disclosure of the matter in issue is established
- Secondly, are there public interest considerations favouring disclosure of the matter in issue which outweigh all public interest considerations favouring non-disclosure of the matter in issue? (**Public Interest Question**).

Personal Affairs Question

What are the personal affairs of a person?

80. In *Stewart and Department of Transport*³⁶, a previous decision of this Office, the Information Commissioner discussed in detail the meaning of the phrase 'personal affairs of a person' as it appears in the FOI Act. In particular, the Information Commissioner found that information concerns the 'personal affairs of a person' if:

- it concerns the private aspects of a person's life; and
- it is information which identifies an individual or is such that it can readily be associated with a particular individual.

81. I note the Information Commissioner's comments in *Stewart*:

For information to be exempt under s.44(1) of the FOI Act, it must be information which identifies an individual or is such that it can readily be associated with a particular individual. Thus deletion of names and other identifying particulars or references can frequently render a document no longer invasive of personal privacy, and remove the basis for claiming exemption under s.44(1).³⁷

82. While there may be a substantial grey area within the ambit of the phrase 'personal affairs', that phrase has a well accepted core meaning which includes:

- family and marital relationships
- health or ill health
- relationships and emotional ties with other people
- domestic responsibilities or financial obligations.³⁸

83. The Information Commissioner has also indicated that the adjective 'personal' is used in the phrase 'personal affairs' in the same sense as a person might use it in refusing to answer an intrusive question with a retort such as: 'I am not prepared to give you that information; it's personal'.³⁹

84. Whether or not matter contained in a document comprises information concerning an individual's personal affairs is a question of fact, to be determined according to the proper characterisation of the information in question.

³⁶ (1993) 1 QAR 227 (**Stewart**) at pages 256-267, paragraphs 79-114.

³⁷ *Stewart*, at paragraph 81.

³⁸ See *Stewart*.

³⁹ See *Stewart* at paragraph 55.

A person's name

85. I note that the former Information Commissioner considered whether a person's name constitutes their personal affairs.

86. In *Pearce and Qld Rural Adjustment Authority*⁴⁰, the Information Commissioner stated that:

21. *A person's name, in isolation, does not ordinarily constitute information concerning that person's personal affairs. In Commissioner of Police v the District Court of New South Wales and Perrin (1993) 31 NSWLR 606, Mahoney JA said (at p.638):*

A person's name would not, I think, ordinarily be, as such, part of his personal affairs. It is that by which, not merely privately but generally, he is known.

Likewise, in State of Queensland v Albietz [1996] 1 Qd R 215, de Jersey J said (at p.221):

I do not think that the name by which a person is known ordinarily forms part of that person's "personal affairs".

22. ***However, a person's name almost invariably appears in a document in the context of surrounding information. It is the characterisation of a person's name, in the context of the information which surrounds it, which may give rise to difficulties. Thus, Lockhart J, sitting as a member of a Full Court of the Federal Court of Australia, in Colakovski v Australian Telecommunications Corporation (1991) 100 ALR 111, said (at page 119):***

*There is a real question as to whether the name and telephone number can answer the description of 'information relating to the personal affairs' of that person under s.41(1)⁴¹. Viewed as an abstract conception I would be inclined to the view that it could not, **but such questions are not considered by Courts in the abstract.***

23. ***Thus, while disclosure of a person's name, in the abstract, would not ordinarily be a disclosure of information concerning that person's personal affairs, disclosure of that name in the context in which it appears may disclose information concerning the person's personal affairs.***

[my emphasis]

87. Further, in *Stewart*⁴² the Information Commissioner noted that:

- a person's name, address and telephone number were matters falling into the 'grey area' rather than within the 'core meaning' of the phrase 'personal affairs of a person'
- such matter must be characterised according to the context in which it appears.

88. In accordance with the decisions set out above, it is clear that in certain circumstances a person's name may constitute their personal affairs.

⁴⁰ S186/98, 4 Nov 1999.

⁴¹ This case refers to section 41(1) of the *Freedom of Information Act 1982* (Cth), which is a similar provision to section 44(1) of the FOI Act.

⁴² At paragraphs 86-90.

Police records/investigation

89. In *Stewart*⁴³, the Information Commissioner found that the mention of a person's name in police records (or in agency records of a comparable nature) in association with some possible wrongdoing was a matter which clearly fell within the meaning of the phrase "personal affairs" in the FOI Act.
90. In respect of a person's involvement or co-operation given in a police investigation, the former Information Commissioner in *Godwin and Queensland Police Service*⁴⁴ commented:

I consider that, at least so far as concerns a member of the public acting in a personal capacity, the fact that a person has (or, indeed, has not) been prepared to co-operate with an investigation by a law enforcement agency is properly to be characterised as information concerning that person's personal affairs. (The position would probably be different in respect of, for example, a police officer who was obliged, in his capacity as such, to answer questions put by an investigating police officer.) Matter which would disclose the information that an identifiable individual, acting in a personal capacity, has or has not co-operated with an investigation by a law enforcement agency would therefore, in my opinion, be prima facie exempt from disclosure under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.44(1).

I should add that, where information that an identifiable individual has or has not cooperated with an investigation by a law enforcement agency becomes a matter of public knowledge or public record (as would frequently occur when such information is disclosed through evidence given in court proceedings), the weight to be attributed to the privacy interest in protecting disclosure of that information would be significantly diminished, for the purposes of any balancing exercise that must be undertaken in the application of the public interest balancing test incorporated in s44(1) of the FOI Act.

Public Interest Question

91. The words 'public interest' are never specifically defined and generally refer to considerations affecting the good order and functioning of community and the well-being of citizens. In general, a public interest consideration is one which is common to all members of the community, or a substantial segment of them, and for their benefit. The public interest is usually treated as distinct from matters of purely private or personal interest. However, some recognised public interest considerations may apply for the benefit of individuals in a particular case.
92. As to what constitutes the public interest, Beazley J of the Federal Court of Australia stated:⁴⁵

The question of what constitutes the public interest is not a static or circumscribed notion. As was said in D v National Society for the Prevention of Cruelty to Children [1997] UKHL 1; (1978) AC 171 at 230, per Hailsham LJ "the categories of public interest are not closed...". See also Sankey v Whitlam per Stephen J at 60.

93. In *Fox and the Department of Police*⁴⁶ the Information Commissioner indicated that:

Because of the way that section 44(1) of the FOI Act is worded and structured, the mere finding that information concerns the personal affairs of a person other than the applicant

⁴³ At paragraph 80.

⁴⁴ 1997 4 QAR 70 at paragraphs 64-65.

⁴⁵ *Australian Doctors' Fund Limited v Commonwealth of Australia* [1994] FCA 1053 at paragraph 34.

⁴⁶ (2001) 6 QAR 1 at paragraph 19.

for access must always tip the scales against disclosure of that information (to an extent that will vary from case to case according to the relative weight of the privacy interests attaching to the particular information in issue in the particular circumstances of any given case), and must decisively tip the scales if there are no public interest considerations which tell in favour of disclosure of the information in issue. It therefore becomes necessary to examine whether there are public interest considerations favouring disclosure, and if so, whether they outweigh all public interest considerations favouring non-disclosure.

Submissions

94. In summary, the QPS submits that:

- the folios to which the QPS objects to the release of information pursuant to section 44(1) of the FOI Act contains the following type of information:
 - names, dates and place of birth, ages, residential addresses of individuals;
 - the names of individuals who at the time of the investigation were suspected of being involved in serious criminal activities including terrorism related offences;
 - that some of these suspected persons were subject to specialist investigative techniques and/or methodologies which may indicate a greater level of criminality on the part of those persons;
 - the names of persons who were prepared to assist in providing information in relation to Operation Rain
- information contained within the folios constitutes the personal affairs of the suspects (having regard to the Information Commissioner's comments in cases such as *Re Stewart and Department of Transport* [1993] 1 QAR 227 and *Salmon (on behalf of EP & EJ Somerset) at Queensland Police Service* (Unreported, Queensland Information Commissioner, 11 April 1997));
- the mention of individuals names within the folios in connection with covert and technical policing methods and in some instances, their occupation, would leave no conclusion to an independent reader other than they were considered suspects;
- it accepts that some of the named individuals who were involved/considered suspects as part of Operation Rain have to some extent been discussed by various media and other informal sources. However, QPS submits that it is one thing for observers to deduce information with varying success from media reports, particularly in relation to the level of criminality of a suspected person, but quite another thing to have that information spelt out publicly from an agency's own documents
- it acknowledges the extent to which the Clarke Inquiry Report has divulged information concerning these matters is a relevant factor in considering disclosure of documents relevant to the review. However, QPS maintains that caution should be exercised in basing any release on the extent to which the matters have been discussed by the commercial media (such caution arising from the extent of misreporting on many aspects surrounding the case);
- the identity of those persons who have been prepared to assist with the investigation of this matter constitutes their personal affairs and is prima facie exempt from disclosure;
- the mere finding that matter comprises 'personal affairs' raises a public interest consideration in favour of non-disclosure, the weight of that public interest consideration will vary according to the nature of the documents and the circumstances of each case;
- the public interest does not, on balance, favour disclosure of the exempted personal affairs information;

- one of the individuals referred to in the matter in issue has been consulted and objects to the release of any personal information;
- although in cases involving law enforcement investigations there is generally a public interest consideration favouring disclosure in the interests of furthering accountability of the law enforcement agency for the quality and thoroughness of the investigation, it is submitted that this has been achieved through the agreed release of material concerning the direct investigation of the Applicant and by the examination of all folios in question by the Clarke Inquiry.

95. In summary, the AFP submits that:

- section 44(1) involves a two-stage process – determining whether disclosure of the documents for which the exemption has been claimed would involve the disclosure of information concerning the personal affairs of any person and, if yes, whether that disclosure would on balance, be in the public interest;
- with reference to s41 of the Cth FOI Act, the question of whether disclosure of personal information would be in the public interest requires balancing competing public interests – on one hand, the public interest in ensuring that personal information about individuals is not necessarily to be disclosed on applications for access to documents and, on the other hand, the public interest in having access to information held by government agencies which is relevant to the affairs of government where the disclosure will contribute to a public gain;
- in weighing up competing public interests, relevant factors include:
 - The nature of the information that would be disclosed
 - The circumstances in which the information was obtained (eg whether it was obtained in confidence)
 - The likelihood that the information is of the kind that the person concerned would not want to have disclosed without his or her consent
 - Whether the information has any current relevance
- it is relevant to consider the extent to which the information is known by or readily available to the person seeking access, or can be obtained from publicly available sources;
- although information concerning a particular individual referred to in the matter in issue is publicly available, a limited amount of information concerning the personal affairs of this person ought to be determined to be exempt from disclosure;
- identifying and other personal information about persons other than the applicant, who were being investigated by the AFP, provided information to the AFP or who came to the attention of the AFP during Operation Rain, ought to be determined by the Commissioner to be exempt from release. This information was obtained in confidence and has not been publicly disclosed. It is information of the type which can be inferred the person would not consent to being disclosed;
- dates of birth, mobile phone numbers and personal email addresses of persons other than the applicant ought to be determined to be exempt from disclosure.

96. In summary, the Applicant submits that:

- If any of the information relates to the applicant's second cousins, it is relevant for the IC to take into the fact that one is deceased and both have been the subject of considerable media coverage in relation to the connection of the Glasgow terrorist act and that one has been convicted of a criminal offence
- If the exemption is claimed over information provided to the respondent and/or the AFP by [a person of interest] during the taped record of interview with the

AFP, the IC can take into account that the fact that information was provided by this person does not make it information about that person's 'personal affairs'

- Information provided by [a person of interest] about this person's relationship with the Applicant is not information about the relevant person, or, at best, it is information about both this person and the Applicant
- Generally, where information which is claimed to be exempt formed part of the evidentiary basis presented by the respondent and/or the AFP to a Magistrate to as to secure the Applicant's continued detention, it is submitted that the public interest in disclosure of that information is high;
- In deciding whether disclosure of information would be in the public interest, the IC can take into account the level of public disclosure which has already occurred in the public submissions to the Clarke Inquiry, and in Mr Clarke's report.

In respect of the public interest considerations, the Applicant also submits:

In the space of 26 days in July 2007, the applicant went from being employed as a doctor at Southport Hospital to being arrested, detained, charged, having the Commonwealth DPP decide to offer no evidence against him, and then being permitted to leave the country. In that time, the applicant, his actions and his reputation were the subject of intense public scrutiny. So too were the actions of the Australian Federal Police, the Queensland Police Service, the Minister for Immigration & Citizenship and the office of the Commonwealth DPP.

In these circumstances, the applicant has an interest in finding out precisely what happened, how it happened and why it happened, which coincides with the public interest. This can be facilitated by allowing the applicant full access to the documents held by the respondent that are relevant to him.

That there is a public interest in finding out these matters is demonstrated by the appointment of the Clarke Inquiry under wide terms of reference. However, the applicant's interest, and the public interest in the applicant having full access to the documents, exist independently of the Clarke Inquiry: c.f. Re James and Australian Natural University (supra).

Further, the public interest in the applicant having access to documents is not diminished by the publication of the report of the Clarke Inquiry. It is a matter of record that Mr Clarke was not given permission by the respondent, the AFP, or any other government agency or department, to allow the applicant to view source documents, witness statements, or unredacted versions of submissions to the inquiry. Further, the existence of the Clarke Inquiry has never detracted from the function of freedom of information legislation as an accountability mechanism. As the Administrative Appeals Tribunal said in Re Downie and Department of Territories:

"In the Tribunal's opinion there is a strong public interest in disclosure of information about the operation of an agency the activities of which have a direct effect upon a significant section of the public. If there were any doubt as to this point, reference to section 3(1)(a) of the FOI Act removes it. The Tribunal does not accept Mr Mallam's submission that the public accountability mechanisms already in place are sufficient to satisfy the public interest. To accept this argument would be to deny one of the fundamental objects of the FOI Act, for the FOI Act is one of the public accountability mechanisms set in place. **The existence of other public accountability mechanisms does not displace its operation and the preparation of public reports in respect of an area of the Department's administration is, as much as anything else, indicative of the public interest in the matter." (Emphasis added)**

It is clear from the decisions of the Administrative Appeals Tribunal, in Haneef and Department of Immigration and Citizenship, that the Tribunal considered there was

sufficient public interest in exposing how, and why, the events of 2-27 July 2007 transpired. When dismissing a claim for exemption by DIAC in relation to a draft of the Minister for Immigration and Citizenship's reasons for cancelling the applicant's visa, the Tribunal found that there was "a very cogent public interest in having the unexpurgated reasons for cancellation of the visa made public".

Findings

Personal Affairs Question

97. The matter in issue comprises:

- names and other identifying particulars or references⁴⁷ of person/s of interest in the investigation;
- names and other identifying particulars or references of other person/s, including those who co-operated with the QPS/AFP during the investigation.

98. I am satisfied that:

- information suggesting that a person has been involved in some alleged (but unproven) criminal activity or wrongdoing, or has otherwise been the subject of police investigation or intelligence gathering, concerns the personal affairs of that person for the purpose of section 44(1) of the FOI Act;⁴⁸
- information revealing the identity of a person who has provided information to the QPS/AFP for the purpose of an investigation (and in a personal capacity) is personal affairs information for the purpose of section 44(1) of the FOI Act;
- although a person's name in isolation does not ordinarily constitute personal affairs information, the names and identifying details of the individuals in this context reveals personal affairs information, including that these individuals were:
 - persons of interest in the investigation; and/or
 - involved in some alleged criminal activity or wrongdoing; and/or
 - co-operating with the police investigationand as such, comprises personal affairs information for the purpose of section 44(1) of the FOI Act.

99. Accordingly, I am satisfied that the remaining matter in issue comprises personal affairs information of persons other than the applicant for the purpose of section 44(1) of the FOI Act. Next I will consider public interest factors in respect of this remaining matter in issue.

Public Interest Question

100. Because I consider the matter in issue concerns the personal affairs of persons other than the applicant, consideration must be given to whether there are sufficient public interest considerations favouring disclosure of the matter in issue to outweigh the public interest considerations favouring non-disclosure of the matter in issue.

⁴⁷ Such as employment, education, living arrangements and telecommunication particulars.

⁴⁸ *Stewart* at paragraph 80; *Ainsworth & Anor and Criminal Justice Commission* (Unreported, Queensland Information Commissioner, 17 December 1999); *Fox and Queensland Police Service* (2001) 6 QAR 1.

Public interest considerations that favour disclosing the Matter in Issue

101. I have identified two public interest considerations that may favour disclosing the matter in issue in this review. These are the public interest in enhancing government's transparency and accountability.

Accountability of government

102. There is a general public interest in enhancing the accountability of government agencies for the efficient and effective performance of their functions for the benefit of the public.
103. Parliament recognises that the public interest is served by enhancing government's accountability and keeping the community informed of government's operations, including the rules and practices followed by government in its dealings with members of the community (section 4(2) of the FOI Act).
104. In this case, there is a public interest in:
- enhancing the accountability of QPS/AFP for the conduct of police investigations and more specifically, the conduct of investigations concerning terrorism-related offences under the *Crimes Act 1914* (Cth) as amended by the *Anti-Terrorism Act 2004* (Cth)
 - the Applicant being given sufficient information to be satisfied that:
 - the QPS/AFP investigation was conducted fairly and thoroughly, using appropriate methods of intelligence and evidence gathering
 - reasonable decisions were made based on the available intelligence and evidence
 - the available evidence/intelligence was sufficient or insufficient to justify the formal actions taken.

105. I note that QPS submits that the accountability of law enforcement agencies for the quality and thoroughness of the investigation has been achieved through the agreed release of material concerning the direct investigation of the applicant and by the examination of all folios in question by the Clarke Inquiry. In my view, the accountability of government is an ongoing obligation which is relevant to my consideration of public interest factors in this review.

106. In any event, after careful consideration of this issue, I consider that disclosure of the personal affairs information of persons other than the applicant will not enhance the accountability of the QPS/AFP given the nature of the information in issue. In the circumstances, it cannot be said that release of names, identifying and relevant personal information is warranted to serve the interests of accountability with respect to the police investigation.

Transparency in government

107. Transparency in government means clear government decisions for which reasons are made plain and other contextual information behind government decision making is made available.⁴⁹ Transparency in this context means making plain the QPS/AFP reasoning behind the decisions concerning the applicant's arrest, detention, charging and prosecution.

⁴⁹ *OKP and Department of Communities* (Unreported, Queensland Information Commissioner, 9 July 2009) at paragraph 59.

108. I consider that there is a public interest in the Applicant obtaining access to documents that will assist him to understand the reasons behind the decisions concerning his arrest, detention, charging, prosecution and the cancellation of his visa.
109. However, I am not satisfied that disclosing the personal affairs information of individuals other than the applicant will:
- assist the applicant or the community to understand the reasons behind the QPS/AFP decisions and the formal actions taken
 - enhance transparency in QPS/AFP

Conclusion

110. In summary, I find that:
- the matter in issue comprises the personal affairs information of individuals other than the applicant
 - a public interest consideration favouring non-disclosure of this matter in issue is established
 - no weight should be afforded to the public interest considerations favouring disclosure set out above (on account of the type of information which is relevant – that is, personal affairs information of individuals other than the applicant).
111. Accordingly, I find that the remaining matter in issue claimed to be exempt, qualifies for exemption from disclosure under section 44(1) of the FOI Act.

Section 50(c)(i) of the FOI Act

112. QPS submits that folios 167-169 qualifies for exemption under section 50(c)(i) of the FOI Act.
113. Section 50(c)(i) of the FOI Act states:

50 Matter disclosure of which would be contempt of Parliament or contempt of court

Matter is exempt matter if its public disclosure would, apart from this Act and any immunity of the Crown—

...

(c) *infringe the privileges of—*

(i) *Parliament; or*

...

114. The word 'Parliament' is not defined in the FOI Act but is defined under section 36 of the *Acts Interpretation Act 1954* as follows:

Parliament means –

- for Queensland – the Sovereign and the Legislative Assembly; or*
- for another State – the State's legislature.*

115. Section 50(c)(i) of the FOI Act therefore requires me to consider whether the public disclosure of the matter in issue would infringe the privileges of the Legislative Assembly (and the Sovereign).

Parliamentary privilege

116. The author of '*Parliamentary Privilege*' writes:⁵⁰

The term 'parliamentary privilege' is commonly used to refer to the special rights and powers possessed by individual houses of a parliament and the various protections accorded by law to members of a parliament and other participants in parliamentary proceedings. These protections include an immunity from legal liability for things said or done in the course of parliamentary proceedings. The special powers possessed by houses of a parliament include a power to require the attendance of persons to give evidence or produce documents, and to delegate that power to a committee of members of the house. Other special powers of a house may include a power to suspend, or even expel, a member of the house and a power to impose penalties on persons whom the house adjudges to have engaged in conduct in contempt of the house or in breach of parliamentary privileges.

The special rights, powers and immunities collectively known as parliamentary privileges serve one essential purpose, that being to enable houses of parliament and their members to carry out their functions effectively.

117. The immunity of parliamentary proceedings from external examination is a fundamental pillar of Westminster-style parliaments. An important reason for the privilege is that '*...a member of Parliament should be able to speak in Parliament with impunity and without any fear of the consequences.*'⁵¹
118. In Queensland, statutory provisions have been enacted in respect of parliamentary privilege. In particular, section 9 of the *Constitution of Queensland Act 2001* provides that:

9 Powers, rights and immunities of Legislative Assembly

1. *The powers, rights and immunities of the Legislative Assembly and its members and committees are –*
 - (a) *the powers, rights and immunities defined under an Act; and*
 - (b) *until defined under an Act – the powers, rights and immunities, by custom, statute or otherwise, of the Common House of Parliament of the United Kingdom and its members and committees at the establishment of the Commonwealth.*
2. *In this section –*

rights *includes privileges*

119. Further, the *Parliament of Queensland Act 2001* provides for, amongst other things, the powers, rights and immunities of the Legislative Assembly. Again, in the *Parliament of Queensland Act 2001*, 'rights' is defined to include privileges.

⁵⁰ Campbell, Enid (2003) '*Parliamentary Privilege*' The Federation Press, page 1.

⁵¹ *Sankey v Whitlam* (1978) 142 CLR 1 at 35 (Gibbs CJ) in the context of a discussion relating to Article 9 of the *Bill of Rights 1688* which declared '*That the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.*'

120. Specifically, section 8 of the *Parliament of Queensland Act 2001* provides:

8 Assembly proceedings can not be impeached or questioned

- (1) *The freedom of speech and debates or proceedings in the Assembly can not be impeached or questioned in any court or place out of the Assembly.*
- (2) *To remove doubt, it is declared that subsection (1) is intended to have the same effect as article 9 of the Bill of Rights (1688) had in relation to the Assembly immediately before the commencement of the subsection.*

121. Section 9 of the *Parliament of Queensland Act 2001* relevantly provides:

9 Meaning of proceedings in the Assembly

- (1) **Proceedings in the Assembly** include all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee.
- (2) Without limiting subsection (1), **proceedings in the Assembly** include—
 - (a) giving evidence before the Assembly, a committee or an inquiry; and
 - (b) evidence given before the Assembly, a committee or an inquiry; and
 - (c) presenting or submitting a document to the Assembly, a committee or an inquiry; and
 - (d) a document tabled in, or presented or submitted to, the Assembly, a committee or an inquiry; and
 - (e) preparing a document for the purposes of, or incidental to, transacting business mentioned in paragraph (a) or (c); and
 - (f) preparing, making or publishing a document (including a report) under the authority of the Assembly or a committee; and
 - (g) a document (including a report) prepared, made or published under the authority of the Assembly or a committee.
- (3) Despite subsection (2)(d), section 8 does not apply to a document mentioned in subsection (2)(d) -
 - (a) in relation to a purpose for which it was brought into existence other than for the purpose of being tabled in, or presented or submitted to, the Assembly or a committee or an inquiry; and
 - (b) if the document has been authorised by the Assembly or the committee to be published....
- (4) If the way in which a document is dealt with has the effect that –
 - (a) under an Act; or
 - (b) under the rules, orders, directions or practices of the Assembly;

the document is treated, or accepted, as having been tabled in the Assembly for any purpose, then, for the purposes of this Act, the document is taken to be tabled in the Assembly.

- (5) *For this section, it does not matter what the nature of the business transacted by a committee is or whether the business is transacted under this Act or otherwise.*

122. The Schedule to the *Parliament of Queensland Act 2001* provides:

Assembly means the Legislative Assembly
committee means a committee of the Assembly, whether or not a statutory committee

Judicial consideration

123. In *Rowley v O'Chee*,⁵² the Queensland Court of Appeal considered a comparable provision in section 16 of the *Parliamentary Privileges Act 1987* (Cth), along with Article 9 of the *Bill of Rights 1688*, the modern formulation of which was stated to provide:

*that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.*⁵³

124. McPherson JA considered the meaning of the word 'impeach' used in Article 9 of the *Bill of Rights 1689* and suggested that:

- the best and surest mode of construing an instrument is to read it in the sense which would have been applied when it was drawn up⁵⁴
- the phrase 'ought not to be impeached' was a reference to not being impeded, hindered or prevented, not being detrimentally or prejudicially affected, or impaired.⁵⁵

125. Accordingly, McPherson JA suggested that reading article 9 of the *Bill of Rights 1689* with section 16(2) of the *Parliamentary Privileges Act 1987* (Cth) lead to the following:

*... preparation of a document for purposes of or incidental to the transacting of the business of a House is not to be impeded, hindered or prevented (first meaning); or is not to be detrimentally or prejudicially affected, or impaired (second meaning).*⁵⁶

126. The nature of the privilege conferred by section 8 and 9 of the *Parliament of Queensland Act 2001* was considered in *Erglis v Buckley (No. 2)*⁵⁷ in which the Queensland Court of Appeal considered the status of a letter supplied to a Minister which was subsequently read and tabled in Parliament. McPherson JA, with whom the other justices agreed, cited the trial judge with approval noting that:

*for the privilege to be attached to a document, a member, or his or her agent, must in some way appropriate the document to proceedings in Parliament by doing some act with respect to the document for purposes of, or incidental to, transacting parliamentary business*⁵⁸

⁵² [2000] 1 Qd R 207.

⁵³ See page 218 per McPherson JA, citing Davies JA in *Laurance v Katter* [2000] 1 Qd R 147 at 202.

⁵⁴ Citing Brennan J in *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 322 – 323.

⁵⁵ At pages 222 – 223, cited with approval in *Erglis v Buckley* [2004] 2 Qd R 599.

⁵⁶ At pages 222 – 223.

⁵⁷ [2006] 2 Qd R 407.

⁵⁸ At paragraph 30. See also paragraphs 99 – 100 of the judgment of Jerrard JA.

and went on to say that the acts of composing, typing, printing and sending the letter to the Minister were brought into the assembly's proceedings when the Minister undertook to read the proposed letter in the assembly.⁵⁹

127. Considering documents which were letters sent by, or documents received from, other persons or sources and subsequently retained by Senator O'Chee, McPherson JA, in *Rowley v O'Chee* said:

Generally, it seems to me that if documents like these came into the possession of Senator O'Chee and he retained them with a view to using them, or the information they contain, for the purpose of Senate questions or debate on a particular topic, then it can fairly be said that his procuring, obtaining or retaining possession of them were 'acts done ... for purposes of or incidental to the transacting of the business' of that House. Although 'acts done' is not specially apt to describe what happens when a possibly unsolicited document arrives through the mail or by other forms of communication, a member who becomes aware that the document has arrived and elects to keep it for purposes of transacting business of a House, may properly be said to have done an 'act' or 'acts' for purposes of, or incidental to, the transacting of that business.⁶⁰

Public disclosure

128. Matter is exempt under section 50(c)(i) of the FOI Act if its *public disclosure* would infringe the privileges of Parliament.

129. It was observed in *Sharples and Queensland Police Service*⁶¹ that:

The test for exemption under s.50 is worded in different terms to other exemption provisions. Most exemption provisions use the words "Matter is exempt if its disclosure ...". However, s.50 uses the words "if its public disclosure ...". This imports a different test. In particular, the test imposed by the words "public disclosure" in s.50 appears to negate the possibility of taking into account the effect of a limited waiver of privilege for the benefit of a particular individual, where that individual is the applicant for access to a document under the FOI Act ... It appears that only an intentional general waiver of parliamentary privilege (most commonly, through tabling, or other authorised publication, of a document) may be taken into account in the application of s.50 of the FOI Act ...

130. Accordingly, even in cases where there has been a limited disclosure to an individual of matter over which section 50(c)(i) of the FOI Act is claimed, it is still open to conclude that the *public disclosure* of that matter would infringe the privileges of Parliament.

131. Section 50(c)(i) of the FOI Act does not require me to determine whether public disclosure of the matter in issue would itself impeach or question proceedings in the Assembly. Rather, I am required to determine whether public disclosure of the matter in issue would *infringe* the privileges of Parliament, which include the privilege set out in section 8(1) of the *Parliament of Queensland Act 2001*, being that proceedings in the Assembly cannot be impeached or questioned.

132. In *Ainsworth; Ainsworth Nominees Pty Ltd and Criminal Justice Commission; A (Third Party); B (Third Party)*⁶² the Information Commissioner said that:

An unauthorised disclosure of 'proceedings in Parliament' will constitute an infringement of the privileges of Parliament, and hence, if the matter in issue can properly be

⁵⁹ See paragraphs 31 – 32.

⁶⁰ [2000] 1 Qd R 207, 221.

⁶¹ (Unreported, Queensland Information Commissioner, 7 December 2001) at paragraph 20.

⁶² (1999) 5 QAR 284 at paragraph 59.

characterised as a 'proceeding in Parliament', it will be exempt matter under s50(c)(i) of the FOI Act, unless its public disclosure has been authorised by Parliament or by the PCJC.

133. Therefore, if a document falls within the meaning of the term 'proceedings in the Assembly' set out in section 9 of the *Parliament of Queensland Act 2001*, then section 8 of the *Parliament of Queensland Act 2001* applies to that document and to release that document, other than in accordance with parliamentary processes,⁶³ would infringe the privileges of parliament.

Submissions

134. In summary, QPS submits that:

- the relevant documents are comprised of a parliamentary briefing for 7-9 August 2007;
- the documents were created for the purpose of answering possible parliamentary questions concerning that particular topic;
- the QPS Cabinet Legislation and Liaison officer confirmed the brief was received by the Minister
- each of the folios is a 'proceeding in Parliament' for the purpose of section 3 of the *Parliamentary Papers Act 1992* (Qld) and disclosure or publication of each, without the authority of Parliament, would infringe the privileges of Parliament.

Findings

135. I have carefully read and considered folios 167-169. In view of the submissions made by QPS and the legal requirements discussed at paragraphs 113-133, I am satisfied that:

- the folios comprise a parliamentary briefing for 7-9 August 2007
- the brief was prepared to assist the Minister to answer questions that might be asked of the Minister in the Assembly
- the document constitutes an act done for the purposes of, or incidental to, transacting business of the Assembly.

136. Accordingly, I find that folios 167-169 are exempt from disclosure under section 51(c)(i) of the FOI Act.

DECISION

137. I vary the decision under review and find that:

- the FOI Act does not apply to the seventh line of text in folio 145 and lines three to seven of text in folio 146 by virtue of section 11D of the FOI Act
- information contained in paragraph 15 of folio 78, the last paragraph of 86 and the fifth paragraph of 91 can be deleted from a copy of the matter in issue pursuant to section 27(3) of the FOI Act
- folio 7 and 63 is not exempt from disclosure under section 42(1)(e) of the FOI Act
- folios 74, 115-117, 125-127 and 154 are exempt from disclosure under section 43(1) of the FOI Act
- folio 114 is not exempt from disclosure under section 43(1) of the FOI Act

⁶³ For instance, Part 5 of the *Parliament of Queensland Act 2001* provides for the publication of parliamentary records in accordance with that Part.

- the matter claimed to be exempt under section 44(1) of the FOI Act is exempt from disclosure under section 44(1) of the FOI Act.
- folios 167-169 are exempt from disclosure under section 51(c)(i) of the FOI Act

138. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

Julie Kinross
Information Commissioner

Date: 24 February 2010