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EXECUTIVE SUMMARY

The Information Commissioner is the independent external review authority established by s.61 of the *Freedom of Information Act 1992* (Qld) (the FOI Act) to whom aggrieved persons may apply for investigation and review of decisions made by agencies or Ministers (in the administration of the FOI Act) that fall within the categories of decision specified in s.71 of the FOI Act.

The goal (or mission statement) of the Office of the Information Commissioner is:

To provide a specialised and expert dispute resolution service (affording independent review in respect of those categories of decisions specified in s.71 of the FOI Act) that is speedier, cheaper for participants, more informal and more user-friendly than the court system, or tribunals which follow court-like procedures.

Demand for the services of the Information Commissioner has significantly exceeded expectations. The FOI Act commenced to apply to Ministers and agencies (other than local authorities) on 19 November 1992. The first application for review was received by the Information Commissioner on 18 January 1993. By 30 June 1993, 120 applications for review had been received by the Information Commissioner, at a rate of 5 per week, or one per working day.

The numerical distribution of the 120 applications for review received to 30 June 1993, across the categories of decision subject to investigation and review by the Information Commissioner (as specified in s.71 of the FOI Act) is set out in the table which appears at Appendix 1. A table showing the distribution of the 120 applications for review according to the identity of the respondent agency appears at Appendix 2.

By 30 June 1993, 27 applications had been resolved, seven by formal decision of the Information Commissioner, and 20 following negotiation with one or both participants. This represents a proportion of 74% of matters resolved by informal methods. Four of the seven formal decisions involved minor matters: 3 applications for extension of time, and one application to review a decision to charge a \$30 application fee for documents which the applicant insisted (wrongly as I determined) related to his personal affairs. The other three formal decisions (*Re Christie*, *Re Eccleston*, *Re Smith*) involved substantial issues, and form the first three entrants in the Information Commissioner's formal decision series. *Re Eccleston* is the most significant, containing an analysis of important matters of principle in relation to the interpretation and application of the FOI Act. It is published in full as Appendix 6 to this Report. Case summaries of all matters resolved up to 30 June 1993 appear in Chapter 5.

Table 1 - Status of External Review Applications as at 30 June 1993

Pending from previous reporting period	0
Opened during the reporting period	120
Completed during the reporting period	27
Pending at end of reporting period	93

Table 2 - Outcome of External Reviews completed during the Reporting Period

No jurisdiction	2
Decision not to review/review further under s.77 of the FOI Act	1
Agency granted further time to deal with application	2
Withdrawn following mediation	13
Resolution mediated	7
Decision issued - Affirming decision under review	1
Decision issued - Varying decision under review	1
Decision issued - setting aside decision under review; making decision in substitution therefor	0
TOTAL	27

Of the 20 matters withdrawn or resolved following mediation, 12 resulted in the applicant successfully obtaining in whole or in part, access to documents, or amendment of personal affairs information, which had previously been refused by an agency. Two of the remaining 8 matters involved applications by third parties consulted under s.51 of the FOI Act seeking to overturn decisions of agencies to disclose documents to an initial applicant for access under the FOI Act. Both cases were resolved in a manner that allowed the initial applicant to have access to the material in issue. In the remaining 6 matters, the applicant either accepted the correctness of the agency's decision or for other reasons resolved not to pursue the application further.

A more detailed overview of operations during the reporting period can be found in Chapter 3 (at paragraphs 3.1 to 3.14) together with an assessment of performance against established performance criteria (at paragraphs 3.15 to 3.24).

Table 3 - Time for Resolution of Completed Cases

Under 1 month	4
1 - 3 months	14
3 - 6 months	9
6 - 9 months	0
over 9 months	0
TOTAL	27

Part 5 of the FOI Act represents a departure from the models of external review in the earliest FOI statutes enacted in Australian jurisdictions (at the Commonwealth level in 1982; in Victoria in 1982; in NSW in 1989). The evolution of the Information Commissioner model is traced in Chapter 2. The Information Commissioner's procedural approach to dispute resolution under the FOI Act is discussed in Chapter 4 (at paragraphs 4.23 to 4.38) where it is concluded that on the available evidence from the reporting period, the Information Commissioner model is, at least in the particular context of FOI disputes, the most efficient and effective system for achieving the goal of a proper resolution of disputes between government decision-makers and persons adversely affected by their decisions, at the least cost.

CHAPTER 1 - CONSTITUTION AND FUNCTIONS; STRUCTURE AND ORGANISATION

PART A : CONSTITUTION AND FUNCTIONS

Enabling Legislation; Statutory Powers and Functions

- 1.1 The Office of the Information Commissioner is established by s.61(1) of the *Freedom of Information Act* 1992 Qld (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". The Information Commissioner is the independent external review authority established by the FOI Act to investigate and review decisions of agencies and Ministers of the kind specified in s.71(1) of the FOI Act, which is in the following terms:

"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."**

- 1.2 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.

- 1.3 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.

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

- power to determine the procedure to be followed on a review under Part 5 of the FOI Act (s.72(1)(a));
- power to give directions to participants in a review as to the procedure to be followed on a review under Part 5 of the FOI Act (s.72(2));
- power to extend the time limit for lodging an application for review (s.73(1));
- power to make preliminary inquiries of an applicant, or a respondent agency or Minister, in order to determine whether the Information Commissioner has power or jurisdiction to review the matter to which the application relates, or whether the Commissioner may decide not to review the matter under s.77 of the FOI Act (s.75);
- power to require the production of a document or matter for inspection for the purpose of enabling the Information Commissioner to determine whether the document or matter is exempt, or is an official document of a Minister (s.76(1));
- power to decide not to review, or not to review further, a decision in respect of which the Information Commissioner is satisfied that the application for review is frivolous, vexatious, misconceived or lacking in substance (s.77);
- power to permit third parties to be participants in the review process (s.78);
- power to grant an extension of time to an agency or Minister to deal with an application under the FOI Act, and to grant such an application subject to conditions such as reduction or waiver of charges (s.79(2) and (3));
- power to try to effect a settlement between the participants, or suspend a review to allow the participants to negotiate a settlement (s.80);
- power to require an agency or Minister to provide an additional statement of reasons for a decision under review, where the initial statement of reasons is considered to be inadequate (s.82);
- power, for the purposes of a review, to obtain information from such persons, and make such inquiries, as the Information Commissioner considers appropriate (s.83(4));
- 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 from a review under Part 5 of the FOI Act to the Supreme Court for decision (s.97).

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

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

Section 89(2) provides that the Information Commissioner must include in the decision the reasons for the decision.

1.6 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.

1.7 The Information Commissioner can properly be described as a specialist tribunal. The Information Commissioner has been conferred with powers and functions, and a role in the scheme of the FOI Act, which are comparable to those of the Commonwealth Administrative Appeals Tribunal (the Commonwealth AAT) and the Victorian Administrative Appeals Tribunal (the Victorian AAT) which undertake the function of independent external review authority in the scheme of the *Freedom of Information Act* 1982 Cth and the *Freedom of Information Act* 1982 Vic., 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 the FOI Act and its legislative history that the Queensland Parliament intended that the Information Commissioner provide a speedier, cheaper, more informal and more user-friendly method of dispute resolution than the court system or tribunals such as the Commonwealth AAT and the Victorian AAT, which adopt court-like procedures (as to which see Chapter 2, *post*).

1.8 Since one of the professed objects of freedom of information legislation (*cf* 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 (*cf* s.39, s.40, s.42 of the FOI Act) or a reasonable expectation of a substantial adverse effect (*cf* 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.

1.9 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, and so far as I am aware, is not proposed). By virtue of my appointment as Parliamentary Commissioner, therefore, I also hold the separate statutory office of Information Commissioner. The reasons for the government's decision to adopt this policy choice doubtless included a desire to effect financial savings on the usual costs of establishing a new statutory body. For example, the present staff of the Office of the Information Commissioner have been able to be accommodated within the office space leased on behalf of the Parliamentary Commissioner's office, and the Office of the Information Commissioner has been able to have its needs for support services met by the Organisational Services Division of the Parliamentary Commissioner's office (and see paragraph 1.11 below). I also consider, however, that the government's choice reflects favourably on the reputation of the Office of the Parliamentary Commissioner as:

- (a) an office independent of the executive branch of government which has some 18 years experience of impartial and objective investigation and review of complaints by members of the public against administrative actions of State government departments and statutory authorities and of local government authorities; and
- (b) an office with 18 years accumulated experience in pursuing cheap, flexible, informal and non-confrontational methods of dispute resolution, making it best suited to adapt those methods to the task of resolving disputes under the FOI Act.

1.10 One unusual aspect of the government's policy choice has necessitated internal decision-making arrangements to avoid the possibility of any conflict of interest. While the Information Commissioner is not subject to the FOI Act (apart from Part 2), the Parliamentary Commissioner is subject to the FOI Act. This means that decisions of the Office of the Parliamentary Commissioner refusing access to documents may be the subject of appeal to the Information Commissioner, who is also the Parliamentary Commissioner. To avoid any conflict of interest in this regard, I have established decision-making arrangements within the Parliamentary Commissioner's office which ensure that I have no involvement in making decisions on applications made under the FOI Act to the Parliamentary Commissioner's office, whether at the initial decision-making level or on internal review. Initial decisions are made by officers at the level of Senior Investigator, and decisions on internal review are made by a Deputy Parliamentary Commissioner. In the event that an application for external review by the Information Commissioner is made in respect of a decision by a Deputy Parliamentary Commissioner (only one such application was received during the period covered by this Annual Report), I also have the option of giving a delegation under s.90 of the FOI Act to the Deputy Information Commissioner (or another member of staff of the Office of the Information Commissioner) to hear and determine the application for review without any personal involvement by me.

Public Finance Standards - Program Structure and Goals

1.11 Although the Office of Information Commissioner and the Office of Parliamentary Commissioner are separate statutory offices, Treasury Department has provided funding for the Office of the Information Commissioner as a new initiative under the program budgeting arrangements for the Office of the Parliamentary Commissioner. The Office of the Information Commissioner has its

corporate services functions of finance, personnel, administration and information technology performed by the Organisational Services Division of the Office of the Parliamentary Commissioner.

In terms of program management, the Office of the Information Commissioner does not have its own separate financial program. It forms part of the program "Complaint Investigation and Resolution", Office of the Parliamentary Commissioner. The financial statements for 1992/93 in respect of that program are published in the 19th Annual Report of the Parliamentary Commissioner.

An amount of \$250,000 was allowed for establishment of the Office of the Information Commissioner and for its operations from November 1992 to 30 June 1993, all of which was expended. \$134,945 was paid in salaries and related costs with other costs including administration and general establishment costs totalling \$115,055. This included the cost of setting up a computer network for a small work group. A sum of \$350,000 has been allocated for the operations of the Office of the Information Commissioner in 1993/94.

- 1.12 The program goal for the program "Complaint Investigation and Resolution" is to ensure responsive, independent and impartial investigation and resolution of grievances from members of the public. While this goal is in a general sense appropriate to the role and functions of the Information Commissioner, its wording was obviously chosen for the Parliamentary Commissioner's role which covers most of state government administration and all local government administration, and which involves attempting to resolve grievances without the aid of determinative powers. In contrast, the role of the Information Commissioner is confined to grievances of specified kinds arising 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 a more specifically appropriate goal (or mission statement) for the staff of the Office of the Information Commissioner which is as follows:

To provide a specialised and expert dispute resolution service (affording independent review in respect of those categories of decisions specified in s.71 of the FOI Act) that is speedier, cheaper for the participants, more informal and more user-friendly than the court system, or tribunals which follow court-like procedures.

- 1.13 A set of performance criteria has also been established (see Chapter 3, paragraphs 3.15 to 3.24).

PART B : STRUCTURE AND ORGANISATION

- 1.14 The principal place of business of the Office of the Information Commissioner is Level 25, Jetset Centre, 288 Edward Street, Brisbane, 4000 (telephone (07) 246 7100).
- 1.15 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. By virtue of that appointment, I also hold office as Information Commissioner pursuant to s.61(2) of the FOI Act.
- 1.16 The following organisational chart sets out the structure of the Office of the Information Commissioner, and also identifies the staff member occupying each position:

INFORMATION COMMISSIONER
Mr F N Albietz, LL.B, Solicitor (Qld)

DEPUTY INFORMATION COMMISSIONER (Equivalent to SES Level 2)
Mr G J Sorensen, B.A./LL.B (ANU), Solicitor (Qld and NSW)

ASSISTANT INFORMATION COMMISSIONER (A08)
Mr G P Sammon, LL.B (Qld), LL.M (Qld), Barrister-at-Law (Qld)

SENIOR INVESTIGATOR (A07)
Ms S K Heal, B.P.H.E. (University of Toronto), M.A. (P.E.)(University of Alberta),
LL.B (Osgoode Hall Law School, York University, Ontario),
Solicitor and Barrister, Ontario

INVESTIGATOR (A06)
Ms S J Walter, B.A.(Hons) (University of Saskatchewan), LL.B (Hons)(Qld),
Solicitor (Qld)

INVESTIGATIVE ASSISTANT (A03)
Mrs C E Henderson

1.17 Additional administrative support is provided by the Organisational Services Division of the Office of the Parliamentary Commissioner.

CHAPTER 2 - EVOLUTION OF THE INFORMATION COMMISSIONER MODEL - A NEW APPROACH TO FOI DISPUTE RESOLUTION IN AUSTRALIA

- 2.1 In 1990, I had made a written submission to the Electoral and Administrative Review Commission (EARC) in respect of its review project on freedom of information legislation, concerning the potential role for the Parliamentary Commissioner in a system of external review of decisions of government agencies under the proposed freedom of information legislation. The relevant parts of my submission are set out at paragraph 17.21 of the EARC Report on Freedom of Information (December 1990, No. 90/R6). In that submission I argued that the Parliamentary Commissioner should have a role in external review of FOI decisions. At that stage, I contemplated that there could be an alternative right to seek review by a tribunal, such as an administrative appeals tribunal, which would permit applicants a choice if they were prepared to bear the disadvantages of a tribunal's procedure, which I saw principally as cost, formality, and a confrontational atmosphere that many people wished to avoid. My submission to EARC concluded as follows:

"In summary I see the Ombudsman, because of his experience, currently existing powers, cheapness, flexibility, informality and non-confrontational approach, as ideally placed to serve as an external review mechanism. Concerns regarding his lack of coercive power can be addressed by either giving him that coercive power (except perhaps in conclusive certificate situations) or providing an alternative or further means of external review by a tribunal or court which does have coercive power."

- 2.2 It is clear from paragraph 17.24 of the EARC Report on Freedom of Information that EARC favoured the external review function for FOI legislation being conducted by a body which could perform in a cheap, efficient, specialised and informal manner, though it recommended the creation of a new independent Office of Information Commissioner to undertake the function, observing in respect of my submission:

"17.25 The Commission considers that it is inappropriate to confer 'coercive powers' (which the Commission takes to mean a power to make binding determinations rather than simply to make recommendations) upon the Parliamentary Commissioner merely to effect an external review function for FOI legislation. The Commission is concerned that if FOI legislation conferred such coercive powers it would alter the status of the Office of the Parliamentary Commissioner. The Commission also considers that the conferral of coercive powers might prejudice the manner in which government agencies deal with the Parliamentary Commissioner in respect of the Parliamentary Commissioner's general jurisdiction."

- 2.3 Ultimately, the Queensland government decided to establish a separate office of Information Commissioner, but to have the Parliamentary Commissioner fill that office, supported by additional staff dedicated to the discharge of the external review function under the FOI Act. Some of the reasons for this policy choice are suggested at paragraph 1.9 above.

- 2.4 The legislative history of the development of Part 5 of the FOI Act clearly shows that it was intended that the Office of the Information Commissioner should adopt a fresh approach (at least from existing Australian models) to dispute resolution under FOI legislation. The EARC Report on Freedom of Information said:

"17.28 The role of the Information Commissioner recommended by the Commission can be compared to the role which New Zealand's Ombudsman has under the Official Information Act 1982 (NZ), and the role of the Information Commissioner created by the Access to Information Act

1982 (Canada) and the Information and Privacy Commissioner created by the Freedom of Information and Protection of Individual Privacy Act 1987 (Ontario). An important distinction between the Information Commissioner proposed by this Commission and the New Zealand Ombudsman's role under the Official Information Act 1982, is that this Commission recommends that the Information Commissioner (like the Canadian equivalents) should have determinative powers upon a review, whereas the New Zealand Ombudsman merely has recommendatory powers upon a review. The Commission notes that the provisions of the Official Information Act 1982 cause the Ombudsman's recommendations to 'crystallise' and become binding after 21 days unless an Order-in-Council is made, effectively vetoing the recommendation. Even if an Order-in-Council is made, a person may still seek judicial review of the reasons for the exercise of the right to veto. To that extent, the Ombudsman's powers are determinative in effect, if not in substance.

...

- 17.30 *It is considered that an Information Commissioner would offer review which was cheap, accessible, free from technicality, expeditious and specialised. The Commission considers that the establishment of an office of Information Commissioner will not involve substantial expenditure of public funds. Initially the Office of the Information Commissioner will require a small staff, perhaps three or four officers with appropriate qualifications and experience in law or public administration, who could act as delegates of the Commissioner in determining applications for review, together with a suitable number of administrative and support staff. This will assist in ensuring specialised review, yet informality and expedition will be encouraged as a result of such small numbers. The need for increased resources will have to be monitored in the light of demand for exercise of the Information Commissioner's external review function.*
- 17.31 *The Commission considers that the informal and non-confrontational style of the Parliamentary Commissioner offers a useful model to the Information Commissioner. At the same time, in contrast to the Parliamentary Commissioner, the Information Commissioner would have determinative powers.*
- 17.32 *The Commission considers that the Information Commissioner ought to have a general power to regulate proceedings. This would ensure the maximum degree of flexibility, while at the same time allowing the Information Commissioner to make such rules as are appropriate to enable people to exercise their rights of external review. The Commission considers that FOI legislation should not automatically confer a right to legal representation. It should occur only with the consent of the Information Commissioner, thus reducing the cost and complexity of external review.*

REVIEW BY THE INFORMATION COMMISSIONER

- 17.33 *One of the major reasons for preferring an Information Commissioner as the external review body is that courts or tribunals tend inevitably to follow adversarial, trial-type procedures. By their long tradition and evolution through the court system, such procedures have been designed to accord the maximum degree of procedural fairness to both parties to a dispute in the*

presentation of their cases for adjudication. Unfortunately they tend also to involve a degree of formality and technicality that is intimidating to the litigant in person, and they tend also to delay and add extra expense to the process of dispute resolution.

17.34 *The disputes which are likely to arise under FOI legislation are likely to range from the very simple to the very complex. Many will not require trial-type procedures for their resolution. In many respects, a formal court or tribunal hearing is not the most sensible model to follow for resolving disputes over whether particular documents are exempt, where the party seeking access must endeavour to present its case without knowing the contents of the documents in dispute. Even mediation or settlement of a dispute is made difficult when the parties are not in an equal position with regard to knowledge of the very subject-matter of the dispute.*

17.35 *The provisions of the draft Bill relating to the Information Commissioner are designed to accord the maximum flexibility in procedures for dispute resolution. The Information Commissioner may, for instance, determine a dispute on the basis of written representations without any of the participants appearing before the Information Commissioner (clause 74(3)). Under clause 63, the procedures to be followed on a review are at the discretion of the Information Commissioner, subject to the obligations imposed on the Information Commissioner by the draft Bill to:*

- (a) conduct proceedings with 'as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Commissioner permit' (clause 63(1)(b));*
- (b) ensure that exempt matter is not revealed to an applicant during the course of a review (clause 67(2) and clause 78); and*
- (c) adopt such procedures as are fair, having regard to the obligations imposed on the Information Commissioner by the Act (such as (a) and (b) above) to ensure that each participant to a review has an opportunity to present her or his views to the Information Commissioner (clause 74).*

17.36 *The framework of Part V of the draft Bill envisages that on receipt of an application for review lodged in accordance with clause 64, the Information Commissioner may call for and read documents claimed to be exempt (clause 67) or otherwise make inquiries of the government agency or any other participant to a review, in order to form tentative views about the subject-matter of the dispute. The Information Commissioner may decide not to review a decision when satisfied that the application is frivolous, vexatious, misconceived or lacking in substance (clause 68). The Information Commissioner may or may not give an applicant an opportunity to make representations before deciding not to review.*

17.37 *In other circumstances the Information Commissioner may decide that the claim for exemption by a government agency appears to lack substance and may wish to discuss in detail with a representative of the government agency the basis of that claim. The Information Commissioner may or may not wish to allow the applicant to be present on such an occasion. The*

Information Commissioner may wish to communicate separately with the applicant to obtain the applicant's views, for instance on the nature of the public interest considerations relevant to the exemptions contained in the draft Bill. When satisfied of the nature of the case of all participants, the Information Commissioner may proceed forthwith to make a decision under clause 80.

17.38 Alternatively, the Information Commissioner may prefer to attempt to effect a settlement between the participants (pursuant to the discretion conferred by clause 71). The Information Commissioner may be aware from talking to the applicant that information which the applicant is particularly concerned to obtain is not contained within the disputed documents. The Information Commissioner may wish to inform the applicant of this, and suggest withdrawal of the application, so that there is no need to determine the issue of exemption. Similarly, the Information Commissioner may be able to suggest to the government party that the particular information that the applicant is seeking can be released in a certain way without threatening the interest which the government party is seeking to protect.

17.39 There will be occasions when complex issues have to be determined, both parties seek permission for legal representation, the applicant wishes to question government officials to test the basis for a claimed exemption, and the Information Commissioner considers that such questioning is fair in all the circumstances of the case. The draft Bill contemplates that the Information Commissioner may adopt more formal procedures in an appropriate case (clause 74), and that hearings of this kind should be conducted in public unless the Information Commissioner determines that a closed hearing is appropriate."

2.5 The EARC recommendations attracted some opposition in submissions to the Parliamentary Committee for Electoral and Administrative Review (PCEAR) which released its report (titled "Freedom of Information for Queensland") on the EARC Report in April 1991, commenting (at p.23-26) as follows:

"EARC considered that:

External review by the Courts, of whatever level, would in the opinion of the Commission be unsatisfactory. The complex adversarial nature of Court procedures renders them less suitable as a means of inexpensive, expeditious and informal external review for FOI legislation (para 17.26).

3.11.4 There is a further argument against the use of the Courts as an appeal mechanism. The Courts exercise a judicial function of applying the law to disputes between parties. An Administrative Appeals Tribunal customarily stands in the shoes of the original decision maker. If an administrative appeal were to be made to the Courts it would require the Court to exercise an administrative function. This tends to lead to a blurring of the distinction between judicial and administrative roles and is to that extent inherently undesirable. It is true that in many existing systems administrative appeals go to the Courts, eg. Workers' Compensation appeals to the Industrial Magistrates Court or appeals to the Magistrates Court and the District Court under the Trade Measurement Administration Act, however it is desirable, where possible, to remove from Courts the responsibility of having to exercise administrative, rather than judicial discretions.

3.11.5 *The essential question in opting for an Information Commissioner or a tribunal system involves the consideration of the competing weight to be given on the one hand to the independence usually found through an adversarial tribunal in contrast with the speed, minimal cost and efficiency of an Ombudsman or Information Commissioner. In considering this question the Committee is mindful of the apparent success of the New Zealand model in which appeal on freedom of information matters lies to the Chief Ombudsman. The Committee is also mindful of proposed reforms in administrative law, still under consideration by this Committee which would allow citizens easier access to the Courts to obtain judicial review. This would mean that an Information Commissioner would be subject to correction by way of judicial review if the Information Commissioner erred in law in the making of a determination.*

...

The Parliamentary Committee's own investigation of the role of the Chief Ombudsman in New Zealand concerning freedom of information leads it to conclude that such a process can be capable of achieving both independence and a speedy, informal, just resolution of disputes.

3.11.9 *The model proposed by EARC involves a departure from the legalistic, adversarial model. The EARC proposal favours an informal, speedy approach. This area is perhaps the most important area for review in the proposed review of the legislation to take place within two years. There is a potential danger in the emergence of the new administrative law of excessive legalism. Equally there could be a danger of a lack of independence of an Information Commissioner, although the New Zealand experience does not bear this out. It would be, in the Committee's opinion, appropriate to review this matter within two years in the light of the evidence of the performance of the Information Commissioner in the handling of disputes about access to documents under freedom of information legislation.*

3.11.10 *The Committee has some concerns that the establishment of an Information Commissioner, in addition to the existing office of the Ombudsman/Parliamentary Commissioner, and other existing or potential Commissions including a Privacy Commission and an Equal Opportunity Commission, could lead to a confusing plethora of bodies facing a member of the public with a grievance against the administration.*

3.11.11 *In the circumstances the Committee concurs with EARC's proposal for an Information Commissioner. The Committee considers however that this role should be reviewed in the context of the proposed two year review of the freedom of information legislation. In particular, regard should be had at that time to the Administrative Appeals report expected from EARC in 1992 and/or to the possibility of vesting the role of Information Commissioner in the same office as that of other Commissioners such as, for example, a Privacy Commissioner or Equal Opportunity Commissioner."*

- 2.6 After some eight months practical experience in the role, I feel quite confident in asserting that the potential concerns expressed in the Parliamentary Committee's report have proven to be unfounded, and that the EARC model for FOI dispute resolution (based on Canadian and New Zealand precedents) is clearly the superior model, involving a more sensible, practicable and flexible approach to dispute resolution in the typical FOI dispute, where the parties are in an unequal position with respect to knowledge of the very subject matter in dispute, i.e. information claimed by the government party to be exempt matter under the FOI Act. Since the Parliamentary Committee

reported, the EARC model of FOI dispute resolution has been embraced in the freedom of information statutes of Tasmania, Western Australia and South Australia (although in the latter instance, the role given to the South Australian Ombudsman of making binding determinations in FOI disputes, is one of two avenues of external merits review, the other lying by way of appeal to the District Court of South Australia).

- 2.7 The Report of the PCEAR devoted some space to a submission prepared by journalists from the *Melbourne Age* who were severely critical of EARC's recommended Information Commissioner model compared to the rights of appeal to an administrative appeals tribunal, and from there to the Supreme Court, which operate in Victoria, with hearings in public and adversarial procedures. The *Melbourne Age* has scored some notable successes in appeals against government decisions through the Victorian system of FOI appeals. Yet it is surprising that the journalists could have been so insensitive to the difference in resources, and ability to contest an issue of principle against a government department, that are possessed by a large organisation such as the publishers of the *Melbourne Age* compared to the average citizen aggrieved by a refusal of access to documents. For most average citizens, the information to which they may be refused access (on the basis that it falls within the terms of an exemption provision in FOI legislation) is not likely to be so intrinsically valuable that they are prepared to spend substantial amounts of money on legal costs to obtain it. Also, for most citizens the prospect of conducting a hearing according to the adversarial procedures adopted by tribunals like the Victorian AAT and the Commonwealth AAT, against a legal representative retained for a government agency, is far too intimidating a prospect to make it worth their while to pursue a challenge to what may indeed have been an unjust decision. For the vast majority of persons aggrieved by decisions under FOI legislation, I believe that the existence of a cheap, user-friendly system of review is a great boon. The Information Commissioner model still has the flexibility to adopt adversarial trial-like procedures where the issues in a case warrant that degree of formality, and for a substantial organisation with the resources to pursue a legal challenge on a point of principle, any perceived legal errors on the part of the Information Commissioner can be pursued through the Supreme Court in proceedings under the *Judicial Review Act 1991*.
- 2.8 While journalists will not always be successful in their attempts to obtain information under the FOI Act, few complaints are likely to be heard from those journalists who have pursued appeals to the Information Commissioner during the period covered by this Annual Report (apart perhaps from concern at the delays caused by the sheer volume of appeals which flowed through in a short space of time, see Chapter 3, paragraphs 3.4 and following). A number of journalists have succeeded, without incurring any legal costs, in obtaining all documents to which they were initially refused access, after a mediation process was undertaken by the Information Commissioner with the decision-making agency. The outcome of the first major case involving a journalist applicant which proceeded to formal determination by the Information Commissioner (*Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs*, Information Commissioner Qld, Decision No. 93002, 30 June 1993 - reproduced at Appendix 6) ought to have expunged any concerns about the independence of the Information Commissioner, making it clear that I propose to ensure that the FOI Act is administered by the executive branch of government in the manner intended by Parliament, with appropriate regard for the attainment of the objects for which the legislation was enacted (*cf* ss.4 and 5 of the FOI Act, and its legislative history as discussed in my reasons for decision in *Re Eccleston* at paragraphs 36 to 41, and paragraphs 58 to 75).
- 2.9 The *Eccleston* case ought also to have allayed any concerns about the efficacy of the informal procedures which are adopted whenever possible in dealing with applications for review by the Information Commissioner. Neither the applicant nor the respondent agency in that case was forced to incur the costs of legal representation in presenting its case to the Information Commissioner. The applicant journalist was largely successful in obtaining access to the information which he sought. The respondent agency accepted the Information Commissioner's decision, and did not seek to have it reviewed for legal error in the Supreme Court. A report on the decision in *Re Eccleston* which appeared in the *Canberra Times* of 21 July 1993 is reproduced at Appendix 5.

2.10 Since I regard the achievement of the aims of speedier, cheaper, more informal, and more user-friendly procedures of FOI dispute resolution as one of the more significant measures of successful performance on the part of the Information Commissioner, I have discussed these issues in more detail in the following chapters.

CHAPTER 3 - REVIEW OF OPERATIONS DURING THE REPORTING YEAR

OVERVIEW OF OPERATIONS FROM 10 NOVEMBER 1992 TO 30 JUNE 1993

- 3.1 With the FOI Act due to commence operation for Ministers and agencies (other than local authorities) on 19 November 1992, the first appointees to the staff of the Office of the Information Commissioner commenced duties on 10 November 1992. Mr Greg Sorensen, Deputy Information Commissioner, had previously been Senior Project Officer in charge of the Administrative Law project team at EARC during the time in which EARC produced its Reports and draft Bills on Judicial Review of Administrative Decisions and Actions (No. 90/R5), Freedom of Information (No. 90/R6) and Protection for Whistleblowers (No. 91/R4), and its Issues Papers on Appeals from Administrative Decisions (Issues Paper No. 14; 91/I4) and Review of Archives Legislation (Issues Paper No. 16; 91/I6). He also had extensive prior experience of freedom of information and general administrative law litigation and advisings, as a solicitor employed by the Commonwealth Attorney-General's Department. Ms Susan Heal, Investigator, had seven years professional experience as a Crown Counsel employed by the Attorney-General's Department of Ontario, in which she had specialised in freedom of information matters before the Information and Privacy Commissioner of Ontario. Her first hand experience of procedures adopted in that jurisdiction, with a well-established Information Commissioner model for FOI dispute resolution, has proved extremely valuable.
- 3.2 I was conscious of the possibility that applications for access to information under the FOI Act lodged on 19 November 1992 were capable of being refused by the principal officer of an agency in a short timeframe, with a right of appeal lying directly to the Information Commissioner immediately thereafter. As events unfolded, however, an early rush of FOI access applications saw most agencies availing themselves of the full statutory time period for processing access applications. The first application for review by the Information Commissioner was received on 18 January 1993.
- 3.3 The intervening period was put to good use in establishing office systems; preparing and distributing standard application forms and an explanatory brochure on the Information Commissioner's powers, functions and procedures; and attempting to procure a library of relevant research materials including all reported and unreported decisions of courts and tribunals exercising jurisdiction under the FOI legislation of all Australian jurisdictions.
- 3.4 The staffing and resource needs of the Office of the Information Commissioner had been calculated on a rough estimate that appeals would flow through at the rate of approximately two per week from mid-December 1992 rising to approximately three per week after six months when the FOI Act commenced to apply to local authorities, with the expectation of a figure in the vicinity of 125 appeals received by January 1994. In fact, the rate of receipt of appeals far exceeded expectations. As the following table illustrates, appeals were received at an average rate of three per week for the first six weeks, surging to approximately seven per week for the next twelve weeks, before abating slightly to four per week. By 30 June 1993, a total of 120 appeals had been received in a period of 24 weeks, i.e. an average rate of receipt of five per week or one per working day.

Table 4 - Rate of Receipt of Applications for Review by the Information Commissioner (up to 30 June 1993)

WEEK NO.	WEEK COMMENCING	NO. OF APPLICATIONS FOR REVIEW RECEIVED BY THE INFORMATION COMMISSIONER
1	18 January 1993	4
2	25 January 1993	4
3	1 February 1993	1
4	8 February 1993	1
5	15 February 1993	3
6	22 February 1993	4
7	1 March 1993	7
8	8 March 1993	4
9	15 March 1993	8
10	22 March 1993	8
11	29 March 1993	5
12	5 April 1993	6
13	12 April 1993	10
14	19 April 1993	8
15	26 April 1993	3
16	3 May 1993	7
17	10 May 1993	7
18	17 May 1993	7
19	24 May 1993	3
20	31 May 1993	4
21	7 June 1993	4
22	14 June 1993	6
23	21 June 1993	4
24	28 June 1993	2
TOTAL TO 30 JUNE 1993		120

3.5 To give these figures some perspective, if an agency had received 120 FOI access applications it would have ranked a close ninth on the list of most applications received: the agencies ranked 8th, 9th and 10th in terms of most FOI access applications received as at 30 June 1993, had received 129, 100, and 94 applications respectively (source: weekly statistical returns compiled by the Freedom of Information and Administrative Law Division of the Department of Justice and Attorney-General). And of course the decisions appealed to the Information Commissioner

should tend to involve the most difficult questions of principle, and to be among the more time-consuming cases which arise under the FOI Act. As of 30 June 1993, only one appeal had been received from a local authority, the FOI Act having commenced to apply to local authorities on 19 May 1993. If the average rate of receipt of appeals noted above continues throughout the course of the first year from January 1993, it would result in the Information Commissioner receiving in the vicinity of 250 appeals just from state government agencies and Ministers, without even taking into account prospective appeals from local authorities.

- 3.6 In the period to 30 June 1993, the proportion of applications for external review by the Information Commissioner (120) compared to the total number of FOI access applications (5,123) was 2.34%. This may be contrasted with the proportion of applications for external review, compared to total FOI access applications, in the first three years of operation of the Commonwealth FOI Act and the Victorian FOI Act, as set out in the following tables:

Table 5A - Commonwealth of Australia - Proportion of External Review Applications to Total FOI Access Applications

Period	No. of Appeals to C/W AAT	Total No. of FOI Access Applications	As a %
01/12/82 to 30/06/83	69	5,669	1.2%
1983/84	203	19,227	1.06%
1984/85	310	32,956	0.94%
1985/86	267	36,956	0.73%

Table 5B - Victoria - Proportion of External Review Applications to Total FOI Access Applications

Period	No. of Appeals to Victorian County Court or AAT	Total No. of FOI Access Applications	As a %
1983/84	59	4,557	1.3%
1984/85	112	5,038	2.22%
1985/86	119	9,431	1.26%

Source: Annual Reports on the Freedom of Information Act of each jurisdiction.

- 3.7 From these figures one can suggest that the Information Commissioner model of external review is less intimidating for aggrieved applicants, who are proportionately almost twice as likely to challenge adverse decisions at external review level under this more user-friendly model. The figures for the Commonwealth and Victoria also show a trend for applications for external review to increase over the first three years, which would be of some concern for the resourcing of the Office of Information Commissioner if the trend were repeated in Queensland.
- 3.8 Because of the lead time involved in assessing the validity of applications for review, formally requesting the decision-making agency or Minister to provide copies of the documents in issue, and conducting a careful preliminary assessment of the contents of the documents in issue before determining the appropriate procedure to progress the review process, the unfortunate consequence of the flood of applications was to create an immediate backlog which has proved impossible to eliminate, and indeed has only increased, during the reporting period. This backlog

of cases awaiting assessment has meant that one of the more important goals intended to be obtained by the Information Commissioner model, i.e. to provide a speedier method of dispute resolution, will be obtained in the majority of cases, but cannot be guaranteed in all cases for the immediate future. In so saying, I do not believe that any of the existing courts or tribunals in Queensland with an established workload, could have managed an influx of appeals of this magnitude any more quickly or effectively than my staff has managed.

- 3.9 By 30 June 1993, 27 cases had been formally resolved, leaving some 93 cases awaiting resolution. This translates to appeals having been received during the period from 18 January 1993 to 30 June 1993 at the rate of approximately five per week, while being cleared up at the rate of approximately one per week. This does not tell the full story, however, since substantial progress was made towards resolution of the vast majority of the cases still awaiting resolution. In all such cases, letters under s.74 of the FOI Act had been forwarded to the participants and relevant documents requested. In 16 of the 94 cases, the documents in issue had not been received from the agency prior to Friday, 25 June 1993, so the preliminary assessment process could not have by then commenced. In many other cases, progress had been made through mediation towards settlement of the dispute or a narrowing of the issues in dispute. In only some 20 cases (where copies of the documents in issue had been received prior to 25 June 1993) had staff not yet found the time to undertake the preliminary assessment of the documents in issue, which is the prelude to determining the appropriate procedure to be followed to progress a matter to resolution.
- 3.10 The budget of \$250,000 allocated for the Office of the Information Commissioner from November 1992 to 30 June 1993 was insufficient, after allowing for equipment and other start-up costs, to enable all positions on the approved establishment to be filled and paid salary, from the commencement of operations in November 1992. With the benefit of hindsight it can be seen that an error was made in providing a budget which forced a staggering of the recruitment of staff to fill the four professional positions on establishment, so that only two positions were filled initially, with the other two filled not when the influx of work required it but when funding was available. By late February 1993, it was apparent that the sudden sharp influx of appeals justified the immediate filling of the vacant professional positions. The vacancies were advertised in *The Courier-Mail* and the *Weekend Australian* on 20 February 1993. In the recessionary employment market, over 220 applications were received for the advertised vacancies, all of which in accordance with the Public Sector Management Standard for Recruitment and Selection were graded according to the selection criteria, by a panel of three people, including one from outside the agency, before shortlisting for interview. The selection process was finalised in early May 1993, and the two new members of professional staff took up duty in early and mid-June 1993 respectively. Thus, for most of the reporting period, there were only two professional staff available to cope with the influx of appeals.
- 3.11 Faced with the unexpectedly large number of appeals, a strategic decision was made to divert one of the two full-time professional staff to the task of establishing a computer data base to assist legal research, in the expectation that the long term efficiency dividends to be obtained from having the legal research data base operational as soon as possible would ultimately outweigh the immediate loss of resources to deal with the influx of appeals. A data base was designed to capture relevant summary details from all decisions made by courts and tribunals under the FOI legislation of all Australian jurisdictions. Research assistants (law students and recent law graduates) were employed (as casual wages staff) to extract the relevant summary details from decided cases in the designated format, and the data is now in the process of being input. Preliminary trials indicate that this legal research data base will, in the long term, prove a huge boon to efficiency in identifying all relevant case law that bears on issues for determinations in appeals received by the Information Commissioner.
- 3.12 In all of the circumstances, I consider that the completion rate for appeals received in the

approximately 5½ months from 18 January to 30 June 1993 was satisfactory. Though the trend gives cause for concern, it may yet be too early to gauge whether the existing resources allocated to the Office of the Information Commissioner are satisfactory in the long term to achieve the object of speedy resolution of FOI disputes in the vast majority of cases (on the other hand, indications to date are that the other goals of following informal and user-friendly procedures which are inexpensive for participants, will certainly be attained). A more realistic assessment should be able to be made based on progress during the year 1993/1994, when the Office of the Information Commissioner will be operating with its full establishment of four professional staff, and the assistance of its newly-developed legal research data base. If, however, the rate of receipt of appeals should accelerate in the first six months of 1993/94, then I consider that the issue of optimum resourcing to meet the goals of the Office of the Information Commissioner must be carefully examined at the mid-year review of agency budgets for 1993/94. A short term measure such as hiring two extra professional staff and one extra administrative assistant, on a one year contract basis with the aim of eliminating backlogs, may be appropriate until long term trends can be evaluated.

- 3.13 Because the work of the office is so labour-intensive (involving careful consideration of the documents in issue in the light of relevant legal principles, co-ordinating inputs from participants to the review process, attempting to mediate settlements wherever possible, and researching and writing reasons for decisions when settlement cannot be achieved) it can safely be said that the provision of additional staff resources will readily equate to a much quicker turnaround time in the resolution of appeals. In the present climate of pressure to restrain public sector outlays, it is a fine question of judgment as to what is a tolerable level of delay in the resolution of FOI disputes, and what level of resourcing the government should be prepared to commit to an independent external review authority for FOI disputes.
- 3.14 A budget of \$250,000 was allocated to the Office of the Information Commissioner for the reporting period, and an allocation of \$350,000 has been given for the first full year of operations from 1 July 1993 to 30 June 1994. These figures can be contrasted with the cost of providing an additional District Court Judge or an additional Supreme Court Judge (including salary, staff and chambers), which according to figures provided by the Minister for Justice and Attorney-General to *The Courier-Mail* (as reported on 11 June 1993) were \$519,282 and \$537,759 per year, respectively. The comparison suggests that the funding of the Office of the Information Commissioner is an extremely cost-effective option for the government in terms of providing an independent external review authority for FOI disputes, and even more so when account is taken of the savings for government departments on expenditure for legal fees and additional legal resources as a result of the more informal procedures followed by the Information Commissioner as discussed at paragraphs 4.32 and 4.33. As should be apparent from the discussion in Chapter 4 of the Information Commissioner's procedural methods (especially in the contrast with traditional adversarial procedures for dispute resolution - see paragraphs 4.25 and 4.30 to 4.33 below), the Information Commissioner model of dispute resolution, to a significant extent, achieves its aim of reducing costs for participants by transferring a large measure of the normal burden of preparing a case for adjudication from the participants to the Information Commissioner (where the task can be more efficiently performed by specialist professionals). The consequent resource savings for government agencies is a legitimate factor to be taken into account in assessing the appropriate resourcing for the Office of the Information Commissioner.

PERFORMANCE STANDARDS

- 3.15 In terms of program management, the Office of the Information Commissioner does not operate under its own separate financial program, but as part of the program "Complaint Investigation and Resolution" of the Office of the Parliamentary Commissioner. The goal for that program is to ensure responsive, independent and impartial investigation and resolution of grievances from members of the public. This wording is in a general sense appropriate to the role and functions

of the Information Commissioner, though as noted at paragraph 1.12, the wording was obviously chosen for the Parliamentary Commissioner's role, and a more specifically appropriate goal (or mission statement) for the staff of the Office of the Information Commissioner has been stipulated which is as follows:

To provide a specialised and expert dispute resolution service (affording independent review in respect of those categories of decisions specified in s.71 of the FOI Act) that is speedier, cheaper for participants, more informal and more user-friendly than the court system, or tribunals which follows court-like procedures.

3.16 To permit a more detailed assessment of the performance of the Office of the Information Commissioner, a number of performance criteria and two sets of performance standards (which are published as Appendices to this report) have been formulated. The performance criteria are grouped under the headings of:

- (a) quality,
- (b) timeliness, and
- (c) informality/user-friendliness of procedure reducing expense and delay for participants.

3.17 As indicated in paragraph 3.12, I am satisfied that the office has performed extremely well against these performance criteria, apart from concerns as to timeliness because of delays experienced in a minority of cases, consequent upon the "instant backlog" created by the influx of large numbers of applications for review. The performance criteria which have been adopted are as follows:

QUALITY:	-	Compliance with the Information Commissioner's Performance Standards as to Quality and Timeliness (reproduced as Appendix 3 to this report);
	-	Proportion of Information Commissioner's formal determinations that are overturned for legal error by the Supreme Court in judicial review proceedings.
TIMELINESS:	-	Compliance with the Information Commissioner's detailed Time Standards for Case Management (reproduced as Appendix 4 to this report).
INFORMALITY/- USER-FRIENDLINESS OF PROCEDURE REDUCING EXPENSE AND DELAY FOR PARTICIPANTS:	-	Proportion of total cases assessed for investigation and review in which mediation is undertaken.
	-	Proportion of cases resolved by mediation compared to cases resolved by formal written determination.
	-	Proportion of participants in resolved cases who did not obtain legal representation or assistance to present their case.
	-	Proportion of cases resolved by formal adversarial hearing compared to proportion of cases resolved following mediation or following receipt of written submissions or informal oral submissions from the participants.

3.18 I am satisfied that the performance standards as to quality and timeliness (which are reproduced as Appendix 3 to this report) have been complied with during the reporting period. As to the second of the quality indicators, none of the formal determinations of the Information Commissioner have been overturned for legal error by the Supreme Court in judicial review proceedings, and indeed as yet, no legal challenge has been initiated to any determination of the Information Commissioner.

3.19 The detailed Time Standards for Case Management (reproduced at Appendix 4 to this report) are framed in terms of maximum indicative time limits for different categories of cases. The majority of cases are resolved well within the maximum time limits (see, for example, Table 3 in the Executive Summary). During the period covered by this Annual Report, there was no breach of any of the time standards apart from standard no. 6. There were a small number of cases (4) during the reporting period in which the maximum time limit set by standard no. 6 was exceeded

in circumstances other than through lack of co-operation by the participants. While none of the maximum time standards stipulated in standard no. 8 had been exceeded as of 30 June 1993, they were likely to be exceeded in respect of the same group of cases. This is essentially the result of the sheer volume of appeals received in such a short space of time, and the fact that only two professional staff were available to deal with them during most of the reporting period.

- 3.20 As explained at paragraph 3.13, because of the labour intensive nature of the work of my office, an increase in the number of professional staff will result in a direct improvement in the timeliness of the resolution of appeals. I refer to my remarks at paragraphs 3.12 and 3.13 on whether staffing of the Office of the Information Commissioner is at the optimum level. It remains to be seen whether a full compliment of four full-time professional staff can produce an acceptable performance level in terms of timeliness in resolving appeals. Other factors may potentially affect this. For instance, it is clear in the appeals received to date that many agencies are still learning to correctly interpret and apply some of the key provisions of the FOI Act. Many cases are being resolved when a government agency accepts that it may have misunderstood or misapplied a provision of the FOI Act. There ought to be some improvement in the quality of decision-making within agencies as they become more experienced in the application of the FOI Act, and as problem areas are identified and clarified during the course of mediation of disputes by the Information Commissioner, and through the publication of reasons for decision given by the Information Commissioner when disputes are resolved by formal determinations.
- 3.21 Turning to the fourth of the performance criteria (and the first in the third group of performance criteria) the records of my Case Management System disclose that, of the 84 cases assessed for investigation and review during the reporting period, mediation was undertaken (or preparation for mediation commenced) in 71, a proportion of 85%.
- 3.22 Of the 27 cases formally resolved during the reporting period, 20 were resolved by mediation and 7 by formal written decision, being a proportion of 74% resolved by mediation. In addition, it has been the experience to date that even when mediation does not fully resolve a dispute, it does in nearly all cases result in some significant progress towards narrowing and reducing the number of issues which must be the subject of formal determination by the Information Commissioner.
- 3.23 The next performance criterion - proportion of participants in resolved cases who did not obtain legal representation or assistance to present their case, may be subject to some lack of precision in measurement. It is generally clear from our records or from our course of dealing with an applicant, when an applicant has obtained legal representation or legal assistance. It is sometimes less clear with government agencies, who frequently have salaried lawyers on staff, or can have recourse to the Crown Law Division for assistance in the preparation of a formal written submission, which is then given in the name of the decision-maker whose decision is under review. Sometimes the fact that legal assistance has been obtained is readily disclosed and other times it can be readily inferred from the terms in which a written submission is expressed (e.g. use of legalese and of legal conventions adopted in professional practice). With the proviso that in a few instances, an informed guess has been made, our records disclose that the 27 cases resolved to 30 June 1993 involved a total of 56 participants, of whom 7, or 12.5% of all participants, were represented or assisted by professional lawyers. In terms of the performance criterion, this means that 87.5% of participants in resolved cases did not obtain legal representation or assistance to present their case.
- 3.24 During the reporting period, no cases were resolved by formal adversarial hearing compared to cases resolved following mediation, or following receipt of written submissions or informal oral submissions from the participants.

CHAPTER 4 - GENERAL OBSERVATIONS ON THE ADMINISTRATION OF THE FOI ACT

- 4.1 I consider that the Information Commissioner and his staff should not be visited with the expectation that they will behave with judicial detachment towards representatives of government agencies, outside of the context of the disposition of particular appeals. I consider that an external review authority has a responsibility for the proper administration of the relevant legislation, and should be prepared to provide feedback to government agencies with the aim of improving the quality of primary decision-making and correcting any systemic problems or weaknesses which become apparent in the course of hearing appeals.
- 4.2 I have been conscious of the educative role which formal decisions of an external review authority should play in guiding decision making at primary levels within government agencies, and I have endeavoured to clearly explain my reasons for arriving at formal determinations, and to set out as much explanatory material as possible on the meaning of individual exemption provisions that have to be interpreted and applied in the course of my formal determinations.
- 4.3 Section 89(4) of the FOI Act provides that the Information Commissioner may arrange to have decisions published. I am presently negotiating with the Law Book Company for an arrangement under which the Information Commissioner's formal decisions and reasons for decisions will be published in a proposed Queensland Administrative Law Service to be authored by two academics from the Law Faculty at the Queensland University of Technology. A network has already been established by the Freedom of Information and Administrative Law Division of the Department of Justice and Attorney-General, for the speedy dissemination to government agencies of the Information Commissioner's formal determinations. Copies of decisions can be made available to members of the public on request to my office.
- 4.4 I have also been concerned that the results of research undertaken and views formed in the course of successfully mediating particular disputes should be disseminated more widely than just to the parties to that dispute, where they could be of more general importance or value. I have included in Chapter 5 of this report a series of case summaries in respect of matters resolved up to 30 June 1993, but considerations of space prevent the summaries from canvassing the detail of all issues which arose in the resolution of those matters. In this regard, the Deputy Information Commissioner has entered into an informal arrangement with the FOI Co-ordinators of state government departments and major authorities, to attend their monthly meetings on three occasions each year to address issues of general concern or interest that have arisen through the external review process. It is also an opportunity for the Information Commissioner's Office to get feedback from some of its more regular clients as to how effectively the Office is seen to be performing its external review functions. The Deputy Information Commissioner has on three occasions in December 1992, April 1993 and August 1993 addressed meetings of FOI Co-ordinators, and at the last meeting, internal review officers from some departments also attended.
- 4.5 The Information Commissioner is not subject to the stringent time limits that apply to primary decision-making, and internal review, under the FOI Act, and I consider it important that the external review authority which is able to take more time to give detailed and thorough consideration (with the aid of submissions from interested parties) to some of the more complex issues that arise under the FOI Act, should feed back into the system of primary administration some of the results of its research and deliberations, at least those which are likely to be of interest or importance.

INITIAL POOR COMPLIANCE WITH STATUTORY OBLIGATIONS AS TO THE CONTENT OF REASONS STATEMENTS FOR DECISIONS UNDER THE FOI ACT

4.6 In my reasons for decision in *Re Eccleston* (reproduced at Appendix 6), I took the opportunity to comment on a matter of concern for the general administration of the FOI Act, namely, that many agencies (and especially internal review officers) did not appear to be fully and adequately complying with the statutory obligations imposed on them by s.34(2)(f) and (g) of the FOI Act, and s.27B of the *Acts Interpretation Act 1954*, in respect of the content of reasons statements. This was a matter raised informally with the head of the Freedom of Information and Administrative Law Division in the Department of Justice and Attorney-General and raised by the Deputy Information Commissioner at the April meeting of FOI Co-Ordinators. I have on seven occasions during the reporting period exercised the discretion conferred on me by s.82 of the FOI Act to require an agency to provide an additional statement of reasons where the statement provided to the applicant was inadequate for the purposes of satisfactorily progressing the conduct of my investigation and review. I could have done so in a great many more cases, if my only purpose was to ensure that decision-makers fully comply with the statutory requirements in respect of the contents of reasons statements. I should record that in the time since these comments were made there has been a noticeable improvement in the quality of reasons statements coming from the major departments and statutory authorities, and the problem of inadequate reasons statements now seems to be more the case in the smaller authorities which do not receive many FOI applications.

NEED FOR LEGISLATIVE AMENDMENTS

4.7 As is the case with many statutes, practical experience of the administration of the FOI Act has revealed several minor gaps and flaws in the legislative scheme, and in the drafting of particular provisions.

4.8 On 23 November 1992, I wrote to the Minister for Justice and Attorney-General in his capacity as Minister administering the FOI Act to draw his attention to some anomalies and minor technical errors that had been discovered in provisions relating to the Information Commissioner's external review jurisdiction. I identified a number of problem areas in s.79 of the FOI Act, and in s.71(1)(f) of the FOI Act, as it related to s.52(7)(b)(i). These problems were remedied by the *Statute Law (Miscellaneous Provisions) Act 1993* (No. 32) s.3 Sch.1, together with some other minor problems in s.20, s.27, s.52 and s.73 which my staff had discussed with officers of the Department of Justice and Attorney-General.

4.9 By another letter to the Minister for Justice and Attorney-General dated 19 February 1993, I requested that consideration be given to making two further amendments to Part 5 of the FOI Act. These requests have not been acted upon although the Minister did indicate to me by letter that it may be possible to include one of the amendments in a proposed Justice (Miscellaneous Provisions) Bill being considered for introduction in August/September 1993. In my letter to the Minister dated 19 February 1993, I raised concerns about two issues, the first of which was occurring with surprising frequency in applications for review lodged with the Information Commissioner, namely where an applicant complains of an agency's failure to provide access to documents in situations where:

- (a) the documents are admitted by an agency to exist, or to have existed, but are claimed to now be lost, misplaced or destroyed; or
- (b) the agency claims that some or all of the documents to which a person has requested access do not, and never did, exist.

4.10 In *Re Smith*, I determined that I have jurisdiction to inquire into a Department's refusal of access to documents in these circumstances, but I remain convinced that I should be given more adequate powers to deal with inquiries of this nature. To enable a proper and thorough investigation and review of both situations (a) and (b), I believe that the Information

Commissioner should be conferred with powers equivalent to those conferred on the Parliamentary Commissioner by s.20 of the *Parliamentary Commissioner Act 1974*, i.e. the power to enter any premises occupied or used by an agency subject to the FOI Act, and power to inspect those premises or anything for the time being therein. I consider that it would be a significant shortcoming in the FOI Act, capable of manipulation or exploitation by an unprincipled agency official, if an agency could escape thorough scrutiny by claiming that documents to which access has been requested do not, and never did, exist.

4.11 My views in this regard have been strongly influenced by my colleague, the Victorian Ombudsman, who has advised that in his role under the Victorian FOI Act of investigating situations (a) and (b), his officers in the great majority of cases find it necessary to access an agency's premises and carry out physical inspections in order to obtain a sufficient understanding of an agency's filing and document handling systems (and the weaknesses in those systems) so as to be able to be satisfied that a document does not exist or cannot, after a thorough and diligent search, be located. If my powers in respect of an unco-operative agency remain confined to examining witnesses under s.85 of the FOI Act away from the agency's premises and record systems (without ever having the opportunity to gain the first hand understanding of an agency's records management system which would allow for meaningful questioning) and to ordering further searches for documents, I consider this would be a more cumbersome, more inefficient and less timely method of proceeding, than having my officers conduct investigations at the site of the problem. I can see no objection in principle to conferring such powers on the Information Commissioner as are already conferred on the Parliamentary Commissioner by s.20 of the *Parliamentary Commissioner Act 1974*: it is merely the case of a government "watchdog" agency being given intrusive powers with respect to other government agencies for the purpose of ensuring that those other government agencies are not permitted to frustrate the rights conferred on citizens by the FOI Act.

4.12 I have also requested an amendment to s.74 of the FOI Act to recast it in the following terms:

"74.(1) Before starting a review, the Commissioner must inform the applicant and the agency or Minister concerned that the decision is to be reviewed.

(2) The Commissioner may take such steps as are practicable to inform another person who the Commissioner considers could be affected by the decision the subject of the review, that the decision is to be reviewed."

4.13 I consider that it is logically preferable that notification of third parties who may be affected should be discretionary rather than mandatory. I have already had cases involving information communicated in confidence about an identifiable third party, where both the identity of the confider as well as the content of the information confided were claimed to be exempt under s.46 of the FOI Act. In those circumstances, one is left in a position of being obliged to inform the third party of review proceedings that may affect them, but being unable (because of s.76(2) and/or s.87(1) of the FOI Act) to give any information as to the nature of the material in dispute and how it may affect the third party, so that there is no practical possibility of meaningful participation by the third party in the review proceedings. In such circumstances, I consider it appropriate that I should have a discretion as to whether or not to inform the third party who may be affected.

4.14 There are further reasons for seeking this amendment to s.74 which have been conveyed to the Minister, but as they are of an extremely sensitive nature and relate to a matter still before me for determination, I do not consider it appropriate to disclose them in this report.

4.15 My proposed subsection 74(2) (set out above) would confer the flexibility to avoid problems of the kind referred to above, while still allowing for the requirements of natural justice to dictate

that a third party be notified of review proceedings and given the opportunity to participate when that is practical and necessary in the third party's own interests.

AWARENESS OF THE INFORMATION COMMISSIONER

4.16 The Office of the Information Commissioner is in the fortunate position of not needing to advertise the availability of its services to its prospective users. The persons able to use the services of the Information Commissioner are those who have received an adverse decision in respect of an application made under the FOI Act (and who satisfy the requirements imposed by s.73(3) of the FOI Act). Section 34 of the FOI Act requires an official who makes such a decision to notify the applicant of the reasons for decision, and by virtue of s.34(2)(i) to notify the applicant of:

"(i) the rights of review conferred by this Act in relation to the decision, the procedures to be followed for exercising the rights and the time within which an application for review must be made".

4.17 Thus, persons who are entitled to apply to the Information Commissioner for independent review of an adverse decision are (subject to one qualification) automatically informed of their rights in that regard.

4.18 One qualification must be made to this statement. Where an application made under the FOI Act has not been dealt with inside the statutory time limits, s.79 provides that an applicant may apply directly to the Information Commissioner for review of a deemed refusal of the initial application. I consider that the FOI Act should be amended to require an agency or Minister to give an applicant notice of the statutory time limit relevant to the particular application, and of the rights conferred by s.79 if the time limit is exceeded, at the same time as an agency gives an applicant the notification of receipt which is presently required by s.27(1) of the FOI Act.

SUFFICIENCY OF SEARCH ISSUES

4.19 Of the 120 applications for external review received in the current reporting period, 24 (or 20%) have involved claims by applicants that agencies have been unable to locate documents to which access has been sought or have failed to make full disclosure of all relevant documentation, or have involved situations in which my preliminary investigation has raised concerns that an agency has not identified all documents falling within the scope of the relevant FOI access application. Of those 24 cases, investigation into the "sufficiency of search" issues is still proceeding in 11 cases. However, of the remaining 13 cases in which that aspect of my investigation has been completed, the allegations of failure by the relevant agency to locate and deal with all relevant documents has been proven to have some merit in 77% of the cases.

4.20 My jurisdiction to entertain applications for external review in situations (a) and (b) referred to in paragraph 4.11, and my powers on review (assuming that jurisdiction is established) were discussed in my decision in the case of *Re Smith*. In that decision, I concluded that ss.72(1) and 88(1) of the FOI Act, when read together, confer upon me the jurisdiction to review, and the power to give directions, in respect of "sufficiency of search" issues raised in external review applications under Part 5 of the Act.

4.21 I observe that based on experience from the cases investigated to date, it appears that staff in many agencies are not completely familiar with their own records management policies and retention schedules, or with the provisions of the *Libraries and Archives Act 1988* concerning the custody, preservation and disposal of public records. An illustration of this is the case noted at paragraphs 5.38 to 5.40 in which the agency's initial response to an access application was that "after a thorough and reasonable search no records can be located ..., and I accept that these

records were destroyed in accordance with the provisions of the *Libraries and Archives Act 1988*". Despite this apparently definitive conclusion, the agency subsequently advised the applicant that it had made a further, and unsuccessful, search for the records in question. The applicant remained convinced that the file to which access was sought must be in the agency's possession, and lodged an application for external review. In response to my request for particulars of the agency's search efforts, the agency initially responded that "on at least three separate occasions, numerous staff ... have carried out extensive searches in an attempt to locate [the file]", with a total of 49½ hours having been expended on those searches. No explanation was provided for the agency's conclusion that the file had been destroyed, or for the agency's decision to continue to search for a file which it had determined had been destroyed. Nevertheless, some 10 days later, the agency informed me that the file had been located in a storage area, thus disposing of the issue under review.

- 4.22 Investigation into "sufficiency of search" allegations involve a substantial workload for my investigative staff, in order to confirm whether or not requested documents do exist, and if so, to verify that all reasonable efforts to locate the document have been made by the agency. In this regard, it is often necessary to physically inspect files or to interview staff responsible for records management, in order to verify that a thorough search has been conducted for the documents in question. While I have found agencies to be generally co-operative and helpful in attempting to resolve problems in this regard, I would observe that my investigation of these matters is greatly expedited in those cases where agencies have thoroughly documented their search efforts. I would encourage agencies to document their search efforts in cases in which requested documents cannot be found, as such detailed documentation is of great assistance to my staff in readily identifying the individuals involved, and the avenues of inquiry which have already been pursued. More importantly of course, it is to be hoped that the experience of responding to requests under the FOI Act will have prompted agencies to review and improve their policies and procedures in relation to records management.

THE INFORMATION COMMISSIONER'S PROCEDURAL APPROACH TO FOI DISPUTE RESOLUTION

- 4.23 A brochure outlining the operations of the Information Commissioner has been distributed to agencies who may pass it on to aggrieved applicants, and a copy of the brochure is provided as a matter of course to applicants and third parties when applications for review are received by the Information Commissioner. The relevant parts of the brochure state as follows:

"What expense will be involved in pursuing review by the Information Commissioner?"

No charge is payable for seeking external review by the Information Commissioner. Each participant in a review by the Information Commissioner must bear his or her own costs of the review proceeding - there is no power to award costs in favour of a successful party, or against an unsuccessful party.

The Act requires the Information Commissioner to conduct reviews with as little formality and technicality, and with as much speed, as the requirements of the Act and a proper consideration of the matters permits. It was Parliament's clear intention that the Information Commissioner provide a speedier, cheaper, more informal and more user-friendly method of dispute resolution than the court system or tribunals which adopt court-like procedures.

The Information Commissioner will ensure that proceedings are conducted as informally, and with as little complexity and technicality, as the issues for determination in the case will allow. The Information Commissioner will also

endeavour to ensure that any unnecessary expense or delay is reduced or eliminated. An applicant for review should not therefore feel intimidated or disadvantaged by presenting his or her case personally.

What procedures are likely to be followed for the review process?

Subject to specific matters prescribed by the FOI Act, the procedure to be followed on a review is within the discretion of the Information Commissioner.

The Information Commissioner proposes to adopt a flexible approach, tailoring procedures according to what appears most appropriate in the individual case. In most disputes over access to documents, for example, the Information Commissioner will call for and examine the disputed documents to assess the issues for determination, before conferring with the parties to decide the procedure to be followed.

The Information Commissioner may decide not to review a decision when satisfied that the application is frivolous, vexatious, misconceived or lacking in substance.

The Information Commissioner will generally assess the prospects of a mediated or negotiated resolution of a dispute, and may direct that the participants undertake a process of mediation in an appropriate case.

Procedures may range from the highly informal to the very formal. The application of many exemption provisions calls for the public interest considerations favouring non-disclosure to be weighed against the public interest considerations which favour disclosure. Highly informal procedures would, for instance, be appropriate to cases where an applicant for review simply wishes to obtain the judgment of the Information Commissioner (who can bring a fresh and independent perspective, free of the pressures that apply to officers within government agencies) on the issue of where the balance of public interest lies. Such an applicant need do no more than lodge an application for review and indicate the public interest considerations favouring disclosure which he or she asserts must be taken into account. The applicant may indicate that he or she does not wish to play any further active part in the review, and is content to have the Information Commissioner examine the relevant documents, question and take submissions from the decision maker (if thought appropriate), and issue a determination.

On the other hand, there may be particular cases where all participants in a review wish to be represented by legal counsel and to take evidence on oath and cross examine witnesses, in a more formal, court-like proceeding.

The Information Commissioner will determine the method of proceeding that is most appropriate having regard to the issues for determination and any views expressed by the participants.

In many cases, it will be appropriate to proceed by having the participants submit written arguments to the Information Commissioner. There is nothing to prevent a participant from seeking legal assistance to prepare written submissions. Where the Information Commissioner proposes to give a participant an opportunity to appear before the Commissioner, the participant may be

represented by another person (including a solicitor or barrister) only with the approval of the Information Commissioner.

Other matters relating to procedure

In any review by the Information Commissioner, the agency or Minister who made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.

The Information Commissioner has the power to obtain information and documents and compel attendance and to examine a witness on oath or affirmation.

In the conduct of a review, the Information Commissioner is obliged to ensure that exempt matter is not disclosed to an applicant or an applicant's representative. It is likely that in many cases the Information Commissioner will at some stage hear argument from the government party in the absence of the applicant or the applicant's representative, so as to permit an uninhibited exchange of argument about the content of documents claimed to be exempt.

After conducting a review, the Information Commissioner must make a written decision and provide written reasons for that decision to each participant."

- 4.24 Once a person aggrieved by a decision of an agency or Minister under the FOI Act lodges a valid application for review by the Information Commissioner under Part 5 of the FOI Act, the Information Commissioner (apart from cases involving review of conclusive certificates under s.84) stands in the shoes of the agency or Minister concerned and is empowered to make a fresh decision which substitutes for the decision of that agency or Minister. The agency or Minister is reduced to the status of a participant seeking to persuade the Information Commissioner as to how the decision-making power now vested by the FOI Act in the Information Commissioner, should be exercised. I therefore take the view that the procedures which I adopt must ultimately be aimed at ensuring that I have available all relevant material which in my opinion is necessary for me to be satisfied that my determinations correctly apply the FOI Act to the information contained in the documents in dispute. In other words, it is the Information Commissioner's role to decide what are the issues for determination and to insist upon production of all relevant evidence or other material, rather than simply to adjudicate on arguments and evidence presented by the participants in a review.
- 4.25 The Office of Information Commissioner tends to follow an inquisitorial model, in preference to an adversarial model, of adjudication. The courts of law operate on the adversary system, the essential characteristics of which are:
- the contesting parties themselves define the parameters of the contest, with the judge ruling on the disputed issues of fact and law which are submitted by the parties for adjudication;
 - the contesting parties undertake responsibility for presenting to the court such evidence as they think fit, in support of their respective cases;
 - evidence at the trial is elicited by the parties questioning witnesses in turn. The judge may not call witnesses, and may not examine witnesses in such a way as to join in the contest - but only so as to clarify a witness's evidence where it is unclear;

- the procedure is designed to concentrate the judge's function into that of presiding at one continuous hearing, and adjudicating on the basis of the judge's assessment of the relative strengths of the competing arguments of the parties.

While court procedures accord the maximum degree of procedural fairness to both parties to a dispute in the presentation of their cases for adjudication, the process of the courts of law is often elaborate, slow and expensive. (At the risk of oversimplifying complex issues, this is the primary reason why community demands for faster and cheaper resolution of disputes through the court system has resulted in courts adopting case management techniques involving greater intervention by judges and court officers in the earlier stages of the process of preparing cases for adjudication, with the aim of eliminating any expensive preparatory steps that are not necessary to bring the case to resolution.) By contrast, the inquisitorial model of adjudication is generally characterised by the decision-making tribunal's firm direction of the preparation of the case for adjudication, by the tribunal soliciting information from the parties and being involved in fact-gathering from an early stage and throughout the decision-making process, and by the pre-hearing and hearing stages not being so significantly differentiated as in the adversary system. It is possible to devise more informal and flexible methods of proceeding which nevertheless satisfy the obligation to accord procedural fairness, within the restrictions (chiefly on disclosure of the substance of the matter in dispute; see s.76(2) and s.87) imposed by the FOI Act.

- 4.26 As a matter of course therefore, I adopt the practice of requiring from the agency or Minister whose decision is under review, copies of all relevant documents in issue, and where applicable, copies of all documents which record the process of consultation with interested third parties under s.51 of the FOI Act. (The "sufficiency of search" cases, discussed in detail at paragraphs 7 to 61 of my decision in *Re Smith and Department of Administrative Services*, Decision No. 93003, 30 June 1993, are an exception to this general principle since the primary issue is whether the documents claimed by the applicant to be relevant, do exist, or can be located.) Based on a careful preliminary assessment of the documents in issue, an assessment is made of the most appropriate procedures for progressing the review in the way which will be quickest and cheapest for the participants, and this assessment may be confirmed or varied after preliminary consultation with the participants themselves.
- 4.27 If I consider that an agency's decision, or some part of it, has been wrongly decided, then in general the most appropriate course of action consistent with the aims referred to above, is to convey my opinions to the relevant decision-maker, and explain my reasons for believing that the decision is wrong, and invite the decision-maker to reconsider. My views might be conveyed in writing or in a face-to-face conference, depending on what is most convenient or timely in all the circumstances. On some occasions, acceptance of my views by an agency resolves all issues in dispute, but more often it resolves only some of the issues in dispute. Nevertheless, if my views are accepted by the decision-maker and concessions are made, this is frequently accepted by the applicant as a sign of good faith on the part of the decision-maker and the Information Commissioner, and the applicant will often be prepared to accept my preliminary assessment that other documents claimed by the decision-maker to be exempt do appear to have been validly claimed to be exempt, subject to any arguments that the applicant wishes to put to the contrary. In this way, adopting a form of "shuttle diplomacy", significant concessions can frequently be obtained from both sides to a dispute, in some instances resolving the dispute entirely, and in other instances significantly narrowing the range of issues which remain in dispute for formal determination by the Information Commissioner.
- 4.28 When attempts are made to settle a dispute by negotiation between the participants, any accommodation that will satisfy the applicant to the extent that the applicant is prepared to withdraw the application for review, can legitimately be explored. For instance, an agency may agree, as part of some acceptable compromise, to exercise its discretion under s.28(1) of the FOI Act to release matter that is technically exempt matter under the FOI Act, or to exercise its

discretion (preserved by s.14 of the FOI Act) to give access to, or amend, documents outside the framework of the FOI Act. (These are discretions not available to the Information Commissioner when an appeal proceeds for formal determination: see s.88(2) of the FOI Act.) Whereas an applicant's motives for seeking access to certain information are generally regarded as irrelevant to the determination of whether the applicant has a right to access the information under the FOI Act, those motives can be explored in detail in the context of settlement negotiations to see if some appropriate compromise can be reached. It frequently transpires that an applicant believes that documents to which he or she has been refused access will reveal information relevant to a particular purpose which the applicant is seeking to advance. The applicant may accept assurances from an independent authority such as the Information Commissioner, who has examined the documents, that none of the exempted matter is relevant to, or will assist in, advancing the applicant's purpose. An applicant may be prepared to accept an assurance to that effect from an independent body rather than from an agency's decision-maker. Although the Information Commissioner cannot reveal the exempt matter in dispute, it is possible to describe the general nature of the exempt matter in such a way as to allow the applicant, in some instances, to assess whether it is information of a kind to which the applicant really wishes to obtain access. On a number of occasions, an applicant has withdrawn after receiving assurances that the information contained in the documents in issue was of a certain nature, when the applicant suspected or believed that it was of an entirely different nature, and its true nature had not been revealed through the reasons for decision given by the agency refusing access.

4.29 Section 83(3) of the FOI Act provides that:

"(3) In conducting a review, the Commissioner must -

- (a) adopt procedures that are fair, having regard to the obligations of the Commissioner under this Act; and*
- (b) ensure that each participant has an opportunity to present the participant's views to the Commissioner;*

but, subject to paragraph (a), it is not necessary for a participant to be given an opportunity to appear before the Commissioner."

4.30 Obviously, in a dispute over access to exempt matter, the Information Commissioner cannot disclose the exempt matter as that would effectively dispose of the subject of dispute. This restriction means that it is frequently difficult for an applicant to make any meaningful contribution to the issues for determination. The more meaningful exchanges are going to occur between the Information Commissioner and the decision-maker, both of whom have access to the information in dispute. This is the nub of why the Information Commissioner model of dispute resolution is more sensible, flexible and practical for resolving FOI disputes than the court/tribunal adversarial hearing model. In the vast majority of FOI disputes, no commensurate benefit to the dispute resolution process occurs through putting an applicant to the inconvenience and expense of being present at, and presenting a case to, a formal hearing at which the applicant has, and can only be permitted, a slight knowledge of the real issues for resolution. To the extent that the applicant is able to make a meaningful contribution to the review process, the applicant's input is, in most cases, best obtained by means other than participation in a formal adversarial hearing. The problem is compounded if the tribunal (unlike the routine practice of the Information Commissioner in examining the documents in issue as the first step in the review process) adopts a practice of only calling for and examining the documents in issue, for the first time, at the final hearing of the appeal. By precluding any meaningful attempt by the review authority to exert pressure on the parties at an early stage to narrow the range of documents in issue, both parties are forced to undertake the expense and inconvenience of preparing for a formal contest on all documents claimed to be exempt.

- 4.31 While legal submissions from an applicant on the case law relevant to the particular exemption provisions claimed, or the proper interpretation of the exemption provisions, are always welcome, they will necessarily suffer from a lack of focus on the precise nature of the exempt matter in issue. It is not strictly necessary for an applicant to address submissions on such issues, as I will make my own determination of the proper interpretation of the exemption provisions and what case law from other FOI jurisdictions should be followed in Queensland. Often, any meaningful role for an applicant is confined to disputing assertions of fact or disputing value judgments (of the kinds referred to in paragraph 1.8 above) contained in the decision-maker's reasons for decision or written submissions to the Information Commissioner, or, where an exemption provision calls for the application of a public interest balancing test, pointing to public interest considerations which favour disclosure of the documents in issue. It is, nevertheless, appropriate for applicants to be given a proper opportunity to present their views to the Information Commissioner, and assistance is frequently obtained on such matters as disputed facts and the nature of relevant public interest considerations. It is also quite appropriate, however, for an applicant merely to request the Information Commissioner to undertake an independent assessment of an agency's decision, with no significant participation by the applicant. The Information Commissioner will be empowered to make a fresh decision (if that is considered to be warranted), the onus will remain on the decision-maker to justify the decision under review (see s.81 of the FOI Act), and it is quite proper for the Information Commissioner to play the role of devil's advocate in respect of evidence and submissions put on behalf of the decision-maker to justify the decision under review.
- 4.32 On the other hand, there is no reason why the benefits of cheaper, more informal and more user-friendly methods of dispute resolution should not also accrue to government agencies, so as to preserve scarce, publicly-funded resources. Where it is fairly clear on the available information that an agency has correctly applied the FOI Act to the documents in issue, it is appropriate not to put the agency to the trouble and expense of further justifying its decision unless and until the applicant (having been given, so far as the specific statutory restrictions in the FOI Act permit, adequate particulars of the case which must be met in order to secure a favourable decision on appeal) can point to some material or some arguments which cast doubt on the validity of the decision under review, and which require a response from the decision-maker. In the case of a meritless application for review, the Information Commissioner is empowered under s.77(1) to decide not to review, if satisfied that the application for review is frivolous, vexatious, misconceived or lacking in substance. In a system such as operates in the Commonwealth AAT and the Victorian AAT, for instance, a meritless applicant can still insist on having his or her "day in court", putting a government decision-maker to the inconvenience and expense of providing legal representation for an adversarial tribunal hearing, and fully preparing affidavit evidence to justify a case for exemption which might have been apparent on the face of the documents in issue, if they were obtained and read by the external review authority at an early stage. It is consistent with the rules of natural justice as applied in the courts that an opportunity to be heard need initially only be given to a party against whom it is proposed to make an adverse decision. In some cases therefore, a government agency may not need to be called upon to provide anything other than its initial reasons for decision and copies of the documents in issue in order to satisfy the Information Commissioner of the correctness of the decision under review. If the applicant is able to provide material which casts doubt on the validity of the decision, then a response from the decision-maker will be required, but if not, the decision-maker need not be put to unnecessary inconvenience and expense.
- 4.33 The benefits of the cheaper, more informal and more user-friendly procedures of the Information Commissioner should therefore result in savings for government agencies, as well as for citizens wishing to dispute FOI decisions. My professional colleague, the Victorian Ombudsman, told me of one case under the Victorian FOI Act which he felt obliged to contest in the Victorian AAT, and in which he successfully defended what he regarded as an important principle, but at a

cost of \$20,000 for legal representation in the formal hearing before the Victorian AAT. In my opinion, it should be a rare dispute over access to government-held information that warrants the expenditure of such substantial sums of money. A system of dispute resolution should not be so designed as to pressure participants to expend substantial sums of money. In the case of government agencies any unnecessary expenditure is of course ultimately borne by the public. It has been noticeable that in a large proportion of appeals handled to date, government decision-makers have felt quite comfortable about personally defending their decisions in the vast majority of cases, without seeking legal representation, though they always have the option of obtaining legal assistance in the preparation of a formal written submission when that is called for in a matter than cannot be settled, and must proceed to formal determination by the Information Commissioner.

- 4.34 Similarly, most applicants have felt comfortable in representing themselves in proceedings before the Information Commissioner. It has generally been the case that where an applicant was represented by lawyers, those lawyers had been retained for another purpose, such as representation in another legal dispute, and access to documents was being sought under the FOI Act for use in that other legal dispute.
- 4.35 Because of the interest in the procedures followed by the Information Commissioner, I generally include in my reasons for decision in matters which proceed to formal determination, a brief segment titled "The Review Process" which illustrates the flexible nature of the procedures that are followed according to the different circumstances of different cases. For instance, in *Re Eccleston* (reproduced at Appendix 6), it is disclosed at paragraphs 7 to 12 that, following my assessment of the documents to which the applicant had been refused access, concerns were raised with the respondent agency about some claims for exemption made under s.43, and the Department after reconsideration decided that it would not press its claim for exemption in respect of the material identified, but would allow the applicant access to it. The applicant subsequently made a significant concession in not contesting the remaining material claimed by the respondent agency to be exempt under s.43 of the FOI Act, or the one document claimed to be exempt under s.36. The applicant wished to press for access only to the matter claimed to be exempt under s.41 of the FOI Act. Each participant was offered the opportunity to bring evidence to establish any facts on which it wished to rely to advance its case, but each declined the opportunity. Both participants were prepared to put their arguments by way of written submission, and as far as I am aware, neither participant felt the need to obtain legal assistance in the preparation of written submissions.
- 4.36 In the case of *Re Smith*, by contrast, my preliminary assessment of the documents in issue indicated that they were *prima facie* exempt under s.43 of the FOI Act. The applicant was given every opportunity to raise arguments or provide material to negative the application of s.43, although he was obviously denied the opportunity (available to me) of assessing the precise contents of the documents in issue. After allowing the applicant to address arguments in writing and in person, I was satisfied that he was unable to provide material which cast doubt on the validity of the claim for exemption under s.43 of the FOI Act, and the respondent agency was not called upon to provide a formal submission to justify its decision. If this case had been heard before the Commonwealth AAT for instance, the respondent agency would probably have been forced to incur the expense and inconvenience of formally presenting its case for exemption in an adversarial hearing.
- 4.37 In a third case, *Re Hudson, as agent for Fencray Pty Ltd, and Department of Premier and Economic and Trade Development* (Information Commissioner Qld, Decision No. 93004, 13 August 1993) in which the relevant inputs from the participants were obtained during the reporting period (although my decision and reasons for decision were not given until August 1993), the participation of the applicant was confined to providing me with a two page submission outlining his attempts to obtain information, and the motives for seeking the

information, together with a copy of an Environmental Impact Assessment which had been submitted for consideration by state government departments in respect of a development approval application. The applicant did not wish to incur the expense of legal representation and indicated that he would accept my judgment as to the application of the relevant legal tests to the document in issue. The review process took the form of my writing to the respondent agency outlining what I considered to be the relevant legal issues, disclosing areas in which I considered that its decision may have been mistaken in part, and inviting a detailed written response to my concerns. The agency's formal written submission was evaluated against the documents in issue, and the material previously supplied by the applicant, and I issued a formal determination of my findings.

- 4.38 On the evidence to date, I can see no cause for concern that the quality of the review process, or of formal determinations, is in any way inferior to that of more legalistic tribunals which routinely follow adversarial, court-like procedures. In any event, as I have remarked earlier, the Information Commissioner model is flexible enough to adopt adversarial procedures where the nature of the issues for determination in a particular case warrant that course. The available evidence from the reporting period indicates to me that, at least in the particular context of FOI disputes, the Information Commissioner model of dispute resolution is the most efficient and effective system for achieving the goal of a proper resolution of disputes between government decision-makers and persons adversely affected by their decisions, at the least cost.

CHAPTER 5 - CASE SUMMARIES

FORMAL DECISIONS ISSUED DURING REPORTING PERIOD:

- 5.1 The Information Commissioner has established a formal decision series, in which decisions are given a unique identifying number for reference purposes.

Re Christie and Queensland Industry Development Corporation (Decision No. 93001, 31 March 1993)

- 5.2 Mr Christie sought access to documents held by the Queensland Industry Development Corporation (QIDC) concerning his business dealings with that agency. In its notification of decision, QIDC advised Mr Christie that its Government Schemes Division held a file responsive to the terms of his access request, and that full access was granted to that file. However, QIDC advised that other documents concerning the Rural Loan Facility which Mr Christie maintained with the Corporation's Dalby branch were not subject to the FOI Act, as QIDC contended that they fell within the scope of s.11(1)(k) of the FOI Act, which excludes from the Act's application "Queensland Industry Development Corporation in relation to its investment functions".
- 5.3 Initially, QIDC argued that it had not made a "decision" which was subject to review by the Information Commissioner. However, my view was that the question of my jurisdiction was dependent on the determination of the issue of whether the documents in question did, or did not, relate to QIDC's "investment functions", and that as an appeal tribunal of limited jurisdiction, I had both the power and a duty to embark upon a consideration of issues relating to the limits of my jurisdiction. It was essential to the exercise of my power in this regard that I examine the documents to determine whether they related to QIDC's "investment functions", and accordingly I required QIDC to produce the documents in issue.
- 5.4 After reviewing relevant case-law on point, I determined that in the context of s.11(1)(k) of the FOI Act, the phrase "investment functions" must be construed as meaning those functions of the QIDC which involve the laying out of money, or the placing of capital, with the purpose or intention of obtaining a return of income or profit from the employment of those funds. According to that meaning, I concluded that the documents relating to the rural loan facility to which access was refused in reliance on s.11(1)(k) of the FOI Act did relate to the "investment functions" of QIDC, and that accordingly QIDC was entitled to refuse Mr Christie access to those documents.

Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs (Decision No. 93002, 30 June 1993) - Reproduced in full at Appendix 6

- 5.5 In this case, I was asked to review a decision of the Department refusing to grant access to documents comprising consultation comments on policy proposals being developed by another agency for eventual consideration by Cabinet. The basis for the agency's refusal to grant access to the documents sought was that they comprised matter relating to the deliberative processes of government within the meaning of s.41(1)(a) of the FOI Act, and that disclosure of that matter would be contrary to the public interest.
- 5.6 In my decision, I explained the proper construction of s.41 of the FOI Act. The decision contains an explanation of the concept of the "public interest" in FOI legislation, and an explanation of the objects of Queensland's FOI legislation, which include enhancing openness and accountability of government and promoting informed public participation in the decision-making and policy forming processes of government.

- 5.7 I determined that the applicant was entitled to have access to the matter which had been claimed to be exempt under s.41 of the FOI Act, except for a small portion of one document which was exempt matter under the "Cabinet matter" exemption provided for in s.36(1) of the FOI Act.

**Re Smith and Administrative Services Department
(Decision No. 93003, 30 June 1993)**

- 5.8 Mr Smith had requested access to all documents held by the Department comprising communications between that Department and the Crown Solicitor's Office relating to a particular dispute between himself and the Department. The Department identified one document as being responsive to the terms of the access application, and refused to grant access to that document on the basis of the s.43 ('legal professional privilege') exemption. Mr Smith applied for an external review of the Department's decision in respect of that document, and challenged the sufficiency of the Department's search for documents responsive to his access application.
- 5.9 In my decision, I addressed the preliminary issue of my jurisdiction to entertain an application for review involving such 'sufficiency of search' allegations, and my powers on review (assuming that jurisdiction could be established). After examining relevant cases decided under the Commonwealth and Victorian FOI legislation, I determined that ss. 72(1) and 88(1) of the FOI Act, when read together, confer on me the jurisdiction to entertain such applications, and the power to direct that further steps be taken in an effort to locate documents responsive to the application. In the particular circumstances of the present case, one additional document was located as a result of further inquiries.
- 5.10 My decision also contains a discussion of the legislative history and intent of the s.43 exemption in the FOI Act, and a summary of the general principles which can be extracted from the recent line of decisions of the High Court of Australia concerning the nature and scope of 'legal professional privilege' at common law. On the basis of my inspection of the two documents in issue, I determined that both fell squarely within the protection afforded by the s.43 exemption, and in doing so found against the arguments advanced by the applicant concerning waiver of the privilege, and entitlement to access on the basis of personal interest or public interest.

SUMMARIES OF OTHER CASES RESOLVED UP TO 30 JUNE 1993 (INCLUDING FORMAL DECISIONS NOT INCLUDED IN THE INFORMATION COMMISSIONER'S FORMAL DECISION SERIES)

I. "Personal Affairs"

- 5.11 Several applications for external review determined in the past year involved the proper interpretation of the provisions of s.29(2) of the *Freedom of Information Act* 1992 (Qld) (the FOI Act) which, when read together with s.6 of the *Freedom of Information Regulation* 1992, requires the payment of a \$30.00 application fee "for access to a document that does not concern the applicant's personal affairs".

R and the Department of Minerals and Energy

- 5.12 In this case, the applicant sought access to documents held by the Department, having as a common linking theme actions taken by government agencies and officials which affected the applicant's freedom of access to mining leases formerly held by the applicant. The Department's initial decision-maker advised the applicant of the provisions of s.29(2) of the FOI Act, and indicated that the interpretation of "personal affairs" in relation to the FOI Act, and similar legislation in other States, is that "it pertains to material which you personally may wish to remain private, e.g. your medical history, date of birth, marital status, etc." As a result, the

original decision-maker determined that a \$30.00 application fee was payable by the applicant.

- 5.13 On internal review, the initial decision was affirmed on the basis that the documents sought did not relate to the applicant's "personal affairs", as that phrase is used in the FOI Act. The internal review decision-maker provided the following expanded explanation of the proper interpretation of "personal affairs":

"... 'personal affairs' is more limited in scope in the Act than in conversational language. It does not simply mean 'the affairs of a person: and does not, in particular, include the business or professional affairs of a person, but relates more to those matters which are of private concern to the individual, such as a person's medical, domestic or financial affairs.'"

- 5.14 The applicant remained unsatisfied with the Department's decision to impose an application fee, and sought external review. In written submissions in support of that application, he indicated that the actions taken by government, as reflected in the documents sought, had caused great misery to himself and others, and that the matter was therefore "very personal". The documents in issue were obtained and reviewed, and it was clear that many, if not most, of the documents sought, did not relate to the applicant's personal affairs. Since the terms of s.29(2) of the FOI Act and s.6 of the FOI Regulation provide that an application for access to documents need seek only one document which does not relate to the applicant's personal affairs to attract the imposition of the \$30.00 application fee, I considered that the Department was correct in requiring payment of the prescribed application fee for the processing of the application for access. I therefore decided not to review the Department's decision, pursuant to s.77(1) of the FOI Act, on the basis that I was satisfied that the external review application was misconceived and lacking in substance.

MF and Department of Transport
JF and Department of Transport

- 5.15 In each of these cases, the applicant sought documents held by the Department pertaining to a Private Hire Vehicle licence held by the applicant. The Department's response, both at the initial decision and internal review stage, was that the information sought related to the applicant's business affairs, and that accordingly the \$30.00 application fee prescribed by s.29(2) of the FOI Act and s.6 of the FOI Regulation must be paid as a pre-condition to the processing of the applications. Each applicant sought external review of the Department's decision, on the basis that the information sought related to the applicant, and therefore concerned the applicant's "personal affairs".
- 5.16 After obtaining and reviewing the documents sought, a member of my investigative staff contacted one of the applicants to discuss the concept of "personal affairs", as that phrase is used in the FOI Act. Following that discussion, that applicant conceded that the documents sought related to his business affairs and indicated that, on that basis, he was prepared to pay the application fee and to withdraw his application for external review. The second applicant subsequently decided to adopt the same course of action.

II. Deemed Refusals/Time Extensions

B and Queensland Police Service
H and Queensland Police Service

- 5.17 Each of these cases involved an application for external review of the agency's deemed refusal to grant access to documents sought, as a result of its failure to determine the access application and notify the applicant of the outcome within the 'appropriate period' prescribed by s.27(7) of the

FOI Act.

- 5.18 In B's case QPS informed me, upon receiving notification of my intention to review the deemed refusal of access, that it had already made its determination on B's access application, and mailed its notification of decision and reasons to B, together with those documents to which access was being granted. In H's case, the agency advised me that its decision had been made and was ready to be posted to the applicant, together with the documents to which access was being provided.
- 5.19 In each case, a member of my staff contacted the applicant to advise of this development, and to discuss the options available to the applicant in such circumstances. It was pointed out to the applicants that technically the agency had no jurisdiction to make a decision once a valid application for external review had been lodged, and that if the external review process continued, it would require me to obtain and examine all of the documents in issue, and obtain submissions from both parties as to the validity of the exemptions claimed for any documents to which access was not granted. In contrast to this process, which would necessarily take some time to conclude, the applicants had the option of withdrawing the external review application, which would enable them to immediately gain access to at least some of the documents sought, and would still permit them to pursue the normal avenues of internal review, and if necessary, external review, to the extent that they were dissatisfied with the agency's determination.
- 5.20 B confirmed receipt of the agency's decision, and indicated that she would review the agency's decision and the documents released to her, and advise whether she would withdraw her application for external review on the basis that she was content with the agency's response. B's application for external review was subsequently formally withdrawn on that basis.
- 5.21 H indicated that in light of the options presented, he wished to withdraw his application for external review, as that would permit him to get access to the documents he sought as quickly as possible. His application for external review was formally withdrawn on that basis.

M and Department of Family Services and Aboriginal and Islander Affairs

- 5.22 In this case, M lodged an application for external review on 19 March 1993, on the basis of the Department's deemed refusal to determine his application for access, which had been lodged with the Department in mid-December 1992. In his application for external review, the applicant indicated that, despite several telephone inquiries, he had heard nothing about the progress of his application since receiving initial acknowledgment from the Department.
- 5.23 Following notification of my intent to review the Department's deemed decision refusing access to the documents sought, the Department advised that the determination of the application had been delayed pending resolution of difficult policy issues, and the necessity of third-party consultations pursuant to s.51 of the Act. In the circumstances, the Department made application to me, under s.79(2) of the Act, for further time to deal with the application.
- 5.24 I advised the applicant of the Department's request for a time extension, and the factors cited by the Department in support of that application, and requested that he advise whether he was prepared to consent to the time extension sought, and if not, to provide me with the reasons for his opposition, including particulars of any prejudice which he asserted he would suffer if the requested time extension was granted. The applicant replied that he was agreeable to the time extension requested, provided that the Department gave an explanation of the "difficult policy issues" which it asserted were involved in his application. The applicant was subsequently advised by a member of my staff that the Department's decision on his access application would include the particulars of the basis for that decision, including the public interest factors taken into consideration by the Department, and that to the extent that he remained dissatisfied with the Department's decision at that time, he would be entitled to pursue the normal avenues of internal

review and, if necessary, external review. On that basis, the applicant indicated in writing that he consented to the time extension sought by the Department.

- 5.25 In view of the positions of both parties, I considered that in the circumstances, the Department's request and the time requested, were reasonable, and therefore decided to exercise the discretion afforded by s.79(2) of the FOI Act to grant the Department's application for further time to deal with the application. In notifying the applicant of my decision on the Department's application for further time, I again indicated that he would be entitled to pursue the normal avenues of review to the extent that he was dissatisfied with the Department's decision on his application. He was further advised that in the alternative, in the event that the Department did not meet the new deadline for determining his application, he would be entitled to lodge a fresh application for external review on the basis of a fresh deemed refusal of access by the Department. In view of this possibility, the Department was requested to advise the applicant directly if it encountered any difficulty in complying with the new deadline.

F and Criminal Justice Commission

- 5.26 In this case, the access application lodged by F in early December 1992, was misdirected and not received by the CJC until early January 1993. On 23 March 1993, F lodged an application for external review, on the basis that the CJC's response was "overdue under the FOI Act". My preliminary investigation disclosed that the CJC had written to the applicant initially on 8 January 1993 to acknowledge receipt of his application, and to request clarification of that application. Having received no reply to that letter, the CJC again wrote to the applicant on 24 February 1993, requesting further particulars "so that [the application] might fully comply with s.25(2)(b) of the FOI Act". The applicant contacted the CJC on 8 March 1993 to provide the requested clarification of his access application.
- 5.27 The CJC contended that F's access request was not a valid application until the requested clarification was received on 8 March 1993, and that the 'appropriate period' for determination of his application had therefore not expired when F lodged his external review application. In the alternative, the CJC stated that, if my view was that the application had been valid when originally lodged, then the CJC was making a request to me for further time to determine the application, pursuant to s.79(2) of the Act. In support of its request for a time extension, the CJC indicated that the application involved an extremely large number of documents, and that it expected to be in a position to finalise the matter by mid-April 1993.
- 5.28 On the basis of my review of the applicant's access application, my view was that it had been a valid access application when originally lodged. Accordingly, the matter was properly within my jurisdiction as an application for external review of the CJC's deemed refusal of access to the requested documents (the time limits prescribed by the FOI Act having expired) and that in the context of that proceeding I would consider the CJC's application for a time extension. In accordance with my usual practice in such cases, the applicant was provided with the particulars of the agency's request for a time extension and the grounds for that request, and was asked to indicate to me whether he was prepared to consent to the time extension sought, or alternatively, to indicate the basis for his objections to the requested time extension, including any prejudice which he asserted he would suffer if the time extension were to be granted. The applicant's response was that he objected to any time extension, intimating that he was concerned for his safety and that any further time granted to the CJC would be utilised to "destroy incriminating evidence". He demanded an undertaking that no further time extensions would be sought, and that if a review was sought that it be determined by a particular date.
- 5.29 On the basis of the submissions of the parties, I determined that the applicant had provided no evidence demonstrating that he would be prejudiced by the granting of the time extension sought. In all of the circumstances, I accepted the factors set out by the CJC in support of its application

as sufficient justification for the requested time extension. I therefore decided to exercise my discretion to grant the time extension sought, and notified the applicant of his options in the event that he was dissatisfied with the agency's determination at that time, or in the alternative, if no decision had been made at that time.

Department of Justice and Attorney General and G

- 5.30 In this case, the Department brought an application for a time extension pursuant to s.79(2) of the FOI Act, on the basis that it would be unable to comply with the impending time limit for responding to G's access application because of the necessity to complete extensive third party consultations under s.51, and that G had refused to consent to the Department's informal request for further time to process that application.
- 5.31 I determined that s.79(2) imposes a pre-condition to an agency making application to the Information Commissioner for further time to deal with an FOI access application, and to the Information Commissioner's exercise of jurisdiction to allow further time. The pre-condition, in my view, is that an application for external review must have been lodged for review of a decision that is deemed to have been made by virtue of s.79(1), even though no actual decision has been made. Accordingly, in my view, the agency's application was premature, as the time period for determining G's FOI access application had not yet expired, and G had not yet sought review by the Information Commissioner on the basis of a deemed refusal of access under s.79(1). There was therefore no entitlement for the agency to make an application for further time under s.79(2), and no jurisdiction for the Information Commissioner to deal with such an application.
- 5.32 I note that a recent amendment to s.79(2) of the FOI Act has removed the ambiguity which gave rise to the particular problem of statutory interpretation raised in this case.

G and Queensland Police Service

- 5.33 G applied for external review of the Queensland Police Service's deemed decision refusing to grant access to documents concerning individuals on whom that agency held "Special Branch" files.
- 5.34 Given that G's application for external review had been lodged only one day after the expiry of the relevant 'appropriate period' for determination of his access application by QPS, and the option available to the agency of applying to me under s.79(2) of the FOI Act for further time to deal with the application, contact was made with the agency to ascertain the status of the matter. The agency indicated that while it had a large back-log of applications to deal with, it was prepared to review G's application to determine whether it could be expedited.
- 5.35 G was then contacted and advised of the above, and that if the timeframe proposed by QPS for determination of the matter was acceptable to G, it would be preferable for all concerned if G would agree to withdraw his application for external review on an undertaking by QPS to issue a formal determination within the agreed period of time. In this way, the QPS could properly assess the material involved, and issue formal written reasons for their decision, which would be subject to the usual mechanisms of internal review and, if necessary, external review. This would be preferable to my office having to call for and examine the documents in issue, and to receive submissions on each document claimed to be exempt.
- 5.36 In advising G of my views in this regard, several problems inherent in his access application were also discussed. In the first place, the request was framed in terms of seeking the names of individuals on whom Special Branch files were kept, and an indication of which of those files were available for perusal. It was pointed out that the FOI Act provides a right of access to

"documents", so that the names of individuals on whom Special Branch files were kept would only be accessible to the extent that a list of such names existed. Further, G was advised that any documents responsive to the terms of his application which did exist would, *prima facie*, be exempt from disclosure under the 'personal affairs' exemption (s.44(1)), on the grounds that their disclosure would disclose information concerning the personal affairs of the individuals named in those files. In the circumstances, G's entitlement to access would depend upon whether it could be established that disclosure of such matter "would, on balance, be in the public interest".

- 5.37 Within a matter of days, QPS notified me that it had located some documents which appeared to be almost exactly responsive to the terms of G's access application. As the agency had technically lost jurisdiction to continue to deal with the matter upon the lodging of G's external review application, I authorised the agency to release those documents directly to G. G subsequently confirmed to me in writing that while the documents received had not been particularly helpful, he did not wish to pursue the matter further, and was withdrawing his application for external review.

III. "Reasonable search"

D and Brisbane North Regional Health Authority

- 5.38 In this case, the applicant sought access to medical records concerning her held by the respondent agency. The Department's response was that the requested file could not be located, despite a "thorough and reasonable search", and that the initial decision-maker accepted that the records had been destroyed in accordance with the *Libraries and Archives Act* 1988. The applicant persisted, and sought internal review of that determination. The internal review decision-maker advised the applicant that a further search had been conducted and that the requested records could not be traced, but that she would be advised if further information came to hand. Subsequently, the internal review officer advised the applicant that "a further extensive and detailed search of all known records ... has been conducted by a number of staff over recent days and no record at all of your treatment/management ... has been located."
- 5.39 My preliminary investigation of D's subsequent application for external review included a request that the respondent agency provide me with particulars of the searches conducted for documents responsive to her application. The agency response was that on at least three separate occasions, five staff members had carried out extensive searches in an attempt to locate the file in question. The agency's search efforts, which had taken some 49½ hours, had included physical extraction of each file (both current and old) held on site, as well as off-site storage. In the result, the agency was satisfied that every effort had been made to locate the file in question.
- 5.40 Following discussions between my staff and the authority's FOI Co-ordinator as to possibilities for further search and inquiry, and as to the implausibility of documents having been destroyed under the *Libraries and Archives Act* 1988 without some record being retained to evidence authorisation of destruction, I was advised some two weeks later that the missing file had been located in a storage area. The applicant was contacted and advised of this development, and asked whether she was now prepared to withdraw her application for external review on the basis that the agency would now proceed to make a determination on her access application, with that determination subject to the normal avenues of internal review and, if necessary, external review. Further discussion with both the applicant and respondent resulted in an agreement that the applicant would withdraw her application for external review on the condition that the time period for the agency's determination of her access application would run from the date on which the file had been found. The applicant was provided with written confirmation of this agreement, details of the deadline within which the agency's determination must be made, and details of her rights of review in respect of the agency's determination (or deemed decision). The applicant then formally withdrew her application for external review.

IV. "Dob-in letters"

RS and Queensland Police Service

- 5.41 The access application lodged by S with QPS was very specific, seeking access to a letter about himself which he alleged had been sent by a particular individual (whose name and address he included in his access request) to the Department of Transport, and subsequently transferred to QPS for investigation. The agency's decision on internal review was to confirm its original decision to refuse access to the one document identified as being "relevant to" S's request, on the basis of the 'law enforcement' (s.42(1)(b)) and 'confidential communications' (s.46(1)(b)) exemptions in the FOI Act.
- 5.42 In the course of my preliminary investigation, I requested further submissions from the agency on the s.42(1)(b) exemption, as it appeared to me that the agency's response to S's very specific access request had, in fact, confirmed the identity of the document's author. A member of my staff contacted the applicant to discuss the external review process, and to obtain further details concerning his application and the document in issue.
- 5.43 When advised that the nature of the external review process would necessarily involve consultation with the author of the document in question to ascertain his views on its disclosure, the applicant indicated that even if the document was released to him, there really wasn't much he could now do with it, and that he would prefer not to disturb the present state of relative peace between himself and the person he suspected of having authored the letter in question. Accordingly, S formally withdrew his application for external review.

V. Miscellaneous Matters

S and Queensland Police Service

- 5.44 In this case, S (a serving member of the Queensland Police Service) sought external review of an internal review decision by the QPS confirming its original decision to refuse access to certain documents in his personal file concerning pending disciplinary charges against him.
- 5.45 A preliminary conference was conducted with representatives of the agency to discuss the issues raised by S's application for external review. Shortly thereafter, the Department advised that the hearing into the disciplinary charges against S had been concluded, and that in view of that fact, and its re-examination of the documents in light of the issues discussed at the preliminary conference, it was prepared to release a considerable number of the documents to S. However, QPS maintained that six of the documents in issue were exempt under ss.41(1), 43(1), 42(1)(b) or 46(1)(b) of the Act.
- 5.46 S was advised of QPS's position, and of my preliminary view in respect of the exemption claims advanced by that agency (i.e. that three of the six documents remaining in issue appeared to be exempt under s.43), and was asked to advise whether he still wished to press for access to those documents. On the basis of independent legal advice, S subsequently indicated that he would not pursue access to the three documents for which QPS had claimed exemption under s.43 (the 'legal professional privilege' exemption), but still wished to gain access to the remaining three documents.
- 5.47 It was apparent from S's written advice to me that he had already obtained from another source a copy of one of the three documents remaining in issue, which were related in subject matter. In light of that advice, I requested that QPS consider whether there was any point in continuing to claim exemption for those documents. QPS subsequently advised that, in view of the release to S of one of the three documents in issue, it was abandoning its exemption claims for those

documents and was prepared to release them to S. On that basis, S formally withdrew his application for external review.

L and Queensland Industry Development Corporation

- 5.48 The factual background of this case was somewhat similar to that in the case of *Re Christie and Queensland Industry Development Corporation* (see paragraphs 5.2 to 5.4 above). In the present case, L sought access to documents held by QIDC concerning his dealings with that agency, and sought amendment of documents held by QIDC concerning him. The agency's response was that documents concerning his dealings with the QIDC's Rural Loan Facility Programme to which access was sought concerned QIDC's investment functions, and were therefore outside the scope of the FOI Act pursuant to s.11(1)(k) of the Act. Concerning other documents sought, pertaining to L's dealings with QIDC under the Government Schemes of Assistance programs, QIDC's response was that it refused to deal with the application on the basis of s.28(2) of the FOI Act. The applicant's request to amend documents was refused on the basis that the amendment mechanism provided in the FOI Act applies only where an applicant had had access to the documents in question, which was not the case here. L applied for external review of QIDC's determinations.
- 5.49 In response to his application for external review, received on 19 February 1993, I advised L that s.73(3) of the FOI Act precludes a person from making an application for external review to the Information Commissioner until the applicant had first exhausted his rights of internal review, and that accordingly I had no jurisdiction to entertain his application for external review at the present time. The applicant subsequently pursued internal review, and obtained determinations from QIDC on the matters set out in the preceding paragraph. Although invited to submit the particulars of the aspects of the internal review determinations which he wished to have reviewed, no such application was received, presumably because L considered it would have been futile in the light of my decision in *Re Christie*.

F and Brisbane North Regional Health Authority

- 5.50 F sought access to records concerning her medical treatment held by the respondent agency. The agency's original decision, affirmed on internal review, was to grant full access to the records in question with the exception of one entry which was deleted from access on grounds of the 'personal affairs' (s.44(1)) and 'confidential communications' (s.46(1)(b)) exemptions in the FOI Act. F sought external review of the agency's decision, arguing that she should be entitled to see everything about her in her own medical records.
- 5.51 During my preliminary investigation into F's application, the document in issue was obtained and reviewed. In making its determination on the access application, the agency had determined that the withheld portion of the record was clearly exempt, and that there was accordingly no necessity to consult with the author of that information to ascertain his views concerning disclosure. However, in keeping with my obligation under s.74 of the FOI Act to notify any person who I "consider would be affected by the decision the subject of the review", that third party was located and asked to advise whether he had any objection to the information in question being disclosed to the applicant. The third party subsequently advised that he had no objection to the information being disclosed to F.
- 5.52 The agency was notified of the third party's consent to disclosure, and was asked whether it was prepared in the circumstances to agree to the disclosure of the information to the applicant, either on the basis that the exemptions claimed no longer applied in the circumstances, or by exercising the discretion afforded by s.28(1) of the FOI Act to release exempt matter. Alternatively, the agency was requested to consider whether it would be appropriate in the particular situation to consider employing the mechanism provided in s.44(3) of the FOI Act to disclose information to

a qualified medical practitioner nominated by the applicant, and approved by the principal officer of the agency concerned. On the basis of the agency's subsequent advice that it had no objection to disclosure of the information directly to the applicant, the information was forwarded directly to the applicant, thus resolving the external review proceedings.

B and Government Superannuation Office

- 5.53 B, a consultant psychiatrist, lodged an external review application against a decision taken by the Government Superannuation Office (the GSO) to release a psychiatric report prepared by B for the GSO. The individual seeking access to the report was the patient who was the subject of the report, and the GSO had determined, despite B's objections, that the documents should be released to the applicant by means of the 'nominated medical practitioner' procedure set out in s.44(3) of the FOI Act. The basis for B's objection to the report's disclosure to the patient was that the patient had entered into a contractual agreement with him, which provided that the report could not be released to any party other than the GSO without the express permission of both the patient and B. The individual seeking access to the report had indicated to the GSO that, while he would prefer to receive a copy of the report himself, he was prepared to accept disclosure to his nominated medical practitioner in accordance with s.44(3) of the FOI Act, and nominated his G.P. for this purpose.
- 5.54 I considered that this was an appropriate case in which to exercise the mediation power conferred on me pursuant to s.80 of the FOI Act, and therefore convened a mediation conference involving B and representatives of the GSO. At that conference, it was pointed out to B that the contractual basis for the confidentiality agreement which he asserted precluded release of the document was doubtful, given that the patient had been required by the GSO to attend for the examination by B (such examination being a requirement for assessment of the patient's eligibility for pension benefits) and had attended very reluctantly. Secondly, it was pointed out that the confidentiality agreement which B argued the patient had voluntarily entered into, could logically only apply to prevent disclosure to third parties, and arguably could not be used against the patient himself. Further, it was noted that B's contractual relationship in connection with the provision of the report in question was not with the patient, but rather was with the GSO, and that the GSO's letter to B requesting that he conduct an examination of the patient and provide a report to the GSO had specifically warned B of the possible introduction of FOI legislation in Queensland, with the resulting possibility that the GSO may be required to release the report to the patient. It was conceded that special circumstances may exist in particular cases to warrant withholding a psychiatric assessment from the patient concerned (e.g. where there was a risk of physical violence), but there did not appear to be any special circumstances in this case that could not be catered for by the s.44(3) mechanism.
- 5.55 Following the mediation conference, B indicated that he was not prepared to agree to the report's release to the applicant's G.P., but would consider agreeing to its release to the applicant's former treating psychiatrist, if that psychiatrist was prepared to act as the nominated medical practitioner in this regard. Following confirmation that the psychiatrist in question was willing to act in that capacity, both B and the applicant confirmed their agreement to the report's release to that psychiatrist in accordance with s.44(3) of the Act. The GSO generously agreed, in the circumstances, to pay for the applicant's consultation with the psychiatrist to whom the report was released by the GSO.
- 5.56 Following confirmation that the report had been released in accordance with the agreement reached between the parties, B formally withdrew his application for external review.

J and Workers' Compensation Board

- 5.57 J applied for external review of a decision of the Workers' Compensation Board (WCB), refusing

to grant access to certain documents in reliance on s.42(1)(a) of the FOI Act [which applies to matter which, if disclosed, could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law (including revenue law) in a particular case]. J also complained that he had not been provided with a transcript of an interview conducted by the WCB with a third party, although he had been provided with an audio tape of that interview.

- 5.58 The issue of access to the transcript was resolved very quickly through mediation. After pointing out to the WCB the provisions in the FOI Act governing forms of access, which include either (or both of) provision of an audio tape, or provision of a written transcript of the words recorded, I asked whether the Board was prepared to provide such a written transcript. The Board subsequently confirmed that it was prepared to provide J with that transcript, and J therefore withdrew that aspect of his review application.
- 5.59 With respect to the remaining documents in issue, J argued that they comprised statements made by J and another person in the course of a WCB investigation into alleged compensation fraud, and that the WCB was not entitled to rely upon the s.42(1)(a) exemption, on the grounds that the WCB investigation had exceeded the limits prescribed by law, within the meaning of the s.42(2)(a)(i) exception to the s.42(1) exemption. Specifically, J argued that he and the other individual who had made statements to the WCB investigators had not been warned regarding the possible consequences of their answers to the questions, submitted to them, nor had they been advised, prior to being required to answer questions, of the allegations made against J upon which charges could or may be laid.
- 5.60 After consideration of the submissions made by J's solicitors in respect of s.42(2)(a)(i), and of relevant case law, I advised that my preliminary view was that the exception was not made out by J, and provided citations to relevant authorities supporting that view. I extended to J a further opportunity to satisfy me that s.42(2) applied in the circumstances of his case. The applicant's solicitors subsequently advised, however, that in consequence of the WCB investigation, J had been charged with having committed an offence contrary to the *Workers' Compensation Act*. In view of the impending hearing of the matter, and the WCB's indicated willingness to disclose, through its barrister, the type of information which formed the basis of the allegations against J, J formally withdrew his application for external review.

W and Workers' Compensation Board

- 5.61 W, a corporate entity, sought external review of the Board's decision refusing to grant access to certain documents, on grounds that they concerned the personal affairs of another individual (s.44).
- 5.62 The documents to which W sought access concerned a successful claim for compensation benefits made by a former employee of W. W sought access to all documentation concerning the Board's decision in the matter, so as to better understand the basis for the ruling which W felt had unfairly penalised it through the loss of its 'no claim bonus'. The particular documents to which W was denied access in response to its FOI application were two statements submitted to the WCB by the former employee in question, and two medical reports relevant to the employee's compensation claim.
- 5.63 W's application for external review revealed a fundamental misunderstanding of the nature of my jurisdiction:

"We respectfully ask of you to please direct that the Workers Compensation Board of Queensland be personally responsible for any monies they see fit to pay to [W's former employee] by way of Workers Compensation Claim and that we be exonerated from any loss of Bonuses pertaining to this claim."

- 5.64 After examining the documents in issue, a member of my staff met with the principal of W to discuss the nature of the external review process, and to convey a preliminary view that the exemptions claimed by the Board for the documents in issue appeared to be valid. A representative of the Board also attended at that meeting, on very short notice, to discuss with W the prospects of achieving his real aim, which appeared to be to overturn the determination which had been made by the Board on the employee's compensation claim.
- 5.65 Following that meeting, W's principal formally advised me that he accepted that the ultimate object he was hoping to achieve through gaining access to the documents in question was not possible, and that he therefore wished to withdraw W's application for external review.

W and Board of Senior Secondary School Studies (Department of Education)

- 5.66 W sought an external review of the Board's decision refusing access to certain information in his personal file on grounds that it comprised information concerning the personal affairs of other individuals, within the meaning of s.44(1) of the FOI Act.
- 5.67 Upon examination of the documents in issue in the review proceedings, it became apparent that there had been some confusion over the nature of one of the exemptions made by the Board. When the true nature of the information deleted was explained to the applicant, he indicated that he was not interested in obtaining that information. His application for external review was treated as having been withdrawn.

M and Department of Administrative Services

- 5.68 In this case, the applicant (M) was a corporate third party which had been consulted by the Department on an access application received by the Department from another corporate entity, C, for information concerning dealings between the Department and M. M is a media monitoring service. Despite M's objections to the disclosure of any of the information sought by C, the Department's internal review determination was to uphold the original decision to disclose information to C subject to the deletion of certain matter considered to be exempt under s.45(1).
- 5.69 In accordance with my statutory obligation to notify parties who I consider would be affected by the decision which is the subject of external review, C was notified of M's external review application and invited to make application to participate in the review. C subsequently made such application, and was granted permission to participate in the external review proceedings.
- 5.70 Following receipt of the documents in issue from the Department, and written submissions from both the Department and M in support of their respective positions, the documents were inspected for the purpose of forming a preliminary view as to the validity of the exemption claims made by M. I subsequently advised both M and the Department of my preliminary views, pointing out that one deletion which had been made was not consistent with the Department's own reasoning, and giving notice it would be an issue before me whether that deleted information should also be released to C. The Department then advised that it was now prepared to release that information to C, and provided a revised submission in support of its position.
- 5.71 After M was advised of the Department's revised position, the written submissions of both the Department and M were provided to C, which was requested to provide written submissions in support of its claim to access to the documents in issue. However, those submissions became unnecessary, as M then advised me that it was withdrawing its application for review, and was prepared to accept the Department's initial determination in the matter. On that basis, M formally withdrew its application for external review.

B and Queensland Corrective Services Commission (#1)

- 5.72 B applied for external review of the Commission's deemed refusal to provide access to information requested by him, as a result of its failure to either acknowledge or determine his application within the time periods prescribed in the FOI Act.
- 5.73 The access application which formed the basis of this review proceeding arose out of a previous access application which B had lodged with the Commission. In the course of processing that earlier application, the Commission had advised B that the nature of the requested documents necessitated consultation with third parties to obtain their views on disclosure. In response to that notification, B lodged a fresh access application with the Commission for the names of those persons consulted by the Commission in connection with his previous request.
- 5.74 When contacted by a member of my staff in response to B's application for external review of its 'deemed refusal', a representative of the Commission's FOI Unit conceded that it had failed to acknowledge receipt of his fresh access application, or to make a determination within the time prescribed in the FOI Act. However, the Commission's position was that the issues raised by B in his second access application were already being addressed in his previous access application (which was already the subject of external review proceedings).
- 5.75 I wrote to B to advise that I was not satisfied that his second access application constituted a valid application for access to a "document of an agency" within the meaning of s.25 of the FOI Act, and that consequently, his application for external review was invalid. The reason for my view in this regard was that the right of access to information held by government which is provided for in the FOI Act applies to information which already exists in documentary form, and that the Act imposes no obligation on an agency to create a list of names (or in fact to create any material) in order to satisfy an FOI request.
- 5.76 Moreover, I advised B that the Commission's decision that certain persons would have to be consulted in the course of determining his earlier access application, would necessarily have been made on the basis that those individuals were named in, or could be readily identified from, the documents which were responsive to that earlier application. Since the Commission's views on B's entitlement to have access to the names of those individuals were reflected in its decision on his earlier application, which was already the subject of external review proceedings, it was my view that the issue which B now sought to have reviewed was already before me for determination.
- 5.77 I drew B's attention to s.77(1) of the FOI Act, which confers upon me the jurisdiction to refuse to review, or to review further, a decision in relation to which an application for external review has been made, if satisfied that the application is "frivolous, vexatious, misconceived or lacking in substance". In view of my analysis of the relative merits of his second application for external review, as outlined above, I asked that B advise whether he was prepared to withdraw that application. Written confirmation was subsequently received from B of his withdrawal of the application for review.

B and Queensland Corrective Services Commission (#2)

- 5.78 This review application involved the same applicant as in the previous case summary, and also arose out of his original access application. There were two separate aspects to this external review. In the first place, B argued that the Commission had deliberately falsified the date on its letter to him notifying him of its decision on his original access application, and had refused to amend the incorrect date of that correspondence in compliance with Part 4 of the FOI Act. Secondly, B argued that the Commission had failed to respond within the prescribed time period to his application to amend three documents released to him under the FOI Act, and was

therefore deemed to have refused to grant him the amendments sought.

- 5.79 Following receipt of further background documentation from the Commission, I advised B that, with respect to the latter three documents, it was my view that the Commission had in fact made a decision refusing to grant the amendments to those documents which he had requested. Accordingly, I indicated to B that I had no jurisdiction to entertain an application for external review in respect of those documents until he had exhausted his rights of internal review.
- 5.80 Concerning the remaining document, I requested that the Commission provide a written response to B's allegation that its decision letter had been intentionally back-dated to give the false and misleading impression that the Commission had complied with the statutory time period for determination of his original access application. The Commission initially responded that the date of the letter was accurate, in that it reflected the date on which its decision had been made, and the letter notifying the decision had been dictated, which was a Saturday. The Commission indicated that the fact that the letter (and enclosures) had not been mailed to B until the following Wednesday was due to internal administrative requirements for the preparation and checking of the letter and accompanying documents.
- 5.81 I subsequently wrote to the Commission to point out that, in my view, it was normal commercial practice for correspondence to bear the date on which it was signed and despatched, and that the reasons for adhering to this practice were particularly compelling where statutory time limits for the doing of certain acts are dependent upon the date of official notification of a decision, or of some step in a statutory process. The Commission responded that it was prepared to concede that its notification letter should have borne the date on which it was signed, and would amend the letter accordingly. B was advised that the agency's concession in this regard resolved the only matter in dispute before the Information Commissioner.

F and Queensland Health E and Queensland Health

- 5.82 Both of these cases involved applications by journalists for access to documents held by the Department concerning the health care delivery system in South-East Queensland. While E's access application was drafted in these general terms, F's access application specifically requested access to documents pertaining to a proposal for the transfer of the Mater Childrens' Hospital to the Queen Elizabeth II Hospital. In each case, the Department's internal review decision confirmed its original refusal to provide access to the documents requested on the grounds that they related to the Department's 'deliberative processes' (s.41).
- 5.83 In each case, I considered that the statement of reasons provided by the Department in support of its decision was not adequate, and did not comply with the statutory requirements under s.34(2)(f) and (g) of the FOI Act, read in conjunction with s.27B of the *Acts Interpretation Act* 1954. I therefore invoked my power, under s.82 of the Act, to require that the Department provide me, and the applicant in each case, with an additional statement of reasons containing further and better particulars which overcame certain defects which I had identified to the Department. I was subsequently advised that, in each case, the Department wished to alter the basis of the decision under review, and was now prepared to release many of the documents responsive to the two access applications.
- 5.84 In view of this development, I thought it appropriate to hold mediation conferences in both matters, to discuss the issues arising in connection with the documents remaining in dispute.
- 5.85 In connection with F's application for external review, the Department indicated that it was now prepared to release all documents in issue with the exception of two draft Cabinet submissions and a draft contractual agreement. F indicated that he was not interested in pursuing a claim for

access to the latter document, leaving only the two draft Cabinet submissions in dispute. Following discussion at that mediation conference, the Department's representatives indicated that they wanted to take advice on the validity of the 'Cabinet documents' (s.36) exemption, in view of the public announcement that the plans under consideration in those documents had been abandoned. At the same time, F was asked to consider whether he still wished to pursue access to those two documents. F subsequently advised that he did not wish to pursue the matter further, and withdrew his application for external review.

- 5.86 In E's case, the Department indicated at the mediation conference that the only documents to which it was still not prepared to provide access were a final report, and the draft versions of that report. In response to the Department's position that the final report had always been intended for public release (and that approval for such release was imminent), it was pointed out that it probably would have been preferable for the Department to have employed the 'deferred access' mechanism provided for in s.31 of the Act, rather than refusing access on grounds of 'deliberative process' (s.41). It was also pointed out to E that there was no reasonable prospect of resolving the external review proceedings within one week (the anticipated time-frame for release of the report). In light of the Department's advice concerning the report's imminent release, E indicated that he was prepared to await release of that document, and was not interested in pursuing access to the draft versions of that report. The final report was subsequently released as anticipated, and E advised that he was satisfied with the outcome, and withdraw his application for review.

BD and MD and Department of Transport

- 5.87 BD and MD applied for external review of the Department's decision to refuse access to certain documents. The original access application by BD and MD was for documents held by the Department concerning commercial vehicle licences held by BD and MD, and certain related matters. Of the documents identified by the Department as responsive to the terms of the access request, certain deletions were made of matter determined to be exempt under the 'personal affairs' (s.44), 'law enforcement' (s.42), 'business affairs' (s.45) or 'breach of confidence' (s.46) exemptions of the FOI Act.
- 5.88 Preliminary inspection of the documents in issue confirmed that the deleted matter comprised two separate categories. The first type of such matter comprised personal details deleted from "dob-in" letters sent to the Department concerning alleged information on the business affairs of another company operating in the same business as BD and MD.
- 5.89 The nature of the information contained in the first group of deleted matter was conveyed to BD and MD, who confirmed that they were not interested in obtaining that information. On that basis, they advised that they were abandoning that aspect of their external review application, but still wished to obtain access to the information concerning the other business entity to which access had been refused.
- 5.90 The Department's records indicated that it had consulted with a representative of that other corporate entity prior to making its decision on access to the documents concerning its business affairs. However, in the course of inquiries by a member of my staff for the purpose of satisfying my obligation to notify that party of the external review proceedings, it became apparent that through amalgamation of that company with another entity, authority to speak on behalf of the company with respect to its views on disclosure of information to BD and MD rested not with the person consulted by the Department, but with another individual.
- 5.91 When contacted, that other individual indicated that he had no objection to the information in question being disclosed to the applicants. In the circumstances, the Department advised that it was abandoning its exemption claims for those documents, and the applicants agreed to withdraw

their application for external review.

CHAPTER 6 - POSTSCRIPT - RESPONSE TO EARC REPORT ON REVIEW OF APPEALS FROM ADMINISTRATIVE DECISIONS

- 6.1 I have called this chapter a postscript because every other part of this Report was finalised ready for forwarding to the printer on 1 September 1993, when I received a copy of EARC's Report on Review of Appeals from Administrative Decisions (No. 93/R3) (the Administrative Appeals Report).
- 6.2 Paragraph 11.103 of that Report recommends that the jurisdiction of the Information Commissioner under the FOI Act be transferred to a new general administrative appeals tribunal (QICAR) whose creation is recommended elsewhere in the Report, and that the Office of the Information Commissioner be abolished.
- 6.3 EARC has made this recommendation without undertaking any form of review of, or inquiry into, the actual operations of the Office of the Information Commissioner or how effectively it is performing its functions. EARC has not sought any information from me relating to these matters.
- 6.4 EARC has given no substantive reasons in support of the recommendation. Such comment as it has been prepared to offer in respect of the recommendation is set out at pages 26.31 to 26.33 of Appendix 26 of the Administrative Appeals Report. The comments begin by quoting EARC's own recommendation from its 1990 Report on Freedom of Information (90/R6) (the FOI Report) for the establishment of a specialised Office of Information Commissioner.

"... No tribunal currently exists which could perform the external review function for FOI legislation in the same cheap, efficient, specialised and informal manner which the Commission considers can be achieved through the creation of a new independent office, to be known as the Information Commissioner." (FOI Report, paragraph 17.24)

- 6.5 Conveniently omitted, however, is the sentence which immediately followed the sentence quoted above:

"The Commission is not disposed to recommend that the external review functions under FOI legislation be given to a tribunal, and accordingly, does not presently propose, in stage 2 of its administrative law review, to further examine the issue of conferring the external review function under FOI legislation on a specialised or general appeals tribunal." (FOI Report, paragraph 17.24)

- 6.6 What then has changed to prompt the reversal of this position? It was not prompted by any study of the performance of the Information Commissioner because none was undertaken. Nor could it have been any criticism of the Information Commissioner which EARC had received, since the Administrative Appeals Report states that during the course of its review EARC did not receive any submissions that related to the Information Commissioner.
- 6.7 Part V of EARC's recommended FOI Bill had gone into considerable detail in prescribing a set of specialised procedures and powers for the Information Commissioner to discharge its specialised review role, and the provisions were enacted by the Queensland Parliament with no change apart from the stipulation that the Parliamentary Commissioner be the Information Commissioner unless another person is appointed. The FOI Report described in considerable detail the way it envisaged the Information Commissioner performing its external review functions (as set out at paragraph 2.4 of this Report). Clearly, EARC was convinced at the time of publishing its FOI Report that it had devised the correct and appropriate, specialised model for FOI dispute resolution. The view was shared by governments in other States of Australia which subsequently

enacted freedom of information legislation, with Western Australia establishing an office of Information Commissioner, and South Australia and Tasmania giving their respective Ombudsmen the power to make binding determinations in respect of FOI appeals. The Office of Information Commissioner has conscientiously, and I believe successfully, strived to adhere to the spirit of the EARC recommendations. Those who wrote EARC's Administrative Appeals Report would have no way of knowing this because they made no attempt to inquire into the performance of the Office of the Information Commissioner.

- 6.8 The only reason which appears to be seriously advanced in the Administrative Appeals Report for EARC's reversal of position on the correctness of the Information Commissioner model for FOI dispute resolution, is that the Queensland government did not strictly adhere to the recommendation in EARC's FOI Report that the Parliamentary Commissioner not be given determinative powers in respect of FOI appeals, but that a separate Office of Information Commissioner should be created. Because the Queensland Government chose to depart (notwithstanding that perfectly valid reasons existed to support its choice; see paragraph 1.9 above) from what EARC has apparently elevated to the status of a sacred principle, EARC's retort is:

"The Commission has reviewed its earlier recommendations about the creation of an Information Commissioner in the light of the government's decision. It believes that the creation of QICAR provides the opportunity to devolve the FOI Act review function on the body best suited to exercising the powers of the Information Commissioner while relieving the Ombudsman of duties inconsistent with the ordinary and proper functions of that Office." (EARC Administrative Appeals Report, p.26.33)

- 6.9 A number of things may be said about this alleged reasoning. Firstly, it exhibits a degree of contempt for a legitimate policy decision made by the Queensland government (and endorsed by the Queensland Parliament) which is consistent with its financially prudent policy of opposing the unnecessary proliferation of new statutory bodies, which occasion unnecessary expenditure of scarce public funds. I estimate that at least an additional \$200,000 per annum would be required in costs for additional staff and accommodation, on top of extra first year establishment costs, if a completely separate Office of Information Commissioner had been established, with its own premises, support staff and equipment, rather than drawing on the existing infrastructure of the office of the Parliamentary Commissioner. The government of Western Australia (a State with a slightly smaller population than Queensland) has also embraced the Information Commissioner model of dispute resolution in its *Freedom of Information Act* 1992 (WA), but decided it should function as a separate office not connected with the Western Australian Ombudsman. A comparison with the annual budget for the W.A. Information Commissioner when it is approved by the W.A. Parliament in its Budget session (expected to be in October 1993) should prove instructive, as it is likely to be approximately double that of the \$350,000 budget allowed for the Queensland Information Commissioner in 1993/94.

- 6.10 The EARC Administrative Appeals Report chiefly sought support from some remarks of the New Zealand Chief Ombudsman who as a matter of principle does not favour the office of Ombudsman being formally given determinative powers in respect of grievances. Yet paragraph 17.28 of EARC's FOI Report had described the New Zealand's Ombudsman's powers under FOI legislation as follows:

"The Commission notes that the provisions of the Official Information Act 1982 cause the Ombudsman's recommendations to 'crystallise' and become binding after 21 days unless an Order-in-Council is made, effectively vetoing the recommendations. Even if an Order-in-Council is made, a person may still seek judicial review of the reasons for the exercise of the right to veto. To that extent,

the Ombudsman's powers are determinative in effect, if not in substance."

- 6.11 EARC's stance raises the interesting question of just how much value the Queensland community should place on the point of principle which EARC seeks to elevate in this manner. Is the principle so important that it warrants the expenditure of an additional \$200,000 per annum in public funds (which has been able to be committed elsewhere in view of the policy choice which the Queensland Government in fact made)?
- 6.12 EARC is either ignorant of, or has deliberately chosen to ignore, the fact that the South Australian Ombudsman has, since 1 January 1992, exercised a statutory power to make binding determinations on the review of decisions of agencies and Ministers under the freedom of information legislation of South Australia, and that the Tasmanian Ombudsman has exercised a like power under Tasmania's freedom of information legislation since it commenced in 1992. In neither jurisdiction has the efficacy of the office of Ombudsman been compromised by performing duties which EARC has seen fit to pronounce as inconsistent with the ordinary and proper functions of that office.
- 6.13 EARC also ignores the fact that the Office of the Information Commissioner is a separate statutory authority, both in form and substance. It employs its own professional staff who are dedicated to the functions of FOI dispute resolution. The FOI Act does not confer determinative powers on the Parliamentary Commissioner, it confers them on the Information Commissioner. I am in effect the head of two separate statutory offices. When I put on my hat as Information Commissioner, I am empowered to make binding determinations in a strictly limited and clearly specified class of decisions under one statute, the FOI Act. When I put on my hat as Parliamentary Commissioner, I deal with grievances covering almost the full range of State and local government administration, but I am not empowered to make binding determinations in respect of those grievances. The distinction has been simple enough to grasp for the State and local government agencies with whom I regularly deal, and for persons aggrieved by decisions made under the FOI Act, who in any event are automatically notified by statutory requirement (s.34(2)(i) - see paragraphs 4.16 to 4.18) of precisely to whom and how they may go about applying for review of an adverse decision.
- 6.14 EARC purports to give one further reason for its recommendation (at p.26.33):
- "A further reason why this Commission considers QICAR is better suited to determine FOI Act matters is that, historically, a tribunal is better suited to hearing legal argument and developing good case law. (After four years Canada had only about 12 substantive court decisions and New Zealand one High Court decision, while Australia had 150 tribunal decisions and Quebec just over 300 (Hazell 1989, p.195).) Case law gives potential applicants guidance in their approach to seeking reviews of decisions, and invariably leads to greater certainty and consistency in the law and how it is applied."*
- 6.15 This passage exhibits a breathtaking ignorance of the field of FOI dispute resolution. As to the first sentence of this passage, what is the Information Commissioner other than a specialist tribunal which receives appeals, attempts mediation, and when mediation is unsuccessful hears legal argument, makes determinations and publishes written reasons for its determinations? The statement which appears in parentheses in the passage is quite extraordinary. It implies that the extensive Case Notes published by the New Zealand Ombudsman (in respect of formal recommendations in FOI disputes) and the reasons for decision given by the Information Commissioner of Canada or the Information and Privacy Commissioner of Ontario, are somehow inferior to court decisions or decisions of the Commonwealth and Victorian AATs, and incapable of giving the required quality of guidance to FOI administrators and applicants. Anyone who is familiar with the extent of the efforts made by the New Zealand Ombudsman and Canada's

federal and provincial Information Commissioners to ensure that their recommendations and rulings will provide guidance for primary administrators would be astonished at EARC's proposition. As I endeavoured to explain in Chapter 4, I have been extremely conscious of the educative and normative effects which my decisions under the FOI Act should have for administrators and applicants. Most fair minded observers would regard the small number of applications for judicial review in Canada and New Zealand as evidence that the external review authorities were performing their jobs well, at least to the extent of not committing reviewable legal errors.

- 6.16 As to the quality of FOI decisions of Australian tribunals, I had occasion to remark in my reasons for decision in *Re Eccleston* (reproduced as Appendix 6) that the extensive case law on the deliberative process exemption generated by differently constituted tribunals within the Commonwealth AAT (and to a lesser extent by differently constituted tribunals within the Victorian AAT) was "*contradictory and confusing, and in some respects unsympathetic to the professed objects of freedom of information legislation*", as I believe I subsequently demonstrated in my reasons for decision (see especially at paragraphs 101 to 145). I consider it to be a virtue of the Information Commissioner model (which should not be overlooked) that it will tend inevitably to promote a consistent approach to the interpretation and application of relevant provisions of the FOI Act, with the safeguard that resort is always available to the Supreme Court of Queensland to seek correction of any perceived legal error in the Information Commissioner's approach.
- 6.17 The final point made by EARC in support of its recommendation (at p.26.33 of the Administrative Appeals Report) is as follows:

"The Commission notes a further comment by the PCEAR in its report on Freedom of Information for Queensland:

"In the circumstances the Committee concurs with EARC's proposal for an Information Commissioner. The Committee considers however that this role should be reviewed in the context of the proposed two year review of the freedom of information legislation. In particular regard should be had at that time to the Administrative Appeals report expected from EARC in 1992 and/or to the possibility of vesting the role of Information Commissioner in the same office as that of other Commissioners such as, for example, a Privacy Commissioner or Equal Opportunity Commissioner" (Parliamentary Committee for Electoral and Administrative Review 1991, p.26).

The Commission has therefore recommended in Chapter Eleven that the jurisdiction of the Information Commissioner under the Freedom of Information Act 1992 be transferred to QICAR and that the office of Information Commissioner be abolished."

- 6.18 If the word "therefore" in the last sentence is intended to relate back to the quoted passage which precedes it, the logical connection is far from apparent. The passage quoted from the April 1991 Report of the PCEAR did not recommend that the Office of Information Commissioner be abolished in favour of whatever body was recommended for creation by EARC's Administrative Appeals Report. It did canvas the possibility of vesting the role of Information Commissioner in the same office as that of another Commissioner (so why not the Parliamentary Commissioner?) but the only clear recommendation which the PCEAR made was that the role of the Information Commissioner should be reviewed in the context of the two year review of the FOI Act which is due in November 1994. Presumably that will involve a proper review of the operations of the

Office of the Information Commissioner, with a *bona fide* attempt to assess the effectiveness and efficiency with which it is performing the functions given to it by Parliament. EARC has not undertaken any such review, and was in no position to assess the performance of the Information Commissioner.

- 6.19 EARC did not even pay the Information Commissioner the courtesy of assessing it against the criteria it claims to have applied to other existing specialist tribunals. At paragraphs 11.17 and 11.21 of its Administrative Appeals Report, EARC states that:

"In determining whether a function may transpose more effectively to a general administrative review body, the Commission has taken into account whether another review body could provide a more independent, fairer, simpler, quicker, more uniform, more cost-effective or more accessible form of review ...

11.21 Reasons for retaining the present jurisdiction of a current specialist review body include:

- (a) the specialist review body's expertise will be lost if its review function is transferred to QICAR;*
- (b) the review body acts efficiently (but the recommendation by the Commission for transfer to QICAR should not be seen as indicating inefficiency);*
- (c) the transfer of administrative review from an existing review body with other roles will make that review body less viable;*
- (d) interest groups and likely objectors prefer to continue to use that review body rather than another review body;*
- (e) these types of decisions have been traditionally reviewed by particular review bodies and there is reason to continue with the tradition;*
- (f) the volume of appeals from a particular area of administration is so great that it is more practical and efficient to make separate appeal arrangements;*
- (g) review of a particular decision requires a different form of review (e.g. more restricted form of appeal than full merits review) or procedure;*
- (h) review, while specialised, in terms of being carried out by a specialist in the area as a member of a general review body, may occur away from the context of its subject matter and be divorced from other matters on a similar subject matter (e.g. those involving disputes between persons rather than between an agency and a person); and*
- (i) the availability of suitable experts in a subject matter to adjudicate disputes or review decisions in a particular area is extremely limited and so separating the adjudicative function from the review function simply means that the best experts are not available for one of the functions (this assumes that the one expert could not be*

a sessional member of both bodies)."

- 6.20 The comments offered by EARC at pages 26.31 to 26.33 of Appendix 26 to the Administrative Appeals Report clearly indicate that no attempt has been made by EARC to evaluate the Office of Information Commissioner against these criteria, although criteria (a), (b), (f) and (g) are all applicable to the Office of the Information Commissioner.
- 6.21 In my opinion, EARC, in making the recommendation for abolition of the Office of Information Commissioner, has failed to comply with its own statutory responsibilities under s.2.23 of the *Electoral and Administrative Review Act 1989*. It has failed to undertake any proper investigation or inquiry to obtain relevant information to support its recommendation. It has failed to accord procedural fairness to the Information Commissioner, by failing to notify the Information Commissioner that it proposed to consider a departure from its own publicly stated position in the second sentence of paragraph 17.24 of its Report on Freedom of Information, and from the publicly stated position of the PCEAR that the role of the Information Commissioner be reviewed in the context of the two year review of the FOI Act, and by failing to give the Information Commissioner an opportunity to make submissions on the issue of whether or not the Information Commissioner's office should be abolished. In terms of s.2.23(2)(d)(ii) of the *Electoral and Administrative Review Act 1989*, EARC has been incapable of providing an objective summary and comment with respect to all considerations of which it is aware that support or oppose or are otherwise pertinent to its recommendation for the abolition of the Office of Information Commissioner, because it has undertaken no proper investigation or inquiry so as to inform itself in any objective way of matters that support or oppose or are otherwise pertinent to that question.
- 6.22 The real basis for EARC's recommendation in respect of the Office of the Information Commissioner appears to be that having decided to recommend the establishment of an extremely expensive general administrative appeals tribunal (QICAR) it needed to justify the expense by pointing to as many existing tribunals as possible whose identifiable budgets could be used to support a case for compensating cost savings, if the functions of those existing tribunals were absorbed into QICAR.
- 6.23 Any follower of the post-Fitzgerald reform process in Queensland will know that EARC has generally produced high quality work on projects aimed at bringing to Queensland long overdue reforms which bring Queensland into line with modern reforms in other Australian jurisdictions in terms of proper accountability in government and public administration. EARC's strength in academic and theoretical work has seen it produce model Bills which contain innovative refinements and improvements to reforms pioneered in other jurisdictions. Yet EARC's work in the fields of administrative law and public administration has been characterised by a tendency to seek the theoretically perfect model with scant regard to questions of cost or cost-effectiveness. EARC has been in the privileged position of being able to take all care in formulating recommendations, but accept no responsibility for their practical implementation. The hard choices as to how its proposals were to be funded and implemented always remained with the executive government. In this light, EARC's retort (see paragraph 6.8 above) to the government's policy choice on how best and most cost-effectively to implement EARC's recommendation for the establishment of an Office of Information Commissioner seems quite inappropriate.
- 6.24 EARC's questionable approach to questions of cost and cost-effectiveness is demonstrated in Chapter 15 of its Administrative Appeals Report, where, perceiving that its recommendations were so costly that it must attempt some kind of cost benefit analysis, it has gathered a very loose set of figures, based on some highly questionable assumptions. For example, at paragraph 15.29, it is asserted that QICAR's estimated operating costs are based on an expected 1,000 applications for review each year. No information is given to substantiate the basis on which the estimate of

1,000 applications for review each year is made. Yet it is crucial to the estimates of resourcing which QICAR will need, especially since EARC intends that QICAR should operate speedily while following procedures which shift much of the normal burden of the preparation of cases for adjudication from the participants to the adjudicators themselves.

- 6.25 EARC made no inquiry of the Office of Information Commissioner to establish the number of appeals it was receiving under the FOI Act. The statistics already detailed in this Report (plus the fact that a further 60 appeals have been received in the months of July and August 1993) mean that the Office of Information Commissioner is likely to receive approximately 300 applications for review in the year to January 1994. Tables 5A and 5B in Chapter 3 of this Report suggest that if anything, the number of external review applications is likely to increase over the first three years of operation of the FOI Act. If the Information Commissioner's jurisdiction is transferred to the proposed QICAR, it can expect to have 30% of its anticipated 1,000 applications for review provided from the FOI Act alone.
- 6.26 The Office of the Information Commissioner already faithfully follows the procedural model which was carefully sketched in EARC's FOI Report and draft FOI Bill, and which (apart from some specialised features peculiar to FOI disputes) is in general accord with the procedures which EARC recommends should be followed by QICAR. In particular, the Information Commissioner tends to adopt the procedures of inquisitorial adjudication because, as explained at paragraphs 4.30 to 4.31 of this Report, that is the most appropriate method of proceeding when the participants in a dispute are in an unequal position with respect to knowledge of the very subject matter of the dispute. As EARC notes at paragraphs 7.84 and 7.85 of its Report on Administrative Appeals, this approach tends to transfer onto tribunal members some of the burdens of preparation of a case for adjudication which are normally borne by the participants themselves in adversarial proceedings. The staff of the Office of the Information Commissioner comprising myself and four full-time professional staff are already experiencing some difficulties in meeting the time standards set out at Appendix 4 in respect of a case load which is on course to reach 300 in the first year of operation, while following similar procedures to those which EARC has recommended should be followed by QICAR. If the workload of the Information Commissioner is transferred to the proposed QICAR it would require the equivalent of five full-time Commissioners of QICAR working on nothing but FOI appeals in order to deal with the caseload of FOI appeals within the timeframes targeted in Appendix 4 to this Report. That is half of the full-time Commissioners which EARC has allowed for in its projected establishment for QICAR. EARC's estimate of 1,000 applications to QICAR each year appears to me to be a gross under-estimate having regard to the breadth of the jurisdiction which EARC is recommending that QICAR immediately take over, and the estimated annual operating costs of QICAR will likewise probably prove to be a gross under-estimate. If, with the establishment that EARC has recommended, QICAR cannot fulfil the expectations raised for it in terms of speedy resolution of appeals, it will either demand more resources from government, or else applicants will have to accept delays. (There is also no indication that EARC has included in the costs of establishing its new system, the costs to the public purse of redundancy payments to those among the 560 persons presently engaged in tribunal activities whose services will no longer be required if EARC's proposals are implemented).
- 6.27 Even confining the issue to the appropriate method of dealing with FOI appeals, EARC's proposal is not cost-effective. The establishment of the Office of Information Commissioner in a manner which allows it to share support services and infrastructure with the Office of Parliamentary Commissioner means that no further budgetary savings are available to be made through eliminating unnecessary duplication of support services and similar overheads, in the event that FOI appeals were absorbed into QICAR. Apart from the concerns as to timeliness expressed earlier in this Report, the Office of Information Commissioner is performing at a high standard at an annualised cost to the public of \$350,000. The EARC proposal would have the specialist expertise acquired by the staff of the Information Commissioner, and the specialised

information systems which the office has developed, sacrificed in favour of newly appointed Commissioners of QICAR who will have to learn as they go, in FOI and many other fields. EARC's proposal is that the full-time Commissioners of QICAR be paid at a salary rate of \$87,000 per year to which must be added salary on-costs (e.g. provision of SES motor vehicle, superannuation etc.), the costs of support staff and other administrative expenses. Since, as I have indicated above, it will require at least the equivalent of five full-time Commissioners of QICAR to handle (in an appropriately timely fashion) the FOI workload already on hand, EARC is effectively recommending that the workload now handled by the Office of Information Commissioner be handled by QICAR at a significantly higher cost to the Queensland taxpayer.

6.28 Other criticisms of this nature will be apparent to those who are not so intimidated by the sheer volume of the Administrative Appeals Report as to inhibit them from casting a critical eye over its contents; but it is appropriate that in this Report I confine my remarks to matters relevant to EARC's recommendation in respect of the Office of the Information Commissioner.

6.29 Some of these matters could have been canvassed with EARC if it had acted fairly and informed me that it was proposing to recommend the abolition of the Office of Information Commissioner. EARC would have done well to heed its own advice as set out in paragraph 4.29 of its Issues Paper No. 14 on Appeals from Administrative Decisions:

"The faith which lawyers repose in the virtues of procedural fairness is based in experience that indicates that the observance of fair procedures reflects in the quality of substantive outcomes."

6.30 EARC had no proper basis for making any recommendation in respect of the continued existence or abolition of the Office of the Information Commissioner. EARC had undertaken a massive review and was struggling to complete it before the time fixed for its own expiry, but in the process it appears to have cut too many corners. The only honourable and reasonable course open to it was to note the fact that it was not in a position to evaluate the effectiveness of the Office of the Information Commissioner, and to endorse the recommendation made by the PCEAR (in its April 1991 Report on EARC's FOI Report) that that evaluation take place in the course of the two year review of the FOI Act. EARC's recommendation at paragraph 11.103 of its Administrative Appeals Report ought to be ignored.

APPENDIX "3"

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Performance Standards - Quality and Timeliness

Access

Safety, accessibility and convenience: The facilities of the Office should be safe, accessible and convenient to use for members of the public, and public sector administrators alike.

Effective participation: All who participate in proceedings before the Information Commissioner are to be given the opportunity to participate effectively without undue hardship, expense or inconvenience.

Affordable costs of access: The Information Commissioner is to ensure that proceedings are conducted with as little complexity and technicality as the issues for determination in the case will allow, and is to adopt flexible and informal procedures so to ensure that participants can, if they wish, effectively present their case without needing to incur the expense of legal representation.

Expedition and Timeliness

Elimination of unnecessary expense or delay: The Information Commissioner is to seek to mediate disputes whenever it is appropriate, and to adopt flexible and informal procedures tailored to achieve the most expeditious and cost-effective resolution of the issues in dispute in any particular case.

Case processing: The Information Commissioner is to ensure a timely progression of cases through the review process by monitoring the progress of all pending cases, the time taken to dispose of cases, the ratio of dispositions to new case load, and like measures.

Equality, Fairness and Integrity

Fair and reliable procedures: The Information Commissioner is to faithfully adhere to the procedural requirements of the *Freedom of Information Act* and the general law as to the observance of fair procedures.

Decision-making process: The Information Commissioner is to give individual attention to cases, deciding them without undue disparity among like cases and only upon legally relevant factors.

Clarity: Decisions of the Information Commissioner are to unambiguously address the issues presented for determination and clearly explain the reasons for arriving at determinations.

Production and preservation of records: Records of all relevant decisions and actions are to be accurate, and properly preserved.

Independence and impartiality: The Information Commissioner is to maintain institutional integrity, and impartiality in the determination of disputes.

Accountability and public education: The Information Commissioner is to provide written reasons explaining and justifying the determinations arrived at to resolve disputes under the FOI Act. Copies of the written reasons for decisions are to be freely available to the public. The Information Commissioner may seek to disseminate the decisions for the purpose of informing the community.

APPENDIX "4"

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Time Standards for Case Management

Case Management System to be Maintained

1. The Office of the Information Commissioner is to maintain a case management system to monitor the timely progress of cases through the review process, by providing a weekly present position report in respect of all current cases, which also indicates the responsibility for next action and any deadlines for completion of that action.

Detailed Time Standards

2. Each application for review received by the Information Commissioner is to be assessed for validity and a letter despatched to the applicant within 7 days advising of any patent defect which renders the application for review invalid, and explaining what further steps the applicant should take.
3.
 - (a) In respect of each application for review that is accepted as valid and appropriate for investigation and review, letters in accordance with s.74 of the FOI Act are to be despatched to the applicant and the respondent agency or Minister within 7 days of the receipt of the application for review.
 - (b) Whenever practicable, a s.74 letter to a respondent agency or Minister is to request the production to the Information Commissioner of copies of the documents in dispute and set an appropriate timeframe for production of the documents. (As a guideline only: less than 100 pages - 7 to 14 days; more than 100 pages - 21 to 28 days.)
 - (c) Whenever practicable, a s.74 letter to a participant is to request whatever input is clearly necessary from that applicant (on the basis of the available information) to aid the timely progress of the case, and is to set an appropriate timeframe for the provision of that input.
4. Where the validity of an application for review is in doubt, the Information Commissioner must within 7 days commence preliminary inquiries to establish whether or not the application for review is valid, and when that issue has been established, must within a further 7 days, take the action contemplated in paragraph 2 or paragraph 3 as the case may be.
5. All communications to a participant in a review requesting or directing some input from the participant to the review process are to set an appropriate timeframe for provision of that input.
6. In every case, the documents in dispute are to be examined with a view to assessing the appropriateness of the case for mediation as soon as practicable, but in any event, within -
 - (a) for cases in CATEGORY A - 12 weeks;
 - (b) for cases in CATEGORY B - 15 weeks;
 - (c) for cases in CATEGORY C - 20 weeks;of the date of receipt of the application for review.
7. Where a case is assessed as appropriate for mediation, the mediation process is to commence as soon as practicable, but in any event within two weeks of that assessment being made, and is to conclude as soon as it is apparent that no further progress can be made toward resolving the dispute, or toward narrowing and defining the specific issues for determination.

8. Where a case has been assessed as unsuitable for mediation, or where mediation has been abandoned in accordance with paragraph 7, the Information Commissioner is to issue directions to the participants as to the inputs required of them to present their case on the issues for determination by the Information Commissioner, with a view to ensuring that a formal determination is given as soon as practicable, but in any event within -
- (a) for cases in CATEGORY A - 6 months;
 - (b) for cases in CATEGORY B - 8 months;
 - (c) for cases in CATEGORY C - 10 months;
- of the date of receipt of the application for review.
9. Nothing in paragraphs 7 and 8 is intended to fetter the Information Commissioner's discretion under s.80 of the FOI Act to open or re-open the mediation process, at any time during a review, if it is considered appropriate.

Factors which may Inhibit Compliance with Time Standards

10. It is recognised that the most significant factors affecting the timely progression of cases through the investigation and review process are:
- (a) the number of pages of matter in issue (which must be the subject of detailed evaluation by the Information Commissioner and may be the subject of detailed submissions by participants);
 - (b) the complexity of the facts and/or technical/legal issues in dispute;
 - (c) any difficulties in locating, and obtaining participation from, third parties whose interests may be affected by the decision under review, and/or relevant witnesses; and
 - (d) any difficulties in obtaining co-operation of the participants in adhering to time limits set by the Information Commissioner for the provision of their required inputs to the review process.
11. (a) It is recognised that where significant difficulties of the type referred to in paragraph 10(c) or (d) are encountered it may constitute a reasonable excuse for failure to comply with the time standards stipulated in this document.
- (b) It is recognised that in an exceptional case, the complexity of the facts and/or technical/legal issues in dispute may constitute a reasonable excuse for failure to comply with the time standards stipulated in this document.

Explanation of Categories

12. Recognising that the factor referred to in paragraph 10(a) will be a variable present in each case received by the Information Commissioner, that will affect what constitutes a reasonable length of time for completion of various stages in the review process, all cases received will be allocated a category according to the number of pages of matter in issue, as follows:

CATEGORY A : 1 to 40 pages
CATEGORY B : 40 to 200 pages
CATEGORY C : more than 200 pages.

APPENDIX "6"

Eccleston Decision

APPENDIX "5"

Report on the decision in *Re Eccleston* which appeared in the *Canberra Times* on 21 July 1993:

Queensland leads on freedom of information

By ROD CAMPBELL

The seekers of government secrets will be looking forward to the day when freedom of information cases are decided Queensland-style.

It was not very long ago that Queensland had the most secretive government in the country. The idea that it might provide the model for government and bureaucratic behaviour was laughable.

But that was pre-Fitzgerald, pre-Criminal Justice Commission and pre-Electoral and Administrative Reform Commission. Suddenly, Queensland is in the vanguard. It has strong and brand-new freedom of information laws and an Information Commissioner (who performs a role in FOI cases not unlike that of the Commonwealth, Victorian and ACT Administrative Appeals Tribunals) with a trail-blazing approach.

The commissioner, Mr F N Albiez, has recently decided the first Queensland FOI case in which the public interest in open government was pitted against government secrecy. Secrecy lost, the public interest won, and comprehensively so.

The case Mr Albiez had to grapple with involved an FOI request by Roy Eccleston, of *The Australian*, in which he was challenging the refusal of the Department of Family Services and Aboriginal and Islander Affairs to grant him access to documents containing material on the possible consequences for Queensland of the High Court's *Mabo* decision.

The issue before Mr Albiez was whether seven documents were exempt from disclosure because they formed part of the "deliberative processes" of government and that their release would not be in the public interest. It was the first time he had been called to rule on the important deliberative-process issue. It is important because it goes to the heart of the government secrecy tradition and, to Mr Albiez's mind, the heart of the post-Fitzgerald reform process. Mr Albiez ruled against the department.

That Queensland will adopt its own - and enthusiastically liberal - approach to FOI is reflected in Mr Albiez's remarks

that some of the "law" emanating from the Commonwealth and Victorian AATs was contradictory, confusing and, in some respects, "unsympathetic to the professed objects of freedom of information legislation".

So Mr Albiez set about discovering the true path. He discussed at length the background to the Queensland FOI Act, namely, the Fitzgerald inquiry and its political aftermath.

He looked closely at the principles espoused in the leading cases on freedom of information generally, secrecy and the public interest, including the High Court's political advertising decision of 1992, and the NSW Court of Appeal's ruling in the *Spycatcher* case.

And then he went on a tour through the decisions of the Commonwealth AAT, embracing many of the views expressed by the respected, Canberra-based former deputy president, Robert Todd, and rejecting the more restrictive but authoritative statements made by its former president, Justice Daryl Davies, in the *Howard* case.

From all these, Mr Albiez extracted a number of fundamental guiding principles, namely:

- Government exists for the benefit of the community it serves and government officials, both elected and appointed, do not hold office for their own benefit but for the benefit of the public (*Spycatcher*).
- Notions of the public interest constitute the basic rationale for the enactment of, and the unifying thread running through, the FOI Act (parliamentary debate on FOI).
- FOI laws provide some check against the potential for manipulation of the dissemination of government-held information by granting the public a legally enforceable right to obtain such information (Fitzgerald).
- Freedom of communication is an indispensable element in representative government (High Court, political advertising case).

The importance of FOI legislation is that it provides the means for a person to

have access to the knowledge and information which will assist a more meaningful and exercise of the right of freedom of communication.

Mr Albiez went to some lengths to extract and re-emphasise these principles before observing that the Queensland FOI Act was still less than a year old, yet views had been publicly expressed by some Ministers and bureaucrats that "the FOI Act and other Fitzgerald inspired accountability mechanisms have 'gone too far', and constitute an expensive and inefficient distraction to the performance of the main tasks of government". These are familiar sentiments in every FOI jurisdiction.

Mr Albiez's view, however, was that "a certain amount of inefficiency in getting things done should be a burden that democratic governments are prepared to accept as the price of honouring the higher values of the democratic process".

His closing words on the general subject sum up the situation in Queensland and elsewhere. It was, he said, the deliberative-process exemption clause in Section 41 of the FOI Act whose application would most frequently call for the resolution of the tension between the objects which the Act sought to attain, and "the tradition of secrecy" which had surrounded the way in which government agencies made decisions which affected the public.

"Unless the exemption provisions, and Section 41 in particular, are applied in a manner which accords appropriate weight to the public interest objects sought to be achieved by the FOI Act, the traditions of government secrecy are likely to continue unchanged," he said.

APPENDIX "1"

**Table 6 - External Review Applications Received up to
30 June 1993, by Category (as per s.71 of the FOI Act)**

STATEMENT OF AFFAIRS (PART 2)	
• Refusal to publish, or to ensure compliance with Part 2	0
• Deemed refusal	0
ACCESS TO DOCUMENTS (PART 3)	
• Refusal to grant access	43
• Deletion of exempt matter	25
• Combination - refusal to grant access/deletion of exempt matter	16
• Deemed refusal to grant access	15
• Deferred access	0
• Charges	7
• Combination - refusal to grant access/charges	1
• Third party consulted; objects to disclosure	7
• Third party not consulted; objects to disclosure	0
AMENDMENT OF RECORDS (PART 4)	
• Refusal to amend	4
• Deemed refusal to amend	1
ISSUANCE OF CONCLUSIVE CERTIFICATE	
• Cabinet matter	0
• Executive Council matter	0
• Law enforcement/Public safety matter	0
MISCELLANEOUS	
• Misconceived applications (i.e. bearing no relationship to a category specified in s.71)	1
TOTAL	120

APPENDIX "2"
**Table 7 - Distribution of External Review Applications Received
up to 30 June 1993, by Respondent Agency**

NAME OF AGENCY	EXTERNAL REVIEWS RECEIVED
ADMINISTRATIVE SERVICES	3
BUSINESS, INDUSTRY, REGIONAL DEVELOPMENT	-
CONSUMER AFFAIRS (includes Rental Bond Authority)	1
CORRECTIVE SERVICES	10
EDUCATION (includes Universities, Board of Senior Secondary School Studies, etc)	13
DEVETIR (includes Workers' Compensation Board)	5
ENVIRONMENT & HERITAGE	-
DFSIA	6
HEALTH (includes Regional Health Authorities)	19
HOUSING, LOCAL GOVT & PLANNING	3
JUSTICE & ATTORNEY-GENERAL	7
PUBLIC TRUST OFFICE	-
LEGAL AID (QLD)	1
CJC	5
LANDS	5
MINERALS & ENERGY	2
POLICE	12
EMERGENCY SERVICES	-
PREMIER, ECONOMIC & TRADE DEVELOPMENT	1
OFFICE OF CABINET	-
AUDITOR-GENERAL	-
PRIMARY INDUSTRIES	9
TOURISM, SPORT & RACING (includes QTTC)	1
TRANSPORT	7
QLD RAIL	-
TREASURY (includes QIDC)	7
PSMC	-
PARLIAMENTARY COMMISSIONER	1

(Ombudsman)	
GOVERNMENT SUPERANNUATION OFFICE	1
WOONGARRA SHIRE COUNCIL	1
TOTAL	120