

**NINTH ANNUAL REPORT**

**OFFICE**

*of the*

**QUEENSLAND  
INFORMATION COMMISSIONER**

**1 JULY 2000 TO 30 JUNE 2001**

**PRESENTED TO PARLIAMENT**

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# CONTENTS

	PAGE
<b>EXECUTIVE SUMMARY</b> .....	i
<b>CHAPTER 1: Constitution &amp; Functions; Structure &amp; Organisation</b> .....	1
Part A      Constitution & Functions .....	1
Enabling Legislation; Statutory Powers & Functions.....	1
Financial Structure & Goals .....	4
Part B      Structure & Organisation .....	5
<b>CHAPTER 2: Overview of Operations During the Reporting Year</b> .....	6
Goals and Performance .....	8
<b>CHAPTER 3: General observations on the FOI process in Queensland</b> .....	12
Management initiatives .....	12
Cabinet and Executive Council matter (s.36 and s.37) exemptions.....	12
Discretion to disclose exempt matter.....	15
Cost of the FOI process .....	15
Observations on the responsibilities of respondent agencies in a review under Part 5 of the FOI Act.....	17
Who uses the external review processes available under Part 5 of the FOI Act?.....	19
Closing remarks.....	21
<b>APPENDICES</b>	
1            Applications for external review received in 2000/2001, by category (as per s.71 of the FOI Act).....	22
2            Applications for external review received in 2000/2001, by respondent agency or Minister.....	23
3            Notes on significant issues dealt with in formal decisions published by the Information Commissioner in 2000/2001.....	24
4            Summaries of decisions issued by means of letters to participants in 2000/2001.....	28

# EXECUTIVE SUMMARY

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



Fred Albiez, Information Commissioner

In 2000/2001, my Office achieved a significant increase in its output, with the finalisation of 396 external review applications, as compared to 352 in the previous reporting period (an increase of 12.5%). This increased output was achieved notwithstanding a slight decrease in professional staff (from the equivalent of 10.6, to 10, full-time staff over the course of the reporting period).

**Table 1 - Applications for review under Part 5 of the FOI Act - 2000/2001**

Pending at start of reporting period (1/7/00)	182
Opened during the reporting period	376
Completed during the reporting period	396
Pending at end of reporting period (30/6/01)	162

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

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

In my previous Annual Reports, I discussed efforts being made to reduce the large backlog of cases accumulated in the first few years of operation of the Office of the Information Commissioner, when the Office was grossly under-resourced to meet the unforeseen high level of demand for its services. For the fifth year in a row, my Office has managed to resolve more cases than were received in the financial year. However, the significant increase in cases resolved was counterbalanced by a substantial increase in the number of new cases received in the financial year (376, up from 327 in 1999/2000, an increase of 15%), resulting in a reduction in cases on hand at the end of the reporting period of some 20 cases (11%). This result was achieved notwithstanding the demands placed on the time of myself and my senior staff in responding to the recommendations contained in the Report of the Strategic Management Review of the Office undertaken by The Consultancy Bureau Pty Ltd pursuant to s.108A of the FOI Act (the Management Review Report), and in responding to requests by

the Legal, Constitutional and Administrative Review Committee of the Legislative Assembly (LCARC) for a progress report on implementation of the recommendations of the Management Review Report, and for a supplementary submission in respect of LCARC's review of the FOI Act.

Notwithstanding those additional demands, there were significant improvements in timeliness of resolution of cases in the reporting period. Of cases finalised in 2000/2001, 55% were resolved within 3 months and 80% were resolved within 9 months of lodgment. The average time for finalisation of cases completed during the reporting period was halved, falling from 370 days in 1999/2000 to 185 days in this reporting period. I anticipate further improvements in these figures once the backlog of older, complex cases requiring formal decisions is eliminated during the next financial year.

The Office of the Information Commissioner has accumulated substantial experience and expertise in the resolution of FOI disputes, having (in the 8½ years from when it commenced operations, up to 30 June 2001) dealt with a total of 2261 applications for review, and resolved 2099. While there have been many recurring areas of dispute, there has been no shortage of novel cases, posing new problems in the interpretation and application of the FOI Act, as citizens seek to make use of it to access government-held information over a wide variety of areas of state and local government administration. My Office continues to accord prime importance to its responsibility to provide authoritative guidance for FOI administrators on the correct interpretation and application of the provisions of the FOI Act, not only by publishing formal decisions of a high standard, but also, in the mediation/negotiation phase of the review process, by explaining to agencies, whether in conference or in correspondence, the basis on which my Office considers that an agency may have misunderstood or misapplied the FOI Act in a particular case. With a view to disseminating the Information Commissioner's formal decisions to government agencies and interested members of the public, as quickly and as cheaply as possible, a web-site has been established to provide free access, via the Internet. Summaries of 'letter decisions' also appear on the web-site. The Information Commissioner's web-site address is <http://www.slq.qld.gov.au/infocomm>.

The Office of the Information Commissioner also accords great importance to offering a dispute resolution service that is as informal, and inexpensive for participants (including government agencies), as the issues requiring resolution in a particular case will permit. My Office places emphasis on informal methods of dispute resolution, endeavouring, in all cases, to undertake a preliminary assessment of the documents in issue as quickly as possible, and to negotiate with the participants in the review with a view to achieving settlement, or at least narrowing the range of issues in dispute which must proceed to a formal determination. This approach is intended to serve the aims of the FOI Act by procuring, as quickly as possible, the disclosure of as much information as possible. Procedures are tailored to suit the circumstances of each individual case, with a view to keeping down the costs of participation in the external review process, not only for applicants but also for agencies (and hence for the public purse). The Office of the Information Commissioner consciously tries to reduce or eliminate unnecessary expense and formality for participants, at least so far as the duty to accord procedural fairness, and the complexity of the issues for determination in any particular case, will allow. In 2000/2001, 340 (or 86%) of the 396 applications finalised, were resolved without the need for a formal decision.

**Table 2 - Outcome of external reviews completed during reporting period, including comparison with previous two years**

<u>Outcome</u>	<u>98/99</u>	<u>99/00</u>	<u>00/01</u>
No jurisdiction	39	40	50
Decision not to review/review further under s.77 of the FOI Act	3	3	1
Agency granted further time to deal with application	8	2	0
Resolved/Withdrawn following mediation	193	223	292
Decision issued - affirming decision under review	26	41	27
Decision issued - varying decision under review	21	30	20
Decision issued - setting aside decision under review	11	13	6
<b>TOTAL</b>	<b>301</b>	<b>352</b>	<b>396</b>

Of the 292 cases resolved or withdrawn (during the reporting period) following mediation:

- 6 involved questions of whether a fee or charge was payable by the applicant;
- 14 involved applications for amendment of documents, with the applicant being successful, in whole or in part, in obtaining an amendment or notation previously refused by an agency, in 8 of those cases;
- 247 involved applications challenging agency decisions to refuse access to documents, with 153 (or 62%) resulting in the applicant obtaining access to documents or matter previously withheld;
- 25 involved 'reverse FOI' applications, by third parties seeking to overturn decisions of agencies to disclose documents to an applicant for access, of which 17 cases were resolved in a manner that allowed the access applicant to obtain access to the information in issue, or part of it.

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

In Chapter 3, I have made some general observations on the operation of the FOI Act in Queensland. I have yet again drawn attention to deficiencies I perceive with the Cabinet and Executive Council exemption provisions, and to the potential for agency decision-makers to remedy those deficiencies by exercising the discretion they have to grant access to matter that technically qualifies for exemption, but the disclosure of which would not prejudice the public interest. I have also reiterated previous comments I made on the cost of FOI in Queensland. In addition, I have made some observations on the proper role of agency participants in external review applications.

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## Constitution & Functions; Structure & Organisation

### Part A : Constitution & Functions

#### Enabling Legislation; Statutory Powers and Functions

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

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

- (a) decisions under section 20 not to publish statements of affairs or as to whether a statement of affairs complies with Part 2;*
- (b) decisions refusing to grant access to documents in accordance with applications under section 25;*
- (c) decisions deferring providing access to documents;*
- (d) decisions giving access to documents subject to the deletion of exempt matter;*
- (e) decisions as to the amount of charges required to be paid before access to documents is granted, whether or not the charge has already been paid;*
- (f) decisions—*

- (i) *to disclose documents contrary to the views of a person obtained under section 51; and*
- (ii) *to disclose documents if an agency or Minister should have taken, but has not taken, steps to obtain the views of a person under section 51; and*
- (iii) *not to amend information in accordance with applications under section 53.*

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

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

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

- power to determine the procedure to be followed on a review under Part 5 of the FOI Act (s.72(1)(a));
- power to give directions to participants in a review as to the procedure to be followed on a review under Part 5 of the FOI Act (s.72(2));
- power to extend the time limit for lodging an application for review (s.73(1));
- power to make preliminary inquiries of an applicant, or a respondent agency or Minister, in order to determine whether the Information Commissioner has power or jurisdiction to review the matter to which the application relates, or whether the Information Commissioner may decide not to review the matter under s.77 of the FOI Act (s.75);
- power to require the production of a document or matter for inspection for the purpose of enabling the Information Commissioner to determine whether the document or matter is exempt, or is an official document of a Minister (s.76(1));
- power to decide not to review, or not to review further, a decision in respect of which the Information Commissioner is satisfied that the application for review is frivolous, vexatious, misconceived or lacking in substance (s.77);
- power to permit third parties to be participants in the review process (s.78);
- power to grant an extension of time to an agency or Minister to deal with an application under the FOI Act, and to grant such an application subject to conditions such as reduction or waiver of charges (s.79(2) and s.79(3));
- power to try to effect a settlement between the participants, or suspend a review to allow

the participants to negotiate a settlement (s.80);

- power to require an agency or Minister to provide an additional statement of reasons for a decision under review, where the initial statement of reasons is considered to be inadequate (s.82);
- power, for the purposes of a review, to obtain information from such persons, and make such inquiries, as the Information Commissioner considers appropriate (s.83(2));
- power to permit a participant to be represented by another person when appearing before the Information Commissioner (s.83(4));
- power to give to persons written notices requiring the giving of information in writing, or the production of documents to the Information Commissioner, or requiring a person to attend before the Information Commissioner and answer questions relevant to a review (s.85);
- power to examine witnesses on oath or affirmation (s.86);
- power to refer a question of law arising on a review under Part 5 of the FOI Act to the Supreme Court for decision (s.97).

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

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

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

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

- (a) affirming the decision; or
- (b) varying the decision; or
- (c) setting aside the decision and making a decision in substitution for the decision.

1.9 Section 89(2) provides that the Information Commissioner must include in the decision the reasons for the decision. Section 89(5) provides that the Information Commissioner may arrange to have decisions published. I have made arrangements with the Law Book Company for my formal decisions to be published in the loose-leaf service *Queensland Administrative Law*, by Dr Chris Gilbert and Mr William Lane. The decisions are subsequently published in a bound series of reports entitled the *Queensland Administrative Reports* (QAR). Formal decisions, and summaries of 'letter decisions', can also be accessed on the Information Commissioner's web-site (<http://www.slq.qld.gov.au/infocomm>) which is maintained with the generous assistance of the State Library of Queensland. Formal decisions are also available

- 1.10 The Information Commissioner can properly be described as a specialist tribunal. The Information Commissioner has been conferred with powers and functions, and a role in the scheme of the FOI Act, which are comparable to those of the Commonwealth Administrative Appeals Tribunal (the Commonwealth AAT) and the Victorian Civil and Administrative Tribunal (the VCAT) which undertake the function of independent external review authority in the scheme of the *Freedom of Information Act 1982 Cth* (the Commonwealth FOI Act) and the *Freedom of Information Act 1982 Vic* (the Victorian FOI Act), respectively. Unlike those two bodies, however, which are tribunals of general jurisdiction, the Information Commissioner provides a specialised dispute resolution service confined to disputes under the FOI Act. Moreover, it is clear from Part 5 of the FOI Act and its legislative history that the Queensland Parliament intended that the Information Commissioner provide a speedier, cheaper, more informal and more user-friendly method of dispute resolution than the court system or tribunals, such as the Commonwealth AAT and the VCAT, which adopt court-like procedures. In Chapter 2 of my first Annual Report (1992/93), I traced the evolution of the Information Commissioner model of dispute resolution for FOI cases. That model has been embraced in the freedom of information statutes of Western Australia, South Australia and Tasmania, although in the last two instances the South Australian Ombudsman and the Tasmanian Ombudsman have been given determinative powers in FOI matters, without the creation of a new statutory office of Information Commissioner.
- 1.11 Since one of the professed objects of freedom of information legislation (see s.5(1)(a) of the FOI Act) is to enhance the accountability of the executive branch of government, it is essential to the credibility of the entire scheme of the legislation that the opportunity is provided for aggrieved applicants to have adverse decisions reviewed on their merits by an authority independent of the executive government. The public is not likely to accept the administration of the FOI Act as being credible, fair and just, if the ultimate decision-making power on whether to grant or refuse access to information, which may reflect on the efficacy or propriety of operations of the executive branch of government, were to remain in the hands of officials within the executive branch of government. Many of the exemption provisions in the FOI Act are unavoidably couched in terms which call for the making of value judgments, for example, as to whether, disclosure (of particular documents) would involve a reasonable expectation of prejudice (see s.39, s.40, s.42 of the FOI Act) or a reasonable expectation of a substantial adverse effect (see s.40, s.47(1)(a), s.49 of the FOI Act) or as to where the balance of public interest lies when competing public interests favouring disclosure and non-disclosure are identified and weighed. If the public is to have confidence in the administration of the FOI Act, it requires the assurance that judgments made by agency officials and by Ministers (who are potentially subject to institutional pressures which may cause their judgments to favour the interests of their own organisation or the interests of the government of the day), can be tested by independent review.
- 1.12 Section 61(2) of the FOI Act provides that the Parliamentary Commissioner for Administrative Investigations (the Parliamentary Commissioner), appointed under the *Parliamentary Commissioner Act 1974*, is to be the Information Commissioner (unless another person is appointed as the Information Commissioner by the Governor-in-Council on an address from the Legislative Assembly - this has not occurred). By virtue of my appointment as Parliamentary Commissioner, therefore, I held the separate statutory office of Information Commissioner for the entire reporting period.

### **Financial Structure & Goals**

- 1.13 Although the Office of Information Commissioner and the Office of Parliamentary Commissioner are separate statutory offices, funding is provided for the Office of the Information Commissioner under the Managing for Outcomes budgeting arrangements for the Office of the Parliamentary Commissioner. The Office of the Information Commissioner also has its corporate services functions of finance, personnel, administration and information technology performed by the Corporate Services Division of the Office of the Parliamentary

Commissioner. The audited financial statements for 2000/2001 for both offices will be published in the 27th Annual Report of the Parliamentary Commissioner. In 2000/2001, \$938,396 was expended on salaries and related costs (e.g., payroll tax, superannuation contributions) attributable to the Office of the Information Commissioner, while \$417,225 was expended on other costs attributed to the Office of the Information Commissioner. (The method of calculation of other costs was altered in the 1999/2000 reporting period, so as to apportion a share of the expenses of the Corporate Services Division and the Commissioner's Office, in addition to administrative expenses directly referable to the operations of staff of the Office of the Information Commissioner. Comparisons with figures in earlier Annual Reports would need to take that into account.)

- 1.14 The performance output for the offices of Parliamentary Commissioner and Information Commissioner is *"Independent review of complaints and appeals about Government administration"*. The suboutput for the Office of the Information Commissioner is *"Independent review by the Information Commissioner of decisions made by Government in the administration of the Freedom of Information Act 1992"*. The role of the Information Commissioner is confined to reviewing decisions of specified kinds made under the FOI Act, and the Information Commissioner can exercise determinative powers, i.e., can make decisions which are binding on the participants to a dispute (subject to a participant's right to seek judicial review by the Supreme Court if an error of law in the Information Commissioner's decision can be demonstrated). I have endorsed appropriate goals and performance indicators for the Office of the Information Commissioner which are explained in Chapter 2 of this report.

## **Part B: Structure & Organisation**

- 1.15 The principal place of business of the Office of the Information Commissioner is Level 25, 288 Edward Street, Brisbane, 4000 (telephone (07) 3005 7100).
- 1.16 I, Frederick Norman Albietz, was appointed by the Governor-in-Council on 16 May 1991 to a three year term as Parliamentary Commissioner for Administrative Investigations pursuant to s.5 of the *Parliamentary Commissioner Act 1974*. Since then I was reappointed on a number of occasions, most recently until 13 August 2001. By virtue of that appointment, I held office as Information Commissioner pursuant to s.61(2) of the FOI Act, for the entire reporting period.
- 1.17 The permanent staffing structure of the Office of the Information Commissioner, as at 30 June 2001, was as follows:
- 1 Deputy Information Commissioner
  - 2 Assistant Information Commissioners (at level AO8)
  - 2 Senior Administrative Review Officers (at level A07)
  - 4 Administrative Review Officers (at level A06)
  - 1 Executive Officer (at level A04)
  - 1 Research Officer/Librarian (at level A05)
  - 2 Administrative Assistants (at level A02).

As at 30 June 2001, the permanent staffing structure was supplemented by one additional temporary staff member, a Senior Administrative Review Officer (at level A07) on temporary transfer from the office of the Parliamentary Commissioner for Administrative Investigations.

## Overview of Operations During the Reporting Year

- 2.1 In 2000/2001, the Office of the Information Commissioner significantly increased its output, with the finalisation of 396 external review applications, as compared to 352 in the previous reporting period (an increase of 12.5%). This is the eighth consecutive year in which the office has significantly increased its outputs, and the fifth consecutive year in which it has managed to finalise more cases than it received during the year. The history of performance of the Office, in terms of numbers of applications dealt with, is set out in Table 3 below.

**Table 3 - Applications dealt with by the Office of the Information Commissioner**

Reporting period	Applications received	Applications completed	Applications pending	Equivalent full-time professional staff
18/1/93 - 30/6/93	120	27	93	2
1/7/93 - 30/6/94	274	125	242	4
1/7/94 - 30/6/95	223	179	286	6
1/7/95 - 30/6/96	209	203	292	6.3
1/7/96 - 30/6/97	231	246	277	8
1/7/97 - 30/6/98	210	270	217	8.5
1/7/98 - 30/6/99	291	301	207	8.8
1/7/99 - 30/6/00	327	352	182	10.6
1/7/00 - 30/6/01	376	396	162	10
<b>Total</b>	2261	2099		

- 2.2 In my 1997/1998 Annual Report, I stated that, provided the numbers of new cases received remained relatively steady (as they had done, in the range of 210-230, over the previous four years), a concerted effort by staff over the next two financial years (with the aid of continued temporary funding for the purpose) should see the elimination of the accumulated backlog by the end of that period. However, a substantial increase in the number of new applications for external review received in the last three financial years (the figures for new applications increased from 210 in 1997/1998 to 291 in 1998/1999, an increase of 38.6%, with a further 12% increase to 327, in 1999/2000, and a further 15% increase in 2000/2001 to 376) has meant that, despite finalising a record number of cases, the backlog remains slightly higher than I hoped for as at 30 June 2001. Efforts will be made to finalise, as quickly as possible, the older cases.
- 2.3 In 2000/2001, there was continued focus on attempting to clear the backlog of complex, older cases, while nevertheless attempting to resolve newer cases more quickly. Senior staff were tasked to make a concerted effort to resolve older cases, and considerable progress was made in that regard. However, there have been considerable demands on the time of staff generally, and senior staff in particular, in responding to the recommendations in the Management Review Report prepared by The Consultancy Bureau Pty Ltd pursuant to s.108A of the FOI Act, as well as requests from the Legal, Constitutional and Administrative Review Committee of the Legislative Assembly (LCARC) for inputs in respect of its wide-ranging review of the FOI Act. Nevertheless, notable improvement was evident in the timeliness of resolution of finalised cases, as Table 4 demonstrates.

**Table 4 - Timeliness of resolution**

Proportion of cases finalised within reporting period that were finalised within—	98/99 %	99/00 %	00/01 %
3 months	46	43	55
5 months	59	57	67
6 months	65	59	71
9 months	74	68	80
10 months	74	70	82
12 months	76	75	86

- 2.4 There has been a substantial reduction in the proportion of applicants for review who have not had their cases dealt with in the timely manner that the Office aspires to achieve. Delays have generally been confined to cases involving very large numbers of documents in issue, and/or very complex issues, and/or substantial numbers of third party participants, or to cases involving particular applicants who have lodged a substantial number of related applications for review. In the reporting period, I continued to prioritise the case-loads of staff according to the factors identified in paragraphs 2.15 to 2.16 of my 1993/1994 Annual Report. I understand and sympathise with the concerns of applicants, and agencies, to have timely resolution of disputes which proceed to external review. During the reporting period the management strategies I discussed in my 1996/1997 Annual Report (at paragraph 2.2) were continued with considerable success. In addition, staff have continued to work on the process of putting in place the systems, processes and training regimes necessary to implement, or trial, the recommendations in the Management Review Report. While this has involved (and will involve, since implementation of some recommendations will be a medium to long term process) further diversion of staff time from working on the resolution of cases, the recommendations may produce enhanced efficiencies in the longer term.
- 2.5 In Chapter 2 of my 1993/1994 Annual Report, I referred (at paragraphs 2.2 to 2.6) to the complex nature of some of the legal issues that arise under the FOI Act, and the compounding effect which can occur when there is a large volume of information in issue. Decisions which proceed through to the stage of external review can ordinarily be expected to involve the more difficult issues of principle which are capable of arising under the FOI Act. The purpose of an external review authority is to take a more careful look at the more complex and contentious issues that arise in the administration of the FOI Act, while affording the opportunity (which, due to statutory time constraints, is not ordinarily available at primary, and internal review, decision-making levels) for participants in a review to provide detailed inputs to the decision-making process by way of evidence and/or submissions on the issues for determination. Although it is best, whenever possible, to avoid an unduly legalistic approach to the application of the FOI Act, that is generally not possible with respect to applications for external review that cannot be resolved informally by negotiation, and must proceed to a formal decision by the Information Commissioner. In the usual case, an applicant is asserting a legal right (in accordance with s.21 of the FOI Act) to be given access to requested documents, and the respondent agency is asserting that the matter in issue falls within one of the exceptions to the right of access provided for in the FOI Act, usually one of the exemption provisions in Part 3, Division 2. The participants are entitled to have such a dispute resolved according to law, and I am obliged to resolve it according to proper legal standards and principles, including the duty to accord procedural fairness. A participant who is aggrieved by a formal decision of the Information Commissioner has the right to apply to the Supreme Court for judicial review if the participant considers that a legal error has been made. Moreover, Australian law imposes fairly onerous obligations as to the extent, and substantive content, of the reasons which must be furnished by a tribunal which (like the Information Commissioner pursuant to s.89(2) of the FOI Act) is required to give reasons for decisions: see H. Katzen "Inadequacy of Reasons as a Ground of Appeal", (1993) 1 *Australian Journal of Administrative Law*, p.33.

- 2.6 In Chapter 4 (pp.24-29) of my 1992/1993 Annual Report, I explained the procedural approach that would ordinarily be adopted for the resolution of FOI disputes. That approach has been adhered to during 2000/01. The main emphasis of that approach is on negotiation with the participants to resolve as many issues in dispute as possible. When that process is exhausted, opportunities are given to the participants to lodge evidence and written submissions in support of their respective cases, preparatory to a formal decision. The procedures adopted are intended to keep the costs for participants (including government agencies) as low as possible.
- 2.7 One of the most important functions of my Office is to provide authoritative guidance for FOI administrators on the correct interpretation and application of the provisions of the FOI Act. This is done not only through the publication of formal decisions, but through attempting, in the mediation/negotiation phase of the review process, to explain to agencies, both in conference and in correspondence, the basis on which my Office considers that an agency may have misunderstood or misapplied the FOI Act in a particular case. The quality of formal decisions is, of course, of prime importance in discharging the educative and normative (i.e., standard-setting) role expected of an external review authority. Notes on the significant issues dealt with in each published formal decision given in 2000/2001 are set out in Appendix 3 to this report. Summaries of other decisions by myself or my delegates appear in Appendix 4.
- 2.8 One notable feature of the reporting period was a marked increase in 'deemed refusal' applications. These are cases in which an agency has not given a decision within the time prescribed in the FOI Act. In the past two reporting periods, there were 67 and 63 deemed refusal applications, respectively. In the current period, the number rose to 119. The substantial increase over preceding years was attributable to two organisations and two applicants. One applicant made more than 30 'deemed refusal' applications in respect of FOI access applications to the Princess Alexandra Hospital Health Service District, which the Hospital could not process within the time limits prescribed in the FOI Act. Nevertheless, all but a handful of those applications have now been resolved. The other agency was the Department of Corrective Services. Some 41 'deemed refusal' applications came from this Department, approximately half of which involved one prisoner applicant. It is, however, pleasing to note that efforts of the staff of the Department appear to have largely redressed the problem, with only 5 'deemed refusal' applications being made in the last 4 months of the reporting period.
- 2.9 Section 23 of the *Public Sector Ethics Act 1994* Qld (the Act) requires that Annual Reports include implementation statements which detail the action taken by agencies during the reporting period to comply with certain provisions of the Act. These provisions relate to the preparation of a Code of Conduct, education of staff, and access and adherence to the Code. The Code of Conduct for the Office was prepared in the previous reporting period, following consultation with staff and associations representing staff, and was approved by the Attorney-General on 31 August 2000. Copies of the ethics principles and ethics obligations for public officers have been circulated to existing staff, are included in induction manuals for new staff, and are posted on the staff notice board. A copy of the Code of Conduct has also been posted to the staff notice board, included in induction manuals, and copies of the Code are available from the Office's administrative staff. During the reporting period, the Office conducted a training session for staff on the Code of Conduct, which outlined the ethical obligations imposed on staff and discussed possible breaches of the Code (including disciplinary action). This training also highlighted the need to ensure that the administrative procedures and management practices of the Office have proper regard to the Code of Conduct.

### **Goals & Performance**

- 2.10 I have established three general goals for the Office of the Information Commissioner, which are set out below. I have also established key performance indicators to measure the achievements of the Office in meeting the goals. I have varied the performance indicators for this reporting period, taking into account the recommendations in the Management Review

Report. Table 5 sets out each of the performance indicators and records performance against them for the current reporting period and (where the information is available) the previous two reporting periods.

### **Goal 1**

To investigate and review decisions under the FOI Act, with a high standard of timeliness, efficiency and professionalism, in order to resolve the dispute by informal means, or, if it proves necessary, to establish the correct decision under the FOI Act, with as much expedition as the requirements of procedural fairness, and the issues for determination in the case, will allow.

### **Goal 2**

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

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

### **Goal 3**

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

**Table 5 Performance indicators**

<b>Performance indicator</b>	<b>98/99</b>	<b>99/00</b>	<b>00/01</b>
<b>Goal 1</b>			
Cases finalised in reporting year	301	352	396
Cases finalised in reporting year per equivalent full-time professional staff member	34.2	33.2	39.6
Proportion of cases finalised in reporting year that were finalised within—			
◆ 3 months	46	43	55
◆ 5 months	59	57	67
◆ 6 months	65	59	71
◆ 9 months	74	68	80
◆ 10 months	74	70	82
◆ 12 months	76	75	86
Proportion of open cases at end of reporting year that are over 12 months old	44%	32%	31%
Average time for finalisation of cases completed in reporting year	44 weeks	53 weeks	26 weeks
Average cost per file closed	n/a <sup>1</sup>	\$3 938	\$3 423 <sup>3</sup>
<b>Goal 2</b>			
Proportion of cases received in which informal dispute resolution methods (i.e., negotiation or mediation) were attempted.	91%	92%	95%
Proportion of cases resolved informally compared to cases resolved by decision	77%	74%	86%
Proportion of 'deemed refusal' applications handled by referral back to agency	n/a <sup>2</sup>	n/a <sup>2</sup>	28%
<b>Goal 3</b>			
Proportion of decisions issued in the reporting year overturned by the Supreme Court in judicial review proceedings	0	0	0
Availability of high quality formal decisions, which authoritatively interpret and illustrate the application of the relevant provisions of the FOI Act, to government agencies and interested members of the public at no cost, through the Information Commissioner's website.	All formal decisions available within 7 days.	All formal decisions available within 7 days.	All formal decisions available within 7 days.

Note 1 Method of calculation of funding in this year differed from later years, so direct comparison not appropriate.

Note 2 Statistics for this strategy have not been kept previously.

Note 3 Reduction achieved notwithstanding 3% salary increase.

## Comments

- 2.11 Most performance indicators showed significant improvement in 2000/2001, notwithstanding the considerable resources taken up in responding to the recommendations in the Management Review Report.
- 2.12 Of cases finalised in 2000/2001, 55% were finalised within 3 months and 80% were resolved within 9 months of lodgment. The average time for finalisation of cases completed during the reporting period was halved, falling from 370 days in 1999/2000 to 185 days in this reporting period. I anticipate further improvements in these figures when the backlog of older, complex cases requiring formal decisions has been eliminated.
- 2.13 Four of my decisions made during the reporting period (and summarised in Appendix 3) were challenged in judicial review proceedings in the Queensland Supreme Court:
- **Re Santoro and Department of Main Roads; Brisbane City Council (third party)**  
Application for judicial review dismissed by Wilson J on 10 April 2001. The Brisbane City Council has lodged an appeal to the Queensland Court of Appeal.
  - **Re Price and Local Government Association of Queensland**  
Application for judicial review dismissed by Atkinson J on 1 March 2001.
  - **Re Gill and Brisbane City Council**  
Application for judicial review discontinued.
  - **Re Whittaker and Queensland Audit Office**  
Application for judicial review dismissed by Moynihan J on 7 September 2001.
- 2.14 In this, my final Annual Report as Information Commissioner, it is satisfying to note that, in 8 ½ years of operation there have been only 11 applications to the Supreme Court for judicial review of a decision given (or of conduct in the course of making a decision) by the Information Commissioner or his delegates. It is a matter of record that none of those 11 challenges has succeeded (although one still remains on appeal to the Queensland Court of Appeal, as noted above). The fact that no decision of the Information Commissioner has been overturned for legal error by the Supreme Court since the establishment of the Office reflects the very high quality of decision making and professionalism exercised in the Office of the Information Commissioner.

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## General observations on the FOI process in Queensland

### Management initiatives

- 3.1 In the previous reporting period, The Consultancy Bureau Pty Ltd was engaged to conduct a management review of my Office, pursuant to s.108A of the FOI Act, with a view to identifying improvements that could be made in terms of economy, efficiency, and effectiveness. The Management Review Report, containing some 25 recommendations, together with my response to the report, was tabled in the Legislative Assembly in June 2000. My staff prepared an implementation plan and schedule, in respect of the specific recommendations made in the report. Implementation or trialling of many of the recommendations has been undertaken throughout the reporting period, and will continue.
- 3.2 I recently provided LCARC with an update on progress in implementation of the Management Review Report. My update forms an attachment to LCARC's *Progress report on implementation of recommendations made in the report of the Strategic Management Review of the Offices of the Queensland Ombudsman and the Information Commissioner*, which was tabled in Parliament on 8 August 2001, and is available on the Parliamentary website at: <http://www.parliament.qld.gov.au/Committees/LCARC/LCARCOMBPRreport.htm>.
- 3.3 Some of the steps initiated by my Office, or given greater emphasis, in the current reporting period, are:
- documentation of, and greater emphasis on, early intervention strategies focussed on informal, problem-solving resolution of disputes;
  - providing accredited mediation training for professional staff;
  - increased use of face-to-face conferences with applicants and agencies;
  - development of plain English Information Sheets aimed at explaining to applicants some of the issues that most commonly recur at external review level;
  - publication of Information sheets and summaries of letter decisions on the Information Commissioner's web-site;
  - arranging for publication of the Information Commissioner's formal decisions on the Australian Legal Information Institute (Austlii) web-site;
  - staff training in, and greater emphasis on, plain English writing in letters and decisions;
  - appointment of Liaison Officers for agencies with substantial numbers of external review applications to facilitate regular contact about demand management and other general issues;
  - attempting, where appropriate, to negotiate agreement for the referral back to agencies of 'deemed refusal' applications, with an extension of time (agreed between the agency and the applicant) for the agency to deal with the relevant access application;
  - trialling an applicant survey about the performance of the Office;
  - extending delegations of the Information Commissioner's decision-making powers, and some other powers, to experienced members of staff.

### Cabinet and Executive Council matter (s.36 and s.37) exemptions

- 3.4 As I retire from office after serving some 8 years and 9 months as Queensland's first Information Commissioner, some of my more profound regrets have been my experiences of antipathy demonstrated towards the FOI Act, and open government principles generally, by some segments of the Queensland public sector (including local government), and the dearth

of any sustained leadership from our political or public service leaders supporting the embrace by the Queensland public sector of open government principles.

- 3.5 Fortunately, most of the larger government agencies have developed experienced FOI administrators who are professional in their understanding and application of the FOI Act, and I and my staff have been appreciative of the co-operation most of them have shown in our endeavours to fairly resolve disputes that have come to my Office. However, in making their decisions on the application of exemption provisions in the FOI Act, FOI administrators are frequently dependent on information supplied, and instructions given, by the line managers and other senior officers who hold the documents which applicants seek. While it is fortunately still the exception rather than the norm, hostility is not infrequently manifested (sometimes by officials who have spent a large part of their careers enforcing laws against citizens) towards the use by a citizen of a legal right to enforce access to information from and about a government agency or official.
- 3.6 However, the clearest example of failure to embrace open government principles lies in the passage in March 1995 of the amendments to the s.36 (Cabinet matter) and s.37 (Executive Council matter) exemptions in the FOI Act, which extended the coverage of those exemptions far beyond what was reasonably necessary to protect the confidentiality of deliberations by Cabinet or Executive Council.
- 3.7 I have previously informed Parliament in some detail of my concerns about the unnecessarily broad reach of the 1995 amendments to s.36 and s.37 of the FOI Act (see my Annual Reports for 1994/1995 at paragraphs 3.4-3.49, 1995/1996 at paragraphs 3.24-3.29, 1996/1997 at paragraphs 3.6-3.13 and 1997/1998 at pages 17-19). To date, there have been no amendments in that regard. At page 17 of my 1997/1998 Annual Report, I said:

*One of the concerns I have previously raised is that s.36 and s.37 in their present form allow scope for the 'manufacture' of an exemption claim by giving blanket exemption to documents placed before Cabinet or Executive Council, even for documents that were not prepared for the purpose of submission to Cabinet or Executive Council, and indeed even for documents which have previously been published. The centrepiece of the FOI Act, the conferral by s.21 of a legally enforceable right of access to documents of agencies and official documents of Ministers (subject only to limited exceptions designed to protect the private and business affairs of members of the community, and essential public interests: see s.5(2) of the FOI Act) has been reduced, in practical terms, to a right of access subject to Ministerial veto. In my 1995/96 Annual Report, I noted that the prospect of public scrutiny deters officials from impropriety and encourages the best possible performance of their functions. If that prospect can, in effect, be evaded (as it can be under s.36 and s.37) and the disclosure of embarrassing or damaging information prevented, one of the chief objects of the FOI Act - accountability of government - is defeated.*

- 3.8 Both sides of politics, while in Opposition, have criticised the 1995 amendments to s.36 and s.37 of the FOI Act, and promised remedial action, but remedial action has never eventuated once they attained government. It seems that, in the context of modern adversarial political skirmishing, neither side of politics in Queensland has been prepared to sacrifice the strategic advantage for a government in power of exercising a degree of control over the flow of information to the Parliament and the public about government activities, in favour of what ought to be the entitlement of citizens, in a system of representative government in which sovereign power resides in the people, to have access to any information about the workings of their government (including information that may be embarrassing to the government of the day or particular officials) the disclosure of which would not unduly prejudice the wider public interest.
- 3.9 Since March 1995, my Office has received several applications for review which have given credence to the concern I raised in the above-quoted passage, including some in which

documents requested under the FOI Act were submitted to Cabinet or a Cabinet committee after receipt of the relevant FOI access application, and then claimed to be exempt under s.36(1)(a) of the FOI Act. I do not mean to suggest that Cabinet or its committees should be at all inhibited from considering issues and documents, merely because they have been the subject of an FOI access application. A document prepared for the purpose of submission to Cabinet or a Cabinet committee should be eligible for exemption (as it would have been under s.36(1) as originally enacted in 1992). But a document that was not prepared for the purpose of submission to Cabinet or a Cabinet committee should not automatically qualify for exemption merely because it has been attached to a Cabinet submission, or referred to in a Cabinet submission and made available for inspection at a meeting of a Cabinet committee. (Such a document might still warrant exemption if it satisfied the requirements of other exemption provisions in the FOI Act.)

- 3.10 In a recent case that attracted some comment in the news media, the Leader of the Opposition, Mr Horan, made FOI access applications to the Department of the Premier and Cabinet, the Department of State Development, the Office of the Minister for State Development, and the Southbank Corporation, seeking documents relevant to the construction of the pedestrian footbridge across the Brisbane River between Southbank and the Queensland University of Technology's Gardens Point campus, in particular, information relating to technical problems that had been encountered, and cost overruns. A senior officer in the Department of the Premier and Cabinet appears to have given instructions to junior staff to co-ordinate the collection and delivery to the Cabinet Secretariat of every document relating to the Southbank pedestrian footbridge from all agencies that had had any involvement with it. The Cabinet Budget Review Committee (the CBRC) was scheduled to review and discuss the problems encountered with the footbridge. It was perfectly proper and legitimate that it should do so. What appears to have been more contrived was the addition to the submission prepared for the CBRC of a schedule describing by file/folder all the documents collected from agencies, which were to be made available for inspection at the relevant meeting of the CBRC. On a conservative estimate, they must have numbered many thousands of documents, most of them technical in nature, and duplicates of many documents would appear to have been held by more than one agency. It appears that no attempt was made to cull the documents for particular relevance or value to the deliberations of the CBRC.
- 3.11 The emphasis with respect to preparation of Cabinet and committee submissions in past and present *Queensland Cabinet Handbooks* has been toward brevity and precision in briefing members of Cabinet or Cabinet committees. For example, section 5.4.11 of the current *Queensland Cabinet Handbook* states that: "*Where an attachment is longer than 10 pages, departments should critically examine whether the full attachment is required and if it could more appropriately be attached in a summarised form or merely cited if readily available*".
- 3.12 It strains credulity to accept that the proper processes of Cabinet government require the scrutiny, or even the availability for possible scrutiny, by Cabinet or a Cabinet committee of every document that mentions a topic like the Southbank footbridge, or, say, the Lang Park redevelopment. The government employs officials, usually with relevant technical expertise, to deal with the minutiae of details that need consideration in a large public development. It is difficult to accept that it is an appropriate or practical role for Ministers (who have an overwhelming number of important duties) to sit down at a Cabinet or Cabinet committee meeting to make, or be guided through, a productive examination of thousands of documents, or even samples of them relevant to particular issues.
- 3.13 However, exemption is established under the present s.36(1)(a) of the FOI Act merely by proof of the fact that a document has been submitted to Cabinet or a Cabinet committee, which includes bringing the document to Cabinet or a Cabinet committee, irrespective of the purpose of doing so, the nature of the document, or the way in which Cabinet or a Cabinet committee deals with it.
- 3.14 I should stress that I am not singling out the present government as being solely responsible for this practice. My experience has been that similar strategies have been adopted by both

sides of politics in the past. In my view, it is imperative for the credibility of the FOI Act and its administration that s.36 and s.37 be amended in the manner I have recommended in previous Annual Reports, and in my submission to LCARC in respect of its current reference to review the FOI Act.

### **Discretion to disclose exempt matter**

- 3.15 Until such amendments are made, there is another mechanism by which agency decision-makers can ameliorate (as appropriate, having regard to the circumstances of each particular case) the unnecessarily broad reach of the s.36 and s.37 exemptions. Cases such as those discussed above could be remedied by judicious exercise of the discretion conferred on agencies and Ministers by s.28(1) of the FOI Act (a discretion which it is not open to the Information Commissioner to exercise on external review because of the specific provision made by s.88(2) of the FOI Act).
- 3.16 Section 28(1) does not require an agency or Minister to refuse access to exempt matter. It confers a discretionary power to refuse access to exempt matter, which may be exercised or not exercised at the discretion of the relevant agency or Minister: see *Re Norman and Mulgrave Shire Council* (1994) 1 QAR 574 at p.577 (paragraph 13). It is therefore important for agency decision-makers to consider carefully the exercise of that discretion, particularly in cases involving s.36 and s.37, since the terms of those exemption provisions do not call for consideration of public interest factors favouring disclosure of particular information, or even the fact that the information in issue is already in the public domain.

### **Cost of the FOI process**

- 3.17 In light of recent public and parliamentary discussion concerning the cost of the FOI process in Queensland, I consider it useful to reiterate the comments that I made about the topic in my 1995/1996 Annual Report:

*3.13 FOI legislation was not primarily intended to confer direct benefits on the executive branch of government (though a host of indirect benefits for the executive government are frequently claimed for it, by supporters of FOI legislation). It was enacted for the benefit of citizens, with a view to fostering more responsive and accountable government, and a healthier, more robust and more participative democracy, by conferring legal rights on citizens that are enforceable against the executive branch of government. Unless these are no longer objects that the Queensland Parliament desires to achieve, claims from within the executive branch of government that the FOI Act, and similar Fitzgerald-inspired accountability mechanisms, have 'gone too far' and constitute an expensive and inefficient distraction from the performance of the main tasks of government, ought to be regarded by the Parliament with a healthy scepticism. In this regard, it is again apposite to quote from the essay by Mr Justice Thomas on "Secrecy and Open Government" (at pp.184-185):*

At the heart of the problem of secrecy in government is the question of power. Power and information are inextricably linked. Unequal access to information confers unequal power, so that the Executive, which possesses the information and the ability to make selective disclosure in the form and at a time to suit the government, continues to have an advantage over the public. The move towards open government can be perceived as an attempt to redress the imbalance in power by securing for the citizen greater access to official information. Open government, therefore, is essentially about a shift in power from the government to the people, so that the democratic sovereignty of

the people is not diminished by being reflected imperfectly in the machinery of government. In essence, the sovereignty of the people is eroded to the extent that they are not privy to the information possessed by their elected representatives.

This perspective explains the drive for greater openness in government and reflects the people's desire to hold the government accountable for what it does in their name and on their behalf. The impulse of the governed for greater accountability ensures that the demand for a system in which government is truly open will be insistent. It tends to be more intense following the revelation of government maladministration which, it is thought, might have been avoided but for the secrecy which prevailed, or of unsuccessful attempts to cover up maladministration. Demand for more openness in government is also manifest in the wake of the discovery of corruption committed by government officials or agencies, the public's instinct correctly perceiving that public vice and impropriety are more likely to take root under the shelter of structures and procedures which are protected from the light of public scrutiny. Aware that undue secrecy allows politicians in government to pursue what is seen as their own ends without ostensible regard to the public interest, the public are alert to the fact that political expediency may favour an attempt to conceal mistakes or abuses.

...

Of equal concern to the government's stockpile of information is the fact that it is the government that controls the form in which information is released and the timing of its release. Exclusive possession of official information enables a government to determine when and how it will lift the veil of secrecy. The scope for the manipulation of information by presenting it in a limited or sanitised form, or delaying its release to further the government's interests, is plain to see.

- 3.14 *Cost and efficiency considerations, with respect to the impact of FOI legislation on government administration, offer the easiest means of attack for opponents of open government. Important as it is, however, accountability in terms of efficiency and economy should not be the first and last word when considering accountability for government administration.*
- 3.15 *There is no doubt that the administration of FOI legislation comes at a cost, and that it is capable of making sporadic intrusions on the time of public officials (generally engaged on other duties) who hold documents which are the subject of applications made under the FOI Act. However, within reasonable limits (and the FOI Act makes provision in this regard - see, for example, s.28(2) of the FOI Act), democratic governments should be capable of tolerating a degree of inefficiency (as FOI Act requirements sporadically affect officers engaged in the administration of government programs), and should be prepared to accept the costs of administering a system for enhancing the accountability of the executive branch of government, as the price of honouring some of the democratic imperatives of a system of representative democracy.*
- 3.16 *Moreover, it is doubtful whether the cost of administering FOI legislation is any greater than the amounts of public money spent by governments of*

*all political persuasions on government media officers, information units, public relations campaigns and the like. The legitimacy of the executive government spending substantial sums of public money on telling the community what it wants the community to know about government administration, initiatives and achievements is not frequently questioned from within government (though, on the potential for abuse, see the Fitzgerald Report at pp.141-142, and the Electoral and Administrative Review Commission's Report on Review of Government Media and Information Services, April 1993, No. 93/R1). There seems a certain elementary fairness and balance in having public funds subsidise the costs of the government responding to members of the public who seek to enforce the right conferred by the FOI Act to obtain government-held information which is of interest or concern to them.*

3.17 In his essay, "Secrecy and Open Government", Mr Justice Thomas suggests an interesting perspective on this issue (at p.225):

... democracy and open government go hand in glove. This nexus derives from the sovereignty of the people. Government is delegated with the authority and power to act on the people's behalf, and the official information it gathers and holds pursuant to that devolution of power is gathered and held on the people's behalf. For representative government to be responsible and accountable, it must make that information available to the people. They do have a "right to know". ... Other essential features of a democracy are implemented irrespective of the cost or burden they might impose. No-one suggests, for example, that free and regular elections should be dispensed with simply because they are enormously expensive. Nor is it contemplated that parliament as an institution should be curtailed in the interests of more efficient and inexpensive government. If greater openness in government is regarded as a democratic imperative, should not the same approach be applicable?

### **Observations on the responsibilities of respondent agencies in a review under Part 5 of the FOI Act**

- 3.18 I consider it timely to reflect on, and reinforce, observations made by judges and tribunal members concerning the role and responsibilities of government agencies and officials involved in court or tribunal proceedings. In doing so, I must stress that, for the most part, it has been my experience that agencies, and in particular FOI co-ordinators of agencies who are charged with implementing the FOI Act, have interacted with my Office in a positive and co-operative way, which has greatly assisted the conduct and resolution of the vast majority of external reviews. Nevertheless, there have been some recent instances of obstructive or uncooperative behaviour, inconsistent with the standards of the 'model litigant' which should be observed by government agencies and officials.
- 3.19 It is established law that, in proceedings of the Commonwealth Administrative Appeals Tribunal (the AAT) which functions under materially identical provisions to those which govern the review functions of the Information Commissioner under Part 5 of the FOI Act, agency representatives have a duty to assist the AAT in reaching the correct decision. The relevant legal position is summarised in paragraph 9.72 of the Australian Law Reform Commission's Report No. 89, "Managing Justice":

*In the conduct of review tribunal proceedings, agency representatives have been held by the Federal Court to have a duty to assist the AAT in reaching the correct decision. Under this principle, the role of the agency's representative is equated to that of counsel for the Crown, particularly with*

*regard to disclosure of evidence. The agency should ensure that all relevant facts and documents are before the AAT, whether favourable to the applicant or not, and should not place undue emphasis on defeating the application.*

- 3.20 In *Re Cimino and Director-General of Social Services* (1982) 4 ALN N106a, the AAT said that "it is very important that representatives of the department approach their task ... as it were as counsel for the Crown, ensuring only that all the facts are before the tribunal and not placing emphasis on defeat of the application." See also *Re Crnkovic and Repatriation Commission* (1990) 20 ALD 131 at p.138; *Re Ermolaeff and Commonwealth* (1989) 17 ALD 686 at p.687; *Re Stewart and Department of Employment, Education and Training* (1990) 20 ALD 471 at p.477, quoting from unreported parts of the decision of Davies J in *Re Mann and Capital Territory Health Commission (No. 2)* (1983) 5 ALN N368; *Re Bessey and Australian Postal Corporation* (2000) 60 ALD 529 at pp.552-554.
- 3.21 In *Scott v Handley* (1999) 58 ALD 373 at pp.383-384, a Full Court of Federal Court of Australia (Spender, Finn and Weinberg JJ) explained the obligations of government agencies and officers as parties to legal proceedings:

*43. The second respondent is, as we have noted, an officer of the Commonwealth. As such he properly is to be expected to adhere to those standards of fair dealing in the conduct of litigation that courts in this country have come to expect - and where there has been a lapse therefrom, to exact - from the Commonwealth and from its officers and agencies. The spirit of this "model litigant" responsibility, now long enshrined in a policy document of the Commonwealth, is perhaps best captured in the observations of Griffith CJ in Melbourne Steamship Co Ltd v Moorehead (1912) 15 CLR 333 at 342:*

"I am sometimes inclined to think that in some parts - not all - of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken."

*44. Insistence upon that standard is a recurrent theme in judicial decisions in this country in relation to the conduct of litigation by all three tiers of government: see eg Yong v Minister for Immigration and Multicultural Affairs (1997) 75 FCR 155 at p.166; Hughes Aircraft Systems International v Airservices Australia (1997) 76 FCR 151 at 196-7; SCI Operations Pty Ltd v Commonwealth (1996) 69 FCR 346 at 368; DPP (Cth) v Saxon (1992) 28 NSWLR 263 at 267; Kenny v South Australia (1987) 46 SASR 268 at 273; Logue v Shoalhaven Shire Council [1979] 1 NSWLR 537 at 558-9; P & C Cantarella Pty Ltd v Egg Marketing Board (NSW) [1973] 2 NSWLR 366 at 383-4; see also Re v Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd [1988] 1 AC 858 at 876-7.*

*45. As with most broad generalisations, the burden of this fair dealing standard is best appreciated in its particular exemplifications in individual cases. The courts have, for example, spoken positively of a public body's obligation of "conscientious compliance with the procedures designed to minimise cost and delay": Kenny's case, above, at 273; and of assisting "the court to arrive at the proper and just result": P & C Cantarella Pty Ltd v Egg Marketing Board, above, at 383. And they have spoken negatively, of not taking purely technical points of practice and procedure: Yong's case, above, at 166; of not unfairly impairing the other party's capacity to defend itself: Saxon's case, above, at 268; and of not taking advantage of its own default: SCI Operations Pty Ltd, above, at 368.*

- 3.22 The role of an agency in administering the FOI Act, and in justifying its decisions in a review under Part 5 of the FOI Act, should not be that of an adversary in legal proceedings, raising whatever obstacles and hurdles, valid or otherwise, might assist in wearing down an opponent. In a review under Part 5 of the FOI Act, the respondent agency has an obligation to assist the Information Commissioner to arrive at the correct decision required by law in the application of relevant provisions of the FOI Act to the documents in issue. This involves raising exemption provisions which are honestly believed, on reasonable grounds, to be applicable to the documents or matter in issue, and explaining and supporting the basis of the exemption claims with relevant written argument and evidence. It also involves disclosing to the Information Commissioner all relevant evidence in the possession or control of, or known to, the agency, which bears on the exemption claim, whether it is favourable to the agency's case or not. It is certainly not appropriate for an agency to invoke a multitude of weakly argued, or unsupported, exemption claims in the hope that one of them may somehow succeed, or to complicate and delay the finalisation of a review under Part 5 of the FOI Act.
- 3.23 I urge all agency officers to bear in mind their ethical and legal obligations as representatives of government party participants in review proceedings under Part 5 of the FOI Act.

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

- 3.24 In my last two Annual Reports, I provided statistical information about the types of applicants who sought external review, and the kinds of information they were seeking. I have conducted a similar exercise in respect of external review cases finalised in the current reporting period. Again, the sample chosen was all cases finalised in the reporting year (396), less those which involved applications for amendment of information (11), making a sample of 385. In some of those cases, the dispute at external review level was over fees and charges, but these cases still involved examination of the kind of information which the applicant for access was seeking. Some of the cases were 'reverse FOI' applications, which have been classified according to the identity of the applicant for access (and where relevant, the nature of the information being sought). In order to provide a useful basis for comparison, I have maintained identical applicant categories to those adopted in my previous Annual Reports.

**Table 6 - Profile of access applicants in external review cases finalised in 2000/01**

<u>Type of Applicant</u>	<u>No.</u>
Politicians or political staffers	16
Journalists	7
Citizens groups/lobby groups	21
Individuals seeking information about public health and safety issues	8
Public servants (or former public servants) seeking information about workplace disputes e.g., grievance/disciplinary proceeding/termination of employment	72
Sub-categories:	
• Professional employee, e.g., salaried medical practitioner	(40)
• Teacher	(8)
• Police officer or ex-police officer	(1)
• University academic	(1)
Businessmen or business organisations seeking information for purposes related to their business	24
Professionals seeking information about their dealings with a professional regulatory body	6
Individuals seeking information about the treatment of their complaints to a professional regulatory body	9
Individuals seeking information relating to their treatment (or the treatment of a relative) by the QPS, the CJC or the courts (i.e., where the access applicant, or his/her relative, was the subject of investigation)	30
Individuals seeking information about how their complaint to the QPS or CJC was dealt with	10
Prisoners or former prisoners (or relatives thereof) seeking information relating to the prisoner's treatment by prison authorities	36
Individuals seeking access to their own medical records or records of a dependant child	15
Individuals seeking access to the medical records of a deceased relative	8
Individuals seeking information relating to their treatment under the Mental Health Act, or by mental health authorities (e.g., Patient Review Tribunal)	1
Individuals seeking information about the treatment of themselves or a family member by welfare agencies	2
Individuals seeking information related to persons involved with an adopted child	2
Individuals seeking access to information concerning treatment by relevant agencies (e.g., local Council/Department of Families) of a neighbourhood dispute or a family dispute;	43
including -	
Individuals seeking the identity of a complainant against them	(18)
Individuals seeking information about how a proposed government decision or policy will affect them, or about a government decision or policy which has affected them	49
Sub-category:	
Planning and development decisions	(3)
Individuals or business organisations seeking access to information for use in pending or proposed legal proceedings	23
Individuals seeking information about an individual public servant who has had dealings with them	3
Agency seeking review of another agency's decision	0
<b>TOTAL</b>	<b>385</b>

- 3.25 In my previous Annual Report, I considered the first four categories listed in the Table as representing general public interest applications, and noted that the proportion of general public interest applications had risen from 9% of cases finalised in 1998/1999 to 16% of cases finalised in 1999/2000. The proportion for the current reporting period has fallen to 14%.
- 3.26 The largest category of applicants continues to be public servants or former public servants. This category represented 19% of external review applications finalised (compared with 10% and 25%, respectively in the two preceding periods) As I noted in my previous Annual Report, I consider that the 10% figure is probably a more accurate representation of the level of usage of the FOI Act by aggrieved public servants, since the figures for the current reporting period and 1998/1999 were considerably inflated by the efforts of one or two individuals making multiple applications.
- 3.27 Applications by individuals or business organisations seeking information for use in pending or proposed legal proceedings represented 6% of all cases. This low figure continues to run counter to the argument that lawyers (and their clients) seeking cheaper and less formal access to government-held information, as an alternative to court-based disclosure, are disproportionate beneficiaries of the public resources devoted to the administration of the FOI Act (at least in so far as use of the external review mechanism is concerned).
- 3.28 The only other significant divergence from the previous reporting period involved applications by prisoners or former prisoners. This category represented 9% of finalised applications in the current period compared with 4% and 2% respectively in the previous two periods.
- 3.29 While the table shows a significant proportion of general public interest external review applications, it nevertheless remains clear that the vast majority of users of the external review mechanism are citizens seeking access to documents about matters of personal concern to them.

### **Closing remarks**

- 3.30 In this, my final Annual Report as Information Commissioner, I wish to place on record my sincere thanks and appreciation to the current and former staff of the Office of the Information Commissioner for the professionalism, integrity and dedication they have applied to their frequently onerous tasks. The vision I shared with staff was that of a fresh approach to FOI dispute resolution in Australia - placing major emphasis on informal, negotiated resolution of disputes, flexible procedures tailored to the circumstances of each particular case and aimed at minimising expense and inconvenience for all participants (including government agencies), and (when required) formal adjudication of the highest standard. That vision has been embraced by staff, and I pay particular tribute to those who struggled to make it work during the first five years of the Office's history, while carrying individual caseloads that were 3 times as high as the optimum caseload that would permit timely attention to all cases on hand. Deserving of special mention is my loyal deputy, Mr Gregory Sorensen, who has given outstanding professional service for the entire 8½ years the Office has conducted its external review function. I have benefited greatly as Information Commissioner because of his considerable management skills, and his wise counsel and legal advice. I thank him for his strong support and assistance. The quality of the Office's published work has garnered a national and international reputation, and proved influential with comparable tribunals in Australia and overseas. I wish the present staff well in their continuing endeavours, and express confidence that the Office will maintain its commitment to quality while continuing its sustained improvement in standards of timeliness of service delivery.

## APPENDIX 1

### Applications for external review received in 2000/2001, by category (as per s.71 of the FOI Act)

<b>STATEMENT OF AFFAIRS (PART 2)</b>	
<input type="checkbox"/> Refusal to publish, or to ensure compliance with Part 2	0
<input type="checkbox"/> Deemed refusal	0
<b>ACCESS TO DOCUMENTS (PART 3)</b>	
<input type="checkbox"/> Refusal to grant access	120
<input type="checkbox"/> Deletion of exempt matter	31
<input type="checkbox"/> Combination - refusal to grant access/deletion of exempt matter	18
<input type="checkbox"/> Deemed refusal to grant access	105
<input type="checkbox"/> Deferred access	0
<input type="checkbox"/> Charges	8
<input type="checkbox"/> Combination - refusal to grant access/charges	2
<input type="checkbox"/> Third party consulted; objects to disclosure	25
<input type="checkbox"/> Third party not consulted; objects to disclosure	0
<b>AMENDMENT OF RECORDS (PART 4)</b>	
<input type="checkbox"/> Refusal to amend	5
<input type="checkbox"/> Deemed refusal to amend	14
<b>ISSUANCE OF CONCLUSIVE CERTIFICATE</b>	
<input type="checkbox"/> Cabinet matter	0
<input type="checkbox"/> Executive Council matter	0
<input type="checkbox"/> Law enforcement/Public safety matter	0
<b>MISCELLANEOUS</b>	
<input type="checkbox"/> No jurisdiction or misconceived application	48
<b>TOTAL</b>	<b>376</b>



## APPENDIX 3

### **Notes on significant issues dealt with in formal decisions published by the Information Commissioner in 2000/2001**

#### **Re Santoro and Department of Main Roads; Brisbane City Council (third party) (Decision No. 03/2000, 24 October 2000, unreported)**

The applicant sought access to documents relating to the City-Valley Bypass project. The respondent and the third party claimed that disclosure of the matter in issue, which related to funding for the construction of the project, could reasonably be expected to cause damage to relations between the State Government and the Brisbane City Council, and that the matter in issue therefore qualified for exemption under s.38(a) of the FOI Act.

I decided that the use of the words "relations between the State and another government" in s.38(a) of the FOI Act indicated that the legislature intended to protect relations between the government of the State of Queensland and other autonomous governments of similar status, and not relations between the two levels of government within Queensland. I decided that the correct interpretation of the phrase "another government" in the context of s.38 of the FOI Act is that it refers to the Commonwealth government, the governments of other Australian States and territories, and the governments of foreign states. Accordingly, I held that the matter in issue did not qualify for exemption under s.38(a), because apprehended damage to relations between the State of Queensland and the Brisbane City Council was not within the sphere of application of s.38(a) of the FOI Act, properly construed.

Even on the assumption (contrary to my finding) that the words "another government" in s.38 extended to the Brisbane City Council, I was not persuaded that the matter in issue would qualify for exemption under s.38(a). I was not satisfied that disclosure of the matter in issue could reasonably be expected to cause damage to relations between the State of Queensland and the Council. I also noted that, had I been persuaded that disclosure of the matter in issue could reasonably be expected to cause some damage to relations between the State of Queensland and the Council, I considered that the public interest considerations favouring disclosure of the matter in issue were strong enough to have warranted a finding that disclosure of the matter in issue would, on balance, be in the public interest.

(The Brisbane City Council sought review of my decision in the Queensland Supreme Court. The matter was heard by Justice Wilson on 10 April 2001 - *BCC v Albietz* [2001] QSC 160. In a judgment delivered on 17 May 2001, Justice Wilson upheld my decision, ordering that the Council's application for judicial review be dismissed. The Council subsequently appealed to the Queensland Court of Appeal, which is expected to hear the appeal in February or March 2002.)

#### **Re Price and Local Government Association of Queensland Inc (Decision No. 04/2000, 8 December 2000, unreported)**

This case required determination of a jurisdictional issue as to whether or not the respondent is an agency subject to the application of the FOI Act. I decided that the respondent is an agency subject to the application of the FOI Act because it is a body that is established for a public purpose by an enactment, within the terms of s.9(1)(a)(i) of the FOI Act. I also noted that it is consistent with the objects of the FOI Act that a body established by an enactment, which performs functions for the benefit of the public or a substantial segment of the public (i.e., for public purposes), should be subject to the application of the FOI Act, irrespective of whether the public purpose is or is not specified in the enactment which established the body.

(The Local Government Association sought review of my decision in the Queensland Supreme Court. The matter was heard by Justice Atkinson on 21 February 2001 - *The Local Government Association of Queensland v Information Commissioner & Anor* [2001] QSC 052, 1 March 2001. In a judgment delivered on 1 March 2001, Justice Atkinson upheld my decision, ordering that the Local Government Association's application for judicial review be dismissed).

**Re Noosa Shire Council and Department of Communication and Information, Local Government and Planning; T M Burke Estates Pty Ltd (third party)  
(Decision No. 05/2000, 15 December 2000, unreported)**

This was a "reverse FOI" application by the applicant Council, which was the proponent of a Development Control Plan (subsequently approved) over land that the third party sought to develop. The applicant had sought legal advice concerning a possible course of action that might affect the level of any compensation payable to the third party. The applicant provided a copy of the legal advice to the respondent, and made comments about the substance of the advice to the third party and to local newspapers. In my decision, I considered whether the legal professional privilege (the ground for exemption under s.43(1) of the FOI Act) which initially attached to the legal advice, had been waived by the applicant. I found that the disclosure to the respondent had been made under an implied understanding of confidentiality and did not constitute an intentional general waiver of privilege. However, I also considered whether the other disclosures by the applicant amounted to an implied waiver of privilege. I decided that the other disclosures were inconsistent with maintenance of confidentiality in the advice and I stated that my finding in that regard could be supported without reference to any wider considerations of fairness to the third party. I therefore decided that the legal advice did not qualify for exemption under s.43(1) of the FOI Act.

**Re Fox and Queensland Police Service  
(Decision No. 01/2001, 9 February 2001, unreported)**

The applicant had been convicted of murder and several attempted murders. He had appealed unsuccessfully to the Supreme Court and had been refused special leave to appeal to the High Court. He wished to make a petition for pardon. He sought access to documents concerning complaints made to the respondent, which he contended might assist him in challenging his conviction for murder, by raising the possibility of an alternative assailant or assailants. In respect of each complaint, the applicant was neither the complainant nor the subject of complaint.

I found that the matter in issue concerned the personal affairs of the complainant and the subject of the complaint and was therefore *prima facie* exempt from disclosure under s.44(1) of the FOI Act, subject to the application of the public interest balancing test. I acknowledged that there may be a public interest in a person obtaining access to information that would assist the *bona fide* use of avenues for correcting a miscarriage of justice (as distinct from, say, accessing information merely to pester or harass a victim or witness). However, I stated that that public interest must be weighed against the public interest in protecting the privacy of information concerning the personal affairs of the individuals identified in the matter in issue. I considered it appropriate (in assessing the weight to be accorded to the public interest considerations favouring disclosure) to take into account the strength of the Crown case against the applicant, and the likelihood that disclosure of the matter in issue would assist the applicant to mount a persuasive case in support of the remedy the applicant proposed to seek.

In the circumstances of the case, I was satisfied that the matter in issue was not sufficiently relevant to, or supportive of, a case for the applicant to obtain a pardon, to outweigh the public interest in protecting the privacy of information concerning the personal affairs of the individuals identified in the matter in issue. I therefore decided that the matter in issue was exempt under s.44(1) of the FOI Act.

**Re Lovelock and Queensland Health  
(Decision No. 02/2001, 12 February 2001, unreported)**

The applicant had been convicted of murder. He had appealed unsuccessfully to the Supreme Court and had applied for special leave to appeal to the High Court. He sought access to medical records of a witness who gave evidence at his trial, in an effort to challenge the credibility of the witness, who had disclosed at the trial that she had a "bi-polar mood disorder".

I found that the medical records concerned the personal affairs of the witness and were therefore

*prima facie* exempt from disclosure under s.44(1) of the FOI Act. As in *Re Fox* (discussed above), I acknowledged that there may be a public interest in a person obtaining access to information that would assist the *bona fide* use of avenues for correcting a miscarriage of justice. However, I stated that that public interest must be weighed against the significant public interest in protecting the privacy of the medical records of the witness. Again, I considered it appropriate (in assessing the weight to be accorded to the public interest considerations favouring disclosure) to take into account the strength of the Crown case against the applicant, and the likelihood that disclosure of the matter in issue would assist the applicant to mount a persuasive case in support of the remedy the applicant proposed to seek.

I referred to comments in the Court of Appeal showing the strength of the Crown case. As the witness had given evidence concerning the disorder at the trial, I indicated that the relevant ground of appeal raised by the applicant in his application for special leave to appeal would not be advanced by detailed evidence concerning the medical history of the witness. I also noted that the medical records predated the murder by a number of years. I decided that disclosure of the medical records would not, on balance, be in the public interest, and that the records were therefore exempt under s.44(1) of the FOI Act.

**Re Antony and Griffith University  
(Decision No. 03/2001, 30 March 2001, unreported)**

The applicant sought review of the respondent's decision to refuse him access to certain documents relating to a selection process for an academic appointment. The matter in issue comprised the application (consisting of a *curriculum vitae*, statement addressing the selection criteria, and covering letter) submitted by the successful candidate for the advertised position. The respondent claimed that the matter in issue was exempt under s.46(1)(a) and s.40(c) of the FOI Act.

Applying the principles established in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, I was not satisfied that the matter in issue was communicated in such circumstances as to fix the respondent with an equitable obligation of confidence in respect of it. I therefore decided that the matter in issue did not qualify for exemption under s.46(1)(a) of the FOI Act.

With regard to the application of s.40(c) of the FOI Act, I was not satisfied that disclosure of the matter in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by the respondent of its personnel. Accordingly, I found that the matter in issue did not qualify for exemption from disclosure under s.40(c) of the FOI Act.

**Re Gill and Brisbane City Council; Re Brisbane City Council and Criminal Justice Commission; Gill (Third Party)  
(Decision No. 04/2001, 6 June 2001, unreported)**

The applicant sought access to documents relating to a complaint he had made to the Brisbane City Council about a neighbour's dog attacking him, and to his subsequent complaint to the Criminal Justice Commission (CJC) that the Council had failed to handle his original complaint properly. One of the documents to which access was sought was a report prepared by the Corporate Investigative Unit (CIU) of the Council. This document was the subject of a 'reverse FOI' application made by the Council, objecting to the decision of the CJC to disclose the report.

The Council claimed that the matter in issue was exempt under s.42(1)(a), s.42(1)(b), s.42(1)(e), s.42(1)(h) and s.43(1) of the FOI Act; and, in the alternative, that parts of matter in issue were exempt under s.40(a), s.40(b), s.40(c), s.42(1)(e), s.44(1), s.45(1)(b), s.45(1)(c) and s.46(1) of the FOI Act. I upheld the Council's claim that the identifying particulars of the owner of the dog were exempt from disclosure under s.44(1) of the FOI Act, but found that the remaining matter in issue did not qualify for exemption under the FOI Act. The major part of the decision examined exemption claims made under s.43(1), the legal professional privilege exemption. I also commented that I considered that several of the exemptions claimed by the Council were entirely lacking in merit and that the Council and other agencies should, in future cases, bear in mind their ethical and legal obligations as government party participants in review proceedings under Part 5 of the FOI Act (see paragraphs

3.18- 3.23 of this Annual Report).

**Re Whittaker and Queensland Audit Office  
(Decision No. 05/2001, 15 June 2001, unreported)**

The applicant sought access to documents relating to an audit by the respondent of outstanding debtor balances of the Legislative Assembly. The respondent claimed that the matter in issue was exempt under s.39(2) of the FOI Act.

During the course of my review, the respondent conceded that some of the matter in issue was not exempt from disclosure as it did not constitute "protected information" within the meaning of s.92 of the *Financial Administration and Audit Act 1977* Qld (as required by s.39(2) of the FOI Act). However, I was of the view that the remainder of the matter in issue did constitute protected information and that its disclosure was not "required by a compelling reason in the public interest". Accordingly, I decided that the matter in issue was exempt from disclosure to the applicant under s.39(2) of the FOI Act.

(The applicant sought review of my decision in the Queensland Supreme Court. The matter was heard by Justice Moynihan who delivered a judgment on 7 September 2001 dismissing the application for judicial review.)

## APPENDIX 4

### Summaries of Decisions Issued by Means of Letters to Participants in 2000/2001

#### **Cashel and WorkCover Queensland**

(S 167/00, 13 September 2000)

The applicant sought access to copies of psychological tests completed by him as part of an assessment conducted by an independent psychologist at WorkCover's request. I was satisfied that WorkCover did not hold copies of the tests and that they were not "documents of an agency" as defined in s.7 of the FOI Act, according to the principles stated in *Re Holt and Education Queensland* (1998) 4 QAR 310 and *Re Price and Nominal Defendant* (1999) 5 QAR 80. I decided that the expert services of the psychologist were provided to WorkCover on a contractual basis which entitled WorkCover to the psychologist's report, but not to the resources used by him in forming his expert opinion.

In relation to 'sufficiency of search' issues raised by the applicant, I found that WorkCover had conducted reasonable searches for further documents falling within the terms of the applicant's FOI access application. I was satisfied that there were no further documents held by WorkCover that were responsive to the terms of the relevant FOI access application.

#### **Barber and Criminal Justice Commission**

(S 67/00, 19 September 2000)

This was a 'reverse FOI' application by a former police officer who objected to the disclosure of documents relating to the investigation of an incident in which she was involved while on duty, in which a firearm was discharged in a police station. Certain references contained in the documents to the private life and health of the applicant had been determined by the respondent to be exempt under s.44(1) of the FOI Act and that information was not in issue in this review. The Deputy Information Commissioner (making his decision as a delegate of the Information Commissioner's powers under s.90 of the FOI Act) decided that the balance of the matter in issue was properly to be characterised as information concerning the employment affairs of the applicant, rather than her personal affairs, and that it therefore did not qualify for exemption under s.44(1) of the FOI Act.

#### **Perkins and Queensland Rail**

(S 58/98, 22 September 2000)

The applicant had applied for a position with Queensland Rail, but was refused an interview on the basis of two adverse referee reports given by former colleagues. The applicant then applied for access to all documents relating to the selection process. During the course of the review, Queensland Rail agreed to release a number of documents to the applicant. I found that the matter remaining in issue was exempt under s.41(1) (a brief record of a meeting of the selection panel) as disclosure would inhibit the frank assessment of applicants for future positions; s.44(1) (the addresses of various applicants for employment and the names of unsuccessful applicants) as it concerned the personal affairs of third parties; or s.46(1)(a) (the two referee reports) as it was provided on an explicit understanding of confidentiality. I also upheld Queensland Rail's reliance upon s.28(2) of the FOI Act in refusing to deal with the applicant's request for access to the names of any other persons who had sought positions with Queensland Rail (similar to the position for which the applicant had applied) and who had been unsuccessful because of negative referee reports.

#### **Office of the Minister for Employment Training and Industrial Relations and Department of Mines and Energy**

(S 204/00, 13 October 2000)

This was an application by the Minister to review the Department's decision to give an FOI access applicant access to certain information. The Minister complained that he had not been consulted by the Department under s.51(1) of the FOI Act prior to its decision to disclose the information. I discussed the jurisdictional issue raised by s.71(1)(f)(ii) of the FOI Act which empowers me to

conduct a review where a person is aggrieved by an agency's failure to consult that person in accordance with s.51(1) of the FOI Act. I stated that I tended to the view that the reasons given by the Department's internal review decision-maker for not consulting the applicant were adequate and that consultation was not necessary. However, I went on to consider the substantive complaint of the Minister's Office, i.e., the contention that the information in issue may have been exempt from disclosure under s.42(1)(a) of the FOI Act, because its disclosure could reasonably be expected to prejudice a pending inquest into a fireworks-related death. I found that there was no evidence to show that disclosure of the information could reasonably be expected to prejudice the coronial inquiry, and that it therefore did not qualify for exemption under s.42(1)(a) of the FOI Act.

### **Tregeagle and Gold Coast City Council**

(L 34/00, 18 October 2000)

This was an application under s.73(1)(d) of the FOI Act for the grant of an extension of time in which to lodge an application for external review. Applying the principles stated in *Re Young and Workers' Compensation Board of Qld* (1994) 1 QAR 543, the Deputy Information Commissioner found in relation to the key considerations that - a) the extent of the delay (approximately 25 days) should not be accorded any substantial or decisive weight in telling against a favourable exercise of the discretion; b) the Council would not be caused any substantial prejudice by an extension of time being granted; c) the applicant had shown that he had a reasonably arguable case with reasonable prospects of success. The merits of the substantive application for review were such that the Deputy Information Commissioner decided to exercise the discretion conferred by s.73(1)(d) of the FOI Act in favour of the applicant, notwithstanding the extent of the delay in applying for external review.

### **Turner and Education Queensland**

(S 32/00, 24 October 2000)

The applicant had sought access to material concerning options, recommendations and plans for Oxley State High School. The Department had given him access to all relevant documents, with the exception of part of one sentence contained in a memorandum from the Director-General to the Minister. The matter in issue concerned another school. The Department claimed that it was exempt under s.41(1) of the FOI Act and that its disclosure could reasonably be expected to affect adversely the morale of the staff and students at that other school. However, I decided that the balance of the public interest lay in better informed public debate on the issues concerned and I therefore found that the matter in issue did not qualify for exemption under s.41(1) of the FOI Act.

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

(S 132/97, 27 October 2000)

(S 77/99, 30 October 2000)

### **Price and Surveyors' Board of Queensland**

(S 157/98, 31 January 2001)

In these applications, the applicant sought access to a range of documents, including documents to which he had already been granted access pursuant to earlier FOI access applications, or which I had previously found to be exempt matter under the FOI Act. The Deputy Information Commissioner decided not to deal further with those categories of documents pursuant to s.77(1) of the FOI Act. The Deputy Information Commissioner also found certain matter to be exempt from disclosure to the applicant under s.42(1)(b) and s.44(1) of the FOI Act.

The applicant asserted that further documents existed in the respondent agencies' possession or control that had not been disclosed to him. Applying the principles stated in *Re Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464, the Deputy Information Commissioner was satisfied that there were no reasonable grounds to believe that further documents existed that fell within the terms of the applicant's FOI access application and that the searches conducted by the agencies had been satisfactory in all the circumstances.

Following the reasons set out in *Re Price and Surveyors Board of Queensland (No.2)* (1999) 5 QAR 110, the Deputy Information Commissioner also found that documents comprising correspondence

from my Office to the respondent agencies were "documents of the commissioner" within the terms of s.12 of the FOI Act, and hence that they were excluded from the application of Part 3 of the FOI Act.

**Third Party Objector and Department of Justice; John Foster (Third Party)**

(S 88/99, 31 October 2000)

This was a 'reverse FOI' application by the applicant who sought a review of the Department's decision to release to the third party, a copy of a letter of complaint which the applicant had written to the Department about the third party and his registration as a Justice of the Peace. Assistant Information Commissioner Moss (making her decision as a delegate of the Information Commissioner's powers under s.90 of the FOI Act), decided that the letter of complaint was exempt from disclosure under s.42(1)(b), s.44(1) and s.46(1) of the FOI Act.

**Dimitrijevic and Parliamentary Commissioner for Administrative Investigations**

(S 183/99, 2 November 2000)

In 1998, the applicant had complained to the Office of the Parliamentary Commissioner (the Ombudsman) about alleged misconduct by officers of Education Queensland. As she was not satisfied with the Ombudsman's investigation, she applied for access to her complaint file. The Ombudsman's Office failed to make a decision on her application, but agreed during the course of the review to give the applicant access to all but one of the documents relating to her complaint. The applicant wanted access to that document because she believed it was a forgery used to "cover up" Education Queensland's unfair treatment of her. She also maintained that there should be further documents on her file. The Deputy Information Commissioner found that there were no reasonable grounds to expect that there were any additional documents which had not been located and dealt with by the Ombudsman's Office in the course of the review; and that disclosure to the applicant of the document remaining in issue (an assessment record in respect of another teacher) could reasonably be expected to have an adverse effect on the quality of future assessment and referee reports. As there was no evidence to support the applicant's claim that the document was a forgery, the Deputy Information Commissioner found that there was no public interest in its disclosure, and that it was exempt from disclosure under s.40(c) of the FOI Act.

**Spencer and Education Queensland**

(S 5/00, 3 November 2000)

This was a 'reverse FOI' application in which the applicant, a teacher, objected to the disclosure to a student's mother of a document which contained the applicant's version of an incident in which the student was involved. The applicant contended that the document was given in confidence to another officer of Education Queensland, who was preparing a response from the Minister to a complaint by the student's mother about the applicant, and was exempt on that basis. I found that nothing more than a conditional understanding of confidentiality could have existed between the applicant and the officer responding to the complaint against the applicant, and that the applicant should have anticipated, at the time of preparing the document in issue, that it would be necessary to disclose at least part of the document in issue to the student's mother, in order to explain to her the reasons for Education Queensland's findings on her complaint. I therefore found that the document in issue did not qualify for exemption under s.46(1) of the FOI Act.

**Moon and Gold Coast District Health Service**

(S 182/00, 8 November 2000)

The applicant was a registered nurse who sought access to all documents relating to an incident which occurred in the Gold Coast Hospital's maternity ward in March 2000. The Health Service requested an application fee of \$31 on the basis that the documents in issue concerned the applicant's employment affairs and not her personal affairs (the applicant was on duty in the maternity ward at the time). I have previously decided that it is only necessary for an applicant to seek access to one document which contains no information which can properly be characterised as information concerning the applicant's personal affairs, in order for the application to attract a fee. After examining a sample of the documents in issue, I affirmed the Health Service's decision that an

application fee of \$31 was payable.

### **Price and Surveyors' Board of Queensland**

(S 201/95, 23 November 2000)

In this case, I considered various 'sufficiency of search' issues in accordance with the principles stated in *Re Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464. I decided that working notes produced by an independent surveyor, engaged by the Board to conduct an investigation into the complaints of the applicant against another surveyor, were not documents of the Board, and were therefore not subject to the FOI Act. In addition, I decided that, in the particular circumstances of the case, records of an interview between the investigator and the surveyor who was subject to investigation were exempt under s.46(1)(a) of the FOI Act, as the Board owed an equitable duty of confidence to the surveyor.

### **Cudmore and Queensland Police Service**

(S 31/99, 29 November 2000)

The applicant sought review of a decision of the QPS to neither confirm nor deny the existence of certain documents under s.35 of the FOI Act. The applicant alleged that the QPS had supplied documents concerning him to the Department of Human Services (DHS) in Victoria on five occasions in late 1997 and early 1998, and that the DHS had used those documents in court proceedings. After it became clear that the applicant knew the general nature of at least some of the documents, the QPS withdrew its reliance upon s.35 of the FOI Act, but claimed that the documents in issue were exempt from disclosure under s.42(1)(a), s.42(1)(c) and s.44(1) of the FOI Act. A 'sufficiency of search' issue was also raised by the applicant.

I found that the QPS did not have any additional documents, responsive to the terms of the applicant's FOI access application, in its possession or control; that the searches made by the QPS in an effort to locate any additional responsive documents had been reasonable in all the circumstances of the case; and that the QPS was not required by the FOI Act to recreate documents of which it had not kept copies. I also found that the matter remaining in issue was exempt from disclosure under s.42(1)(a) (as it related to offences allegedly committed by the applicant, in respect of which the QPS had yet to lay charges), and under s.44(1) (as it concerned the personal affairs of third parties, or of the applicant and third parties, allegedly involved in those offences).

### **Price and Department of Justice and Attorney-General**

(S 100/97, 19 December 2000)

I considered a number of 'sufficiency of search' issues raised by the applicant. I found that there were no reasonable grounds to believe that additional responsive documents existed in the possession or control of the respondent, and that the searches undertaken by the respondent had been reasonable in all the circumstances of the case. I decided that Crown Law notional legal invoices and billing work sheets from 1996 were not exempt under s.45(1)(c) of the FOI Act, as disclosure at the time of my decision could not reasonably be expected to have an adverse effect on Crown Law's business affairs. I decided that the respondent was entitled to refuse access under s.22(a) of the FOI Act to District Court and Court of Appeal transcripts which were available for purchase from the State Reporting Bureau. I also found that the respondent was entitled to refuse access under s.22(b) and s.22(c) of the FOI Act to Court Calendars that could be purchased from the Department and which were also published in the *Government Gazette*, copies of which are available in public libraries. I decided that the balance of the matter in issue was exempt under s.43(1) or s.44(1) of the FOI Act.

### **Price and Queensland Police Service**

(S 188/95, 18 December 2000)

This case concerned documents relevant to court action involving the applicant, certain third parties and the respondent agency. I found that the matter in issue was exempt under s.41(1), s.44(1) or s.46(1)(b) of the FOI Act. The applicant also raised a 'sufficiency of search' issue. Applying the principles stated in *Re Shepherd and Department of Housing, Local Government and Planning* (1994)

1 QAR 464, I decided that in respect of most of the large number of categories of documents referred to by the applicant, there were no reasonable grounds to believe that additional documents falling within the terms of the relevant FOI access application existed in the possession or control of the QPS. In those cases where there was some basis to believe additional documents may have existed, I found that the search efforts by the QPS to locate any such documents had been reasonable in all the circumstances of the case.

#### **Borcherdt and Queensland Police Service**

(S 183/00, 17 January 2001)

The applicant had been both a complainant to the QPS and the subject of a QPS investigation. He sought access to "*all documents held and relating to myself*" and applied for external review on the grounds of both 'sufficiency of search' issues and the QPS's claim for exemption under s.44(1) of the FOI Act. During the course of the external review, further documents were located by the QPS to the applicant's satisfaction. Assistant Information Commissioner Shoyer found that all of the matter remaining in issue concerned the shared personal affairs of the applicant and other persons. Applying the principles stated in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 regarding shared personal affairs, the Assistant Information Commissioner decided that the matter in issue was *prima facie* exempt from disclosure to the applicant, subject to the application of the public interest balancing test. The Assistant Information Commissioner decided that, given the amount of matter already disclosed to the applicant, the disclosure of the matter in issue would not significantly further the applicant's understanding of how the QPS handled his complaint. He decided that the public interest considerations favouring disclosure did not outweigh the public interest in protecting the privacy of the other persons referred to in the matter in issue, and that the matter in issue was therefore exempt under s.44(1) of the FOI Act.

#### **"CHY" and Department of Families**

(S 54/00, 1 February 2001)

The applicant sought review of the respondent's deemed refusal of access to documents concerning his deceased wife, his two children and his three step-children. The respondent objected to the release of the matter in issue on the basis that it comprised exempt matter under s.42(1)(b), s.42(1)(e), s.42(1)(h), s.44(1) or s.46(1)(b) of the FOI Act. I found that the bulk of the matter in issue comprised information concerning the personal affairs of persons other than the applicant and that there were no public interest considerations favouring disclosure to the applicant that outweighed the public interest in preserving the privacy interests of third persons. I therefore found that that matter was exempt from disclosure under s.44(1) of the FOI Act. I also decided that some matter in issue was exempt from disclosure under s.42(1)(b), s.42(1)(e) and s.46(1)(b) of the FOI Act.

#### **Traynor and Queensland Transport**

(S 315/00, 8 February 2001)

The applicant asserted that a further document (or documents) existed that had not been disclosed to him by the respondent. Applying the principles stated in *Re Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464, the Deputy Information Commissioner was satisfied that there were no reasonable grounds to believe that further documents existed in the possession or control of Queensland Transport that fell within the terms of the applicant's FOI access application.

#### **Ferguson and Department of Corrective Services**

(S 32/01, 27 February 2001)

Applying the principles stated in *Re Price and the Nominal Defendant* (1999) 5 QAR 80, the Deputy Information Commissioner decided, in accordance with s.77 of the FOI Act, not to review further the Department's deemed refusal of access to documents on the basis that the applicant's application was misconceived and lacking in substance.

**Gazaford Pty Ltd and Department of Primary Industries**  
(S 86/00, 27 February 2001)

This was a 'reverse FOI' application in which the applicant sought review of the Department's decision to release to the FOI access applicant, documents relating to the Department's regulation of a commercial prawn farm operated by the applicant. The applicant claimed that the documents in issue were exempt from disclosure under s.45(1)(c) of the FOI Act. Applying the principles stated in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, I found that the matter in issue comprised information concerning the business or commercial affairs of the applicant (and/or the previous licence holders of the prawn farm). However, I was not satisfied that disclosure of the matter in issue could reasonably be expected to have an adverse effect on the applicant's business or commercial affairs, nor that disclosure could reasonably be expected to prejudice the future supply of like information to government. Accordingly, I found that the matter in issue did not qualify for exemption under s.45(1)(c) of the FOI Act.

**Azad and Princess Alexandra Hospital Health Service District**  
(S 35/01, 27 February 2001)

This case concerned an application for an extension of time in which to apply for external review. The application was made over 250 days out of time. Applying the principles stated in *Re Young and Workers' Compensation Board of Qld* (1994) 1 QAR 543, and following an examination of the documents in issue and the exemption provision relied upon by the respondent, I decided that the applicant's application for review did not have reasonable prospects of success and I decided not to exercise my discretion under s.73(1)(d) to extend time.

**"BOW" and Department of Families**  
(S 46/01, 28 February 2001)

The applicant sought access to the name of her putative father (i.e., the person named by her mother as her father) which was recorded in an interview with the applicant's mother following the applicant's birth. The Department claimed that the name of the putative father was exempt from disclosure under s.44(1) of the FOI Act. Applying the principles stated in *Re "KBN" and Department of Families, Youth and Community Care* (1998) 4 QAR 422 and after consideration of the competing public interest arguments, I decided to affirm the decision of the Department that the information in issue was exempt from disclosure under s.44(1) of the FOI Act.

**Prisoners' Legal Service Inc. and Department of Corrective Services**  
(S 110/00, 24 April 2001)

This was an application for access to part of an investigation report, namely, the Summary of Findings, on the circumstances surrounding the death in custody of an inmate at a correctional centre. The private company which operated the correctional centre claimed that the matter in issue was exempt under s.41(1) of the FOI Act. I decided that the matter in issue answered the description of 'deliberative process matter' as required by s.41(1)(a) of the FOI Act. However, I was not satisfied that disclosure of the matter in issue would, on balance, be contrary to the public interest. Accordingly, I decided that it did not qualify for exemption under s.41(1) of the FOI Act.

**Smith and Hinchinbrook Shire Council**  
(L 15/01, 16 May 2001)

This was an application under s.73(1)(d) of the FOI Act for the grant of an extension of time in which to lodge an application for external review. Applying the principles stated in *Re Young and Workers' Compensation Board of Qld* (1994) 1 QAR 543, the Deputy Information Commissioner found that the extent of the delay in applying for external review (approximately 33 days) should not be accorded any substantial or decisive weight in telling against a favourable exercise of the discretion (particularly since the Council had omitted to notify the applicant of the relevant 60 day time limit); neither the Council nor any third parties would be caused any prejudice by an extension of time being granted; and the applicant had shown that he had a reasonably arguable case with reasonable prospects

of success. The merits of the substantive application for review were such that the Deputy Information Commissioner decided to exercise the discretion conferred by s.73(1)(d) of the FOI Act in favour of the applicant.

**Price and Local Government Association of Queensland Inc.**

(S 52/00, 17 May 2001)

The applicant sought access to all documents relating to himself, his family and/or his property. (I had previously decided that the respondent was an agency for the purposes of the FOI Act). The respondent advised that it held no documents that fell within the terms of the applicant's FOI access application. Applying the principles stated in *Re Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464, the Deputy Information Commissioner was satisfied that there were no reasonable grounds to believe that documents responsive to the terms of the applicant's FOI access application existed in the possession or control of the respondent as at the date the applicant lodged his FOI access application.

**Turner and Gold Coast City Council**

(L 7/01, 18 May 2001)

The applicant sought access to complaints made to the Gold Coast City Council about his property. The Council identified one document as falling within the terms of the applicant's FOI access application, and granted access to that document, subject to the deletion of a postal address and signature which the Council found were exempt from disclosure under s.42(1)(b) of the FOI Act. Assistant Information Commissioner Shoyer considered the application of s.42(1)(b) and the principles stated in *Re McEniery and Medical Board of Queensland* (1994) 1 QAR 349, and affirmed the decision under review.

**Edwards and Fraser Coast Health Service District**

(S 55/01, 24 May 2001)

This was an application under s.73(1)(d) of the FOI Act for the grant of an extension of time in which to lodge an application for external review. The delay was in excess of 20 weeks beyond the statutory 60 day time limit. The applicant sought access to blood group details of her deceased father in order to try to extrapolate (from his blood group and the blood groups of herself and her brother) the likely blood group of her deceased mother. She intended to use that information to try to establish whether her mother and her aunt (also deceased) were sisters of full or half blood for the purpose of the administration of the aunt's estate. The applicant argued that there was a public interest in ensuring that a deceased person's estate is distributed appropriately. However, Assistant Information Commissioner Shoyer decided that he was not satisfied that the information sought was capable of assisting in that process. In view of the extent of the delay, which was largely unexplained, and the fact that the Assistant Information Commissioner was not satisfied that the applicant had a reasonably arguable case with reasonable prospects of success, the Assistant Information Commissioner declined to exercise the discretion contained in s.73(1)(d) of the FOI Act in favour of the applicant.

**Rashleigh and Princess Alexandra Health Service District**

(S 117/99, 30 May 2001)

The applicant was a former employee of the respondent who had been directed by the respondent to attend an appointment with a psychiatrist for the purpose of undergoing an assessment. The applicant sought access to a copy of the referral letter sent by the respondent to the psychiatrist. The respondent claimed the letter was exempt under s.40(c), s.42(1)(c) and s.46(1) of the FOI Act. It was clear that the contents of the letter had been disclosed to the applicant during her consultation with the psychiatrist for the purpose of gaining the applicant's response. Those specific responses were recited at some length in the psychiatrist's report. Applying the principles established in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, Assistant Information Commissioner Shoyer decided that the claims for exemption under s.46(1)(a) and s.46(1)(b) of the FOI Act could not be sustained. Similarly, on the material before him, the Assistant Information Commissioner decided that the respondent's claims for exemption under s.40(c) and s.42(1)(c) had not been made out. He

therefore set aside the decision under review and decided that the letter in issue did not qualify for exemption under the FOI Act.

**Villanueva and West Moreton Health Service District**  
(S 190/2000, 31 May 2001)

This application for review raised a 'sufficiency of search' issue relating to an autopsy report concerning the applicant's newborn son. The applicant contended that the one page autopsy report that had been disclosed to her did not comprise the entire report. As well as giving consideration to material lodged by the agency and the applicant, inquiries were made with the pathologist who performed the autopsy. The pathologist confirmed that the one page report to which the applicant had been given access was the entire report. Applying the principles stated in *Re Shepherd and Department of Housing, Local Government & Planning* (1994) 1 QAR 464, Assistant Information Commissioner Shoyer decided that there were no reasonable grounds to believe that an autopsy report, other than the one page report that had already been disclosed to the applicant, existed in the possession or control of the agency.

**Althaus and James Cook University**  
(S 16/00, 5 June 2001)

The applicant had applied for access to parts of a document comprising the names of students at the University who had signed a petition in support of a particular subject and its lecturer. The University and a number of the students who had signed the petition claimed that the matter in issue was exempt under s.42(1)(c) and s.44(1) of the FOI Act. I dismissed the claim for exemption under s.42(1)(c) of the FOI Act. In relation to the application of s.44(1), I stated that I did not consider that the act of signing a petition could ordinarily be regarded as a private activity such as to bring it within the realm of a person's personal affairs. However, I was satisfied that, in the particular circumstances of this case, disclosure of the students' names in the context in which they appeared on the petition, would incidentally disclose the fact of the students' enrolment in a course of private study at the University. In accordance with the principles explained in *Re BKR and Queensland University of Technology* (1999) 5 QAR 70, I found that disclosure of the students' names in that context would disclose information concerning the personal affairs of identifiable individuals. In the absence of any substantive public interest considerations favouring disclosure, I found that the information was exempt matter under s.44(1) of the FOI Act.

**Henderson and Queensland Law Society Inc.**  
(S 113/99, 8 June 2001)

This was an application for access to various documents contained on the personnel file of a former employee of the QLS. Both the QLS and the former employee claimed that the documents were exempt under s.44(1) and s.46(1)(a) of the FOI Act. I decided that documents containing information about the former employee's salary package with the QLS, and leave applications, together with extracts from the former employee's passport and her signature where it appeared on the documents in issue, were exempt from disclosure under s.44(1) of the FOI Act. I also decided that an employment agreement between the QLS and the former employee, together with documents comprising the former employee's job application and selection material, were exempt from disclosure under s.46(1)(a) of the FOI Act, having regard to evidence of express and implicit promises of confidential treatment, and the absence of any circumstances that would justify non-compliance with those promises.

**Watt and Queensland Police Service**  
(S 121/99, 8 June 2001)

The matter in issue comprised a memorandum written to the Queensland Police Service (QPS) containing allegations about the applicant. The author of the memorandum claimed that it was provided to the QPS in confidence and was therefore exempt from disclosure to the applicant under s.46(1) of the FOI Act. It was clear that the specific contents of the memorandum had been discussed with the applicant and his barrister during an interview between the applicant and a police officer.

Applying the principles stated in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 and *Re Godwin and Queensland Police Service* (1997) 4 QAR 70, Assistant Information Commissioner Moss decided that the memorandum could no longer qualify for exemption under s.46(1) of the FOI Act.

**Flexihire Pty Ltd and Department of Main Roads**  
(S 75/00, 15 June 2001)

The applicant had applied for access to parts of the revenue and expense reports for the individual trading locations of a business unit of the Department (with which the applicant was in competition). During the course of the review, the applicant was given access to information which disclosed the overall financial positions for the individual trading locations (but which did not identify their particular geographical location). The Department contended that the matter remaining in issue was exempt from disclosure to the applicant under s.45(1)(c) of the FOI Act. I decided that those parts of the reports which identified the particular geographical trading locations (and which would enable the applicant to link the trading results to a particular trading location) were exempt from disclosure under s.45(1)(c) of the FOI Act. I was not satisfied, however, that disclosure of the figures for the revenue and expense totals for the particular trading locations (without knowledge of the relevant geographical trading location) could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the business unit, and accordingly, I decided that those figures did not qualify for exemption from disclosure to the applicant.

**East and Environmental Protection Agency**  
(S 85/98, 15 June 2001)

The applicant was a former employee of the EPA who applied for access to documents relating to a grievance investigation in which he was involved. The EPA claimed that the documents in issue were exempt under s.40(c) and s.46(1)(b) of the FOI Act. I decided that none of the matter in issue was communicated in confidence and therefore did not qualify for exemption under s.46(1)(b) of the FOI Act. Nor was I satisfied that disclosure of the matter in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by the respondent of its personnel, such as to qualify for exemption under s.40(c) of the FOI Act. I also made the observation that the EPA was obliged to allow the applicant to inspect the matter in issue under s.16 of the *Public Service Regulation 1997 Qld*.

**Meldon and Brisbane City Council**  
(L 29/01, 26 June 2001)

The applicant sought access to complaints made to the Brisbane City Council about unauthorised noise and nuisance run-off from his property. The Council granted access to five pages, subject to the deletion of the names and other identifying particulars of the complainants. Applying the principles stated in *Re Byrne and Gold Coast City Council* (1994) 1 QAR 477, Assistant Information Commissioner Shoyer decided that the matter to which the applicant sought access was information concerning the personal affairs of the complainants and that disclosure of the matter in issue would not, on balance, be in the public interest. He therefore found that the matter in issue was exempt under s.44(1) of the FOI Act. The Assistant Information Commissioner also considered the application of s.42(1)(b) of that FOI Act and was satisfied that the matter in issue also qualified for exemption under that provision.

**Kennedy and Redland Shire Council**  
(L 37/00, 27 June 2001)

The applicant sought access to information about a complaint to the Council which alleged that there had been unauthorised filling of swamp land on property owned by the applicant's mother on North Stradbroke Island. The Council refused the applicant access to the names of various third parties, including that of the author of the letter of complaint, and to the letter of complaint itself, but disclosed all other relevant matter. The applicant did not press his claim for access to the identities of third parties, but pursued access to the text of the letter. Both the Council and the author of the letter

objected to the disclosure of any part of the letter, on the ground that its contents would enable the applicant to identify the author. Assistant Information Commissioner Shoyer found that disclosure of the matter in issue would not necessarily identify the author of the letter, as anyone who wished to do so could, with a little effort, have acquired the information contained in the letter. The Assistant Information Commissioner also found that the matter remaining in issue was not confidential information as against the applicant, who was already aware of its substance, and that the matter therefore did not qualify for exemption from disclosure to the applicant under the FOI Act.

### **Guille and James Cook University**

(S 49/01, 29 June 2001)

This was a 'reverse FOI' application in which the applicant objected to the disclosure of two letters which he had written in his capacity as Queensland Secretary of the National Tertiary Education Union. (The NTEU was representing a lecturer in relation to the lecturer's dispute with the University). Assistant Information Commissioner Shoyer found that the letters did not qualify for exemption from disclosure under s.40(c), s.40(d) or s.41(1) of the FOI Act, as it was not possible to identify any significant public interest which would be harmed by their disclosure. The Assistant Information Commissioner also found that the signature on each letter qualified for exemption under s.44(1) of the FOI Act, but that the balance of the letters did not qualify for exemption under s.44(1), as they concerned the NTEU member's professional affairs and not his personal affairs.

### **McCaffrey and James Cook University**

(S 65/01, 29 June 2001)

The applicant sought access to a range of documents relating to disciplinary action taken in respect of a lecturer in the University's School of Law. The lecturer was an environmental law specialist, and an active opponent of commercial developments in North Queensland supported by the applicant. After concessions were made by the applicant and the University, the matter in issue comprised three letters of support for the lecturer, written by two environmental groups and an environmental consultant, and the signature on a letter written to the lecturer by the University's Vice-Chancellor. The University contended that the letters were exempt under s.40(c) of the FOI Act, for similar reasons to those discussed in *Re Pemberton and the University of Queensland* (1994) 2 QAR 293. Assistant Information Commissioner Shoyer found that the letters did not qualify for exemption under s.40(c), as there was nothing to justify a finding that their disclosure would have an adverse effect, let alone a substantial adverse effect, on the management or assessment by the University of its personnel. He also found, however, that the signatures on the three letters, and the signature on the letter from the Vice-Chancellor, were exempt from disclosure under s.44(1) of the FOI Act.

### **Fairall and James Cook University**

(S 95/01, 29 June 2001)

This was a 'reverse FOI' application in which the applicant objected to the disclosure of documents relating to expenses incurred on a trip to South Africa, which was undertaken by the applicant in his capacity as Head of the School of Law at the University. The FOI access applicant, a journalist with *The Courier-Mail*, had already published a story about the applicant's trip, including the fact that the applicant had been obliged to reimburse the University almost \$1,700 in overpaid allowances. The applicant contended that the matter in issue, which the University was prepared to disclose to the FOI access applicant, was exempt matter under s.39, s.41(1), s.44(1) and s.46(1) of the FOI Act. Assistant Information Commissioner Shoyer found that none of the matter in issue qualified for exemption from disclosure under s.39, as it did not relate to an audit by the Auditor-General; or under s.41(1), as it did not constitute an opinion, advice or recommendation; or under s.44(1), as the University had already correctly determined that those segments of matter which concerned the applicant's personal affairs were exempt from disclosure; or under s.46(1), as it did not disclose anything which was not already in the public domain.

**Henderson and Queensland Law Society Inc.**  
(S 191/98, 29 June 2001)

The matter in issue comprised performance appraisal documents for two QLS employees. I decided that those documents were exempt from disclosure under s.40(c) of the FOI Act. I also upheld the QLS's reliance upon s.28(2) of the FOI Act in refusing to process parts of the applicant's FOI access application. However, I rejected a submission from the QLS employees (who were third party participants in the review) that I should exercise the discretion given to me under s.77(1) of the FOI Act, and decide not to conduct the review on the grounds that the applicant's application for review was vexatious. I noted that, during the course of the review, I had communicated to the QLS and to the third party participants, my preliminary view that a number of the documents which were in issue did not qualify for exemption under the FOI Act. The QLS and the third parties subsequently withdrew their claims for exemption in respect of a number of those documents, and the applicant was given access to them. Accordingly, I did not consider that it could be said that the applicant's application for external review had been instituted without sufficient grounds and I therefore declined to exercise the discretion conferred on me by s.77(1) of the FOI Act.

**Henderson and University of Southern Queensland**  
(S 171/98, 29 June 2001)

The applicant sought access to the student records and examination scripts of two students. I applied the principles stated in *Re Aylward and Griffith University* (S 33/96, 5 February 1997, unreported); *Re Henderson and Queensland Health: Re Higgins and Queensland Health* (S 178/99 & S 12/99, 1 February 2000, unreported); and *Re BKR and Queensland University of Technology; Queensland Nursing Council* (1999) 5 QAR 70 in finding that all of the matter in issue concerned the personal affairs of the students in question and was exempt from disclosure under s.44(1) of the FOI Act.

**Minty and Department of Corrective Services**  
(S 175/98, 29 June 2001)

In this case, I considered the application of s.44(1) and s.42(1)(c) of the FOI Act to the documents in issue which were contained on the applicant's various prison files. With respect to s.44(1), I found that the matter in issue consisted of information that was properly to be characterised as information concerning the personal affairs of persons other than the applicant for access. I could discern no public interest considerations favouring disclosure of that matter to the applicant that might outweigh the public interest in protecting the privacy of information concerning the personal affairs of other individuals, and none were suggested to me by the applicant. I therefore found that the matter was exempt from disclosure under s.44(1) of the FOI Act.

With regard to s.42(1)(c), I was not satisfied that disclosure of the matter in issue to the applicant could reasonably be expected to endanger a person's life or physical safety. I therefore found that the matter in issue did not qualify for exemption under s.42(1)(c) of the FOI Act.

**Price and Local Government Association of Queensland Inc.**  
(S 108/01, 29 June 2001)

The applicant had sought access from the LGAQ to all documents relating to himself. The LGAQ claimed that some of the documents in issue were exempt from disclosure under s.43(1) of the FOI Act. I reviewed the documents in issue and found that some (specifically, some file notes written by the LGAQ's solicitors) did not qualify as "documents of an agency" and hence were not subject to the application of the FOI Act. I found that matter in issue which identified another individual who had made an external review application to the LGAQ was exempt from disclosure under s.44(1) of the FOI Act, and that the balance of the matter was exempt from disclosure under s.43(1) of the FOI Act.

**Price and Local Government Association of Queensland Inc.**

(S 111/01, 29 June 2001)

The applicant had made a subsequent application to the LGAQ for access to all documents related to himself, his family and/or property *et cetera* held by the LGAQ and its solicitors. The applicant submitted that, in addition to documents passing between the LGAQ and its solicitors, he was also entitled to have access to documents passing between those solicitors and a number of Shire Councils who were members of the LGAQ. The LGAQ informed the applicant that it did not hold any documents responsive to the applicant's FOI access application that had not already been processed in the applicant's previous FOI access applications to the LGAQ.

The Deputy Information Commissioner explained to the applicant that each Shire Council was a distinct legal entity, and a distinct agency for the purposes of the FOI Act. As regards the remainder of the applicant's application, the Deputy Information Commissioner decided, in accordance with s.77(1) of the FOI Act, not to deal further with the applicant's application for review on the basis that it was vexatious, misconceived, and lacking in substance.

**Price and Queensland Police Service**

(S 168/96 and S 183/96, 29 June 2001)

The applicant had made numerous FOI access applications to the QPS. Certain 'sufficiency of search' issues, common to more than one review and previously dealt with, arose again in this review. Under s.77 of the FOI Act, I declined to review those aspects of the QPS's decisions. In relation to the balance of the 'sufficiency of search' issues raised by the applicant, I found that the search efforts undertaken by the QPS to locate matter responsive to the terms of the relevant FOI access applications had been reasonable in all the circumstances. As regards the matter in issue, applying the principles stated in *Re Byrne and Gold Coast City Council* (1994) 1 QAR 477 and *Re Godwin and Queensland Police Service* (1997) 4 QAR 70, I found that the matter in issue was exempt from disclosure s.44(1) of the FOI Act.

**Mogg and Ergon Energy**

(S 127/01, 29 June 2001)

In this case, Assistant Information Commissioner Shoyer affirmed a decision by the respondent that a \$31 application fee was payable in respect of the applicant's FOI access application in which the applicant sought access to inspection reports relating to an electrical accident in which he sustained injuries. The Assistant Information Commissioner was satisfied that the reports contained no information which could properly be characterised as information concerning the applicant's personal affairs.