OFFICE OF THE INFORMATION COMMISSIONER (QLD)	**)** **)**	S 159 of 1993 (Decision No. 95020)

Participants:

EST
Applicant

- and -

DEPARTMENT OF FAMILY SERVICES AND ABORIGINAL AND ISLANDER AFFAIRS
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - request by applicant for access to copies of complaints of child abuse said to have been made against the applicant by a named person - refusal by respondent to give information as to the existence or non-existence of the requested documents, in accordance with s.35 of the *Freedom of Information Act 1992* Qld - whether the requested documents, if they existed, would contain exempt matter under s.42(1)(b) of the *Freedom of Information Act 1992* Qld - observations on deficiencies in the scheme for review, under Part 5 of the *Freedom of Information Act 1992* Qld, of decisions by an agency or Minister to refuse to give information as to the existence or non-existence of a requested document.

Freedom of Information Act 1992 Qld s.35, s.36, s.37, s.42, s.42(1)(b), s.42(2), s.71(1)(b), s.87(2), s.88(1), s.89, s.110
Administrative Appeals Tribunal Act 1975 Cth s.43(1)(c)(ii)
Children's Services Act 1965 Qld s.144
Freedom of Information Act 1982 Cth s.25
Freedom of Information Amendment Act 1995 Qld s.4, Sch.cl.3
Judicial Review Act 1991 Qld

Accident Compensation Commission v Croom [1991] 2 VR 322
Bussey and Council of the Shire of Bowen, Re (Information Commissioner Qld, Decision No. 94010, 24 June 1994, unreported)
Croom and Accident Compensation Commission, Re (1989) 3 VAR 441
Department of Community Services and Another v Jephcott (1987) 73 ALR 493
Fagan and Minister for Justice and Attorney-General and Minister for the Arts, Re (Information Commissioner Qld, Decision No. 95015, 26 May 1995, unreported)
Jephcott and Department of Community Services, Re (1986) 14 ALD 93
McEniery and the Medical Board of Queensland, Re (Information Commissioner Qld, Decision No. 94002, 28 February 1994, unreported)

DECISION

I affirm the respondent's decision, in accordance with s.35 of the *Freedom of Information Act 1992* Qld, to neither confirm nor deny the existence of documents of the type to which the applicant has requested access on the basis that if such documents existed they would contain exempt matter under s.42(1)(b) of the *Freedom of Information Act 1992* Qld.

Date of Decision: 30 June 1995

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision under s.35 of the *Freedom of Information Act 1992* Qld (the FOI Act or the Queensland FOI Act) to neither confirm nor deny the existence of documents to which the applicant has requested access. The respondent asserts that, assuming the existence of the requested documents, they would contain exempt matter under s.42(1)(b) of the FOI Act.

2. The applicant's FOI access application, lodged with the Department of Family Services and Aboriginal and Islander Affairs (the Department) on 14 December 1992, requested access to:

> *copies (4) of the complaints made against me by* [two individuals and their town of residence were identified here] *at* [a regional office of the Department]. *These complaints I believe contain libellous complaints and have caused access to our grandchildren to be severely restricted on advice from* [the regional office of the Department]. *I would like these libellous and scurrilous complaints which have no basis in truth struck off these records or investigated thoroughly on both sides, not a one sided story*.

3. The Department's initial decision in response was made by Mr V Jeppesen who, by letter dated 26 March 1993, informed the applicant as follows:

> *I have decided under s.35 of the FOI Act to neither confirm nor deny the existence or non-existence of the documents to which you seek access. I have decided this on the basis that if such documents did in fact exist they would be exempt from disclosure under s.42(1)(b) of the FOI Act.*
>
> *As you would appreciate the Department relies on members of the public to provide information on a range of sensitive issues and in these circumstances many people would be reluctant to notify the Department without the assurance that their identity would not be revealed. It is in this context that s.42(1)(b) is applied.*

4. The applicant's husband subsequently wrote to the Department, on the applicant's behalf, seeking internal review of Mr Jeppesen's decision. His letter stated:

> *I recently applied to your department to get information from the* [regional office of the Department] *regarding false and malicious untruths given to that Department by* [here an individual was identified]. *We have been denied access to our grandchildren on those lies and nobody has asked us or inquired if these reports are the truth or false. My wife and I do not wish to be judged and found guilty without trial. ... We know who gave these untrue statements, we even know why she gave them. ... I was told by someone in your Department that these files do exist, although Mr Jeppeson says they do not. I also have spoken to the person in* [the regional office of the Department] *who admits that these statements were made, but officially says that they cannot disclose what was said.*

5. The internal review was undertaken by Ms S J Crook, who on 5 May 1993 affirmed the initial decision. In her reasons for decision, Ms Crook quoted s.35(1) and s.42(1)(b) of the FOI Act, then stated:

> *Thus this review needs to determine whether the Decision Maker was correct in concluding from the information provided in the Applicant's application that the material sought would be exempt under Section 42(1)(b) of the Act and hence Section 35 could be relied on.*

6. In satisfying herself that s.42(1)(b) had been correctly applied, and thus the provisions of s.35 correctly invoked, Ms Crook found that -

> *Complaints of the type alleged by the applicant, if made, would be treated confidentially by this Department wherever possible. If the Department could not guarantee some degree of confidentiality, it would prejudice the provision of such information in the future. For example, people who assist in child protection investigations do so on the understanding that their identity as a source of information will remain confidential ...;* and
>
> *Complaints of the nature broadly referred to by the applicant could be construed to be handled in accordance with the provisions of the* Children's Services Act 1965 *Qld ... Thus it is reasonable to construe that a complaint of the nature referred to by* [the applicant] *would have been related to the administration and enforcement of the law as specified in the Act.*

7. The applicant's husband subsequently wrote to me on the applicant's behalf to apply for independent review, under Part 5 of the FOI Act, in respect of Ms Crook's decision. In that letter, the applicant's concerns were stated as follows:

> *My wife and I are being victimised without due cause, have been found guilty without trial and have caused a total breakdown of relationship between my son's children and their grandparents. ... we have not much time left to enjoy our son's children.*

Relevant provisions of the FOI Act

8. Some minor amendments to s.35(2) of the FOI Act were made by cl.3 of the Schedule to the *Freedom of Information Amendment Act 1995* Qld. By virtue of s.4 of that Act (which inserted a new s.110 of the FOI Act), the amendments were made retrospective, so they apply in the case under consideration. The amendments do not appear to have made any substantive change to the meaning of s.35(2). Section 35 of the FOI Act provides:

> ***35.(1)*** *Nothing in this Act requires an agency or Minister to give information as to the existence or non-existence of a document containing matter that would be exempt matter under section 36, 37 or 42.*
>
> ***(2)*** *If an application relates to a document that includes exempt matter under section 36, 37 or 42, the agency or Minister concerned may give written notice to the applicant -*
>
> *(a) that the agency or Minister neither confirms nor denies the existence of that type of document as a document of the agency or an official document of the Minister; but*
>
> *(b) that, assuming the existence of the document, it would be an exempt document.*
>
> ***(3)*** *If a notice is given under subsection (2) -*
>
> *(a) section 34 applies as if the decision to give the notice were the decision on the application mentioned in that section; and*
>
> *(b) the decision to give the notice were a decision refusing access to the document because the document would, if it existed, be exempt.*

9. Section 42(1)(b) of the FOI Act provides:

> ***42.(1)*** *Matter is exempt matter if its disclosure could reasonably be expected to -*
>
> *...*
>
> *(b) enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained ... .*

Analysis of section 35 of the FOI Act

10. Section 35 of the FOI Act is the counterpart to s.25 of the *Freedom of Information 1982* Cth (the Commonwealth FOI Act). There are significant differences in the wording and the practical application of the two provisions. Section 25 of the Commonwealth FOI Act operates by reference to whether a notional document, containing information as to the existence or non-existence of a requested document, would itself be an exempt document under the relevant exemption provisions of the Commonwealth FOI Act. Section 35 of the Queensland FOI Act operates by reference to whether a requested document, if it exists, does contain, or if it does not exist, would contain, exempt matter under s.36, s.37 or s.42; but in either case, notice is given to the applicant in terms which refer to whether a notional document, of the type to which the applicant has requested access, would, if it existed, contain exempt matter under s.36, s.37 or s.42.

11. The basic object of the two provisions, however, is the same. The purpose of including a provision of this kind in freedom of information legislation was explained in the 1979 report by the Senate Committee on Constitutional and Legal Affairs on the draft Commonwealth Freedom of Information Bill (at page 121, point 9.27):

> *A particular problem that arises in relation to the giving of reasons and particulars, but which is not addressed at all in the present Bill, is the position of the decision-*

maker when he is confronted with a request for a document which is manifestly exempt from disclosure, but where the character of the document is such that the mere acknowledgment of its existence, albeit accompanied by a denial of access, will itself cause the damage against which the exemption provision is designed to guard. One obvious example would be a request for a Cabinet paper recommending a devaluation of the currency; another might be a request for a criminal intelligence record disclosing the activities of a particular police informant.

...

We agree that there will, on occasion, be a need for an agency to refuse to acknowledge the very existence of a document. However, although it might be argued that there are a number of other contexts in which this response might conceivably be justified in particular instances, we believe that the power to respond in the way suggested is so open to potential misuse that it ought to be confined to a very narrow set of exemptions, namely those relating to classes of documents which by their very nature are likely to be widely accepted as especially sensitive.

Further examples of situations in which the availability of a "neither confirm nor deny" response might be of considerable practical importance are given in *Re Jephcott and Department of Community Services* (1986) 14 ALD 93 at pp.99-100 (paragraph 14) and in *Department of Community Services and Anor v Jephcott* (1987) 73 ALR 493 at p.497.

12. In its consideration of the inclusion of a similar provision in its recommended model Freedom of Information Bill for Queensland, the Electoral and Administrative Review Commission recognised the potential for abuse in the use of a "neither confirm nor deny" response, stating (at p.103 of its Report on Freedom of Information, Serial No. 90/R6, December 1990):

> *7.332 The Commission considers that there will be limited occasions when it shall be necessary for government to refuse to acknowledge the very existence of certain documents. Given that the power is open to potential misuse, it ought properly be confined to a very narrow set of exemptions: namely, those relating to documents whose character is recognised as requiring particular secrecy. The Commission considers that the power to neither confirm nor deny the existence of certain documents should be restricted to the Cabinet and Executive Council exemptions and the law enforcement and public safety exemption. The power is a discretionary power, however, and should only be exercised in those circumstances where government recognises that there is a need for its exercise.*

13. According to the language in which s.35 of the FOI Act is framed, an agency or Minister has a discretion to use a s.35 "neither confirm nor deny" response in either of two situations, provided certain preconditions are satisfied. The first situation is that specifically contemplated by s.35(2), i.e., a document requested by an applicant exists, and the precondition to invoking a s.35 "neither confirm nor deny response" is that the document contains matter which is exempt matter under s.36, s.37 or s.42. To take a simple example of where a s.35 response may be appropriate in respect of an existing document: suppose person A, who is engaged in an illegal enterprise, wishes to establish whether a suspected informer, X, has supplied information to a law enforcement or regulatory agency concerning A's activities. How should the agency respond to an FOI access application by A for any information supplied by X concerning A? If the agency acknowledges the existence of a requested document, but claims it is exempt under s.42(1)(b), A will have obtained confirmation that X has informed on A. The preferable course, therefore, is to invoke a s.35 "neither confirm nor deny" response. (Examples of the danger where A uses a "shopping list" approach, i.e. making a

series of similarly framed requests in respect of a number of suspected informers, are given in the *Jephcott* cases in the references noted at paragraph 11 above.)

14. The second situation, which the terms of s.35(1) are broad enough to comprehend, is that a document requested by an applicant does not exist, but would, if it existed, contain exempt matter under s.36, s.37 or s.42. There may be areas of government administration where it is appropriate that an FOI access application for documents of a certain kind which do not in fact exist, should be met with a "neither confirm nor deny" response rather than an acknowledgment that the requested documents do not exist. If, for example, a person, or a group of persons acting in concert, makes a series of FOI access applications at regular intervals aimed at establishing whether a law enforcement or regulatory agency has documents of a certain kind, the issue of a "neither confirm nor deny" response following a series of acknowledgments that the requested documents do not exist, is liable to betray the fact that the agency now has documents of the kind in question. To lessen the chances of such a scenario eventuating, it may be necessary to routinely employ a "neither confirm nor deny" response to requests for documents that do not in fact exist, but which, if they did exist, would be of such a nature that disclosure of their very existence could reasonably be expected to have prejudicial effects of a kind stipulated in s.42(1) of the FOI Act.

15. The preconditions to the exercise of the discretion to invoke a s.35 "neither confirm nor deny" response will, of course, be satisfied in a great many instances where it is not necessary or appropriate to invoke that response. As the legislative history indicates, resort to s.35 was intended to be the exception rather than the rule. The normal response should be to acknowledge the existence of requested documents which contain matter claimed to be exempt under s.36, s.37 or s.42, and justify the claims for exemption (or acknowledge that requested documents do not exist). The s.35 "neither confirm nor deny" response should be reserved for use only where special circumstances make its use necessary or appropriate.

16. The potential for misuse of the s.35 "neither confirm nor deny" response having been recognised in the legislative history, it is regrettable that the Information Commissioner, as the independent external review authority under the FOI Act, was not conferred with specific power to determine whether a s.35 response has been appropriately employed by an agency or Minister. In the interests of fairness to applicants, I consider that the Information Commissioner should be given power to determine, after hearing in private from the respondent agency or Minister, that it would be more appropriate to acknowledge that a requested document exists, and that its exempt status should be decided on the merits with the opportunity for meaningful input from the applicant, in preference to persisting with a s.35 response. My recent decision in *Re Fagan and Minister for Justice and Attorney-General and Minister for the Arts* (Information Commissioner Qld, Decision No. 95015, 26 May 1995, unreported) afforded an example of a situation where it was probably inappropriate to invoke s.35 in the first place (see paragraph 5 of *Re Fagan*) but where it certainly became inappropriate to persist with the s.35 response once the existence of the requested documents had been acknowledged in a report tabled in Parliament (see paragraph 7 of *Re Fagan*). If the Information Commissioner is satisfied that no harm could be caused by disclosure of the existence of a requested document (even allowing that it may ultimately be found to be an exempt document) or where the existence of a requested document has become a matter of public record, or there is otherwise overwhelming evidence (accessible to the applicant) that points to the existence of a requested document, it is consistent with the objects of the FOI Act, and would make for fairer review under Part 5 of the FOI Act (allowing for more meaningful participation by the applicant), if the Information Commissioner were empowered to decide to inform the applicant of the existence of a requested document, and proceed with the review to determine whether the document contains exempt matter. To achieve this position, however, legislative amendments would be required.

17. At face value, the terms of s.88(1) suggest the Information Commissioner has sufficient power to decide whether a s.35 response has been appropriately employed by an agency or Minister:

> ***88.(1)*** *In the conduct of a review, the 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 this Act, have been decided by an agency or Minister;*
>
> *and any decision of the Commissioner under this section has the same effect as a decision of the agency or Minister.*

The apparent width of that provision, however, is relevantly circumscribed by the terms of s.87(1) and (2):

> ***87.(1)*** *On a review, the Commissioner may give such directions as the Commissioner considers necessary in order to avoid the disclosure to the applicant or the applicant's representative of exempt matter or information of the kind mentioned in section 35.*
>
> ***(2)*** *The Commissioner -*
>
> *(a) must not, in a decision on a review or in reasons for such a decision, include matter or information of a kind mentioned in subsection (1); and*
>
> *(b) may receive evidence, or hear argument, in the absence of a participant or a representative of a participant if it is necessary to do so to prevent disclosure to that person of matter or information of that kind.*

18. Information of a kind mentioned in s.35 is, of course, information as to the existence or non-existence of a document (containing matter that would be exempt matter under s.36, s.37 or s.42) to which the applicant for review has requested access. By necessary implication, the broad grant of power to the Information Commissioner in s.88(1) cannot have been intended to extend to deciding to inform an applicant of the existence of a document in respect of which s.35 has been invoked, when s.87(2)(a) appears to prohibit the Information Commissioner from including, in a decision or reasons for decision, information as to the existence or non-existence of such a document, and s.87(1) and s.87(2)(b) contemplate that the Information Commissioner should do what is necessary to prevent disclosure to an applicant of information of that kind. A specific grant of power to the Information Commissioner, and probably some consequential amendments, would appear necessary, therefore, to give effect to my recommendation in paragraph 16 above. This is the first of several respects in which I consider that the legislative scheme for external review of decisions to invoke s.35 of the FOI Act needs amendment.

19. A decision by an agency or Minister to invoke a s.35 "neither confirm nor deny" response is, in substance and effect, a decision refusing to grant access to documents in accordance with an application for access under s.25 of the FOI Act. The Information Commissioner has jurisdiction to review such a decision by virtue of s.71(1)(b) of the FOI Act. Parliament clearly contemplated that the Information Commissioner was being invested with such a jurisdiction by making special provision for it in s.87.

20. In a review of an ordinary refusal of access decision, the applicant for access is necessarily disadvantaged, in the extent to which meaningful submissions can be made about the exempt status of matter in issue, by a lack of precise knowledge as to the nature of the matter in issue. That disadvantage is exacerbated in a review of a decision to invoke a s.35 "neither confirm or deny" response. The review must largely proceed in private between the Information Commissioner and the respondent. Where requested documents do exist, I will call for and examine them, and where doubt exists, debate the merits of the claims for exemption with the respondent. If the requested documents do not exist, the debate will be over the merits of a claim for exemption of a notional document of the kind to which the applicant has requested access. The procedures adopted *vis-à-vis* the applicant should, so far as practical, not be varied according to whether a requested documents does or does not exist, as that may in effect give information as to the existence or non-existence of a requested document. The applicant's opportunity to participate in the review must necessarily be limited to submitting evidence or arguments based on what the applicant knows or believes about the documents to which access has been requested, and/or in response to such information as is disclosed in the respondent's reasons for decision, or in any evidence or submissions filed by the respondent which are able to be phrased in such a way that they give no indication as to the existence or non-existence of a requested document (where that is not practicable, the respondent's evidence and submissions necessarily have to be given in private, usually without reference to them being made in the Information Commissioner's subsequent reasons for decision).

21. It has become apparent to me in the course of analysing relevant provisions for the purposes of this review, that Part 5 of the FOI Act does not make adequate provision for review of decisions invoking a s.35 "neither confirm nor deny" response. In particular, the present legislative scheme only works satisfactorily where an agency or Minister has correctly invoked s.35, and the outcome of a review under Part 5 must be to affirm the decision under review. Adequate provision has not been made for the situation where I am satisfied that a document which exists does not contain exempt matter under s.36, s.37 or s.42, or that a requested document which does not exist, would not (if it did exist) contain exempt matter under s.36, s.37 or s.42.

22. There are five possible outcomes of a review by the Information Commissioner of decisions to invoke a s.35 "neither confirm nor deny" response. They can be grouped into the following categories:

(a) A requested document exists. After it has been examined and the participants have been heard, three outcomes are possible -

(i) a finding that the document contains exempt matter under s.36, s.37 or s.42, and hence the respondent was entitled to invoke s.35, and the decision under review must be affirmed;

(ii) a finding that the document contains no information which is exempt matter under s.36, s.37 or s.42 of the FOI Act, but contains information which may be exempt matter under another exemption provision of the FOI Act - hence the agency was not entitled to invoke s.35, and the applicant should have the opportunity to lodge evidence or submissions on the issue of whether or not the document contains exempt matter (under an exemption provision other than s.36, s.37 or s.42) with knowledge of the document's existence; or

(iii) a finding that the document contains no exempt matter, and hence the agency was not entitled to invoke s.35, nor to refuse access to the document.

(b) A requested document does not exist as a document of the relevant agency (or an official document of the relevant Minister). After the participants have been heard (with the

respondent addressing the issue of whether a notional document of the type to which the applicant has requested access would contain exempt matter), two outcomes are possible -

(i) a finding that, if the notional document existed, it would contain exempt matter under s.36, s.37 or s.42; hence the respondent was entitled to invoke s.35 and the decision under review must be affirmed; or

(ii) a finding that, if the notional document existed, it would not contain exempt matter under s.36, s.37 or s.42; hence the respondent was not entitled to invoke s.35, and the proper outcome is that the applicant should be informed that the requested document does not exist as a document of the agency (or an official document of the Minister). (It is irrelevant in this regard that if the requested document did exist it would or might be exempt under an exemption provision other than s.36, s.37 or s.42.)

23. It is appropriate in situations (a)(i) or (b)(i), to give an applicant a decision and reasons for decision which neither confirm nor deny the existence of the requested document, but find that if a document of that type existed it would contain exempt matter under s.36, s.37 or s.42. (There may be situations, however, where it is impractical to convey any meaningful reasons for decision in support of such a finding.)

24. The present legislative scheme under Part 5 of the FOI Act does not, however, make adequate or appropriate provision for situations (a)(ii), (a)(iii) and (b)(ii) described above. It is not appropriate that there be unnecessary restrictions on informing the applicant of the outcome of a review which is in the applicant's favour. The terms of s.87(2)(a) prevent an applicant being informed of the details of the outcome of a review which is in the applicant's favour: the most that a successful applicant can be told is that the Information Commissioner has decided that, if a document of the kind to which the applicant has requested access exists, it would not contain exempt matter under s.36, s.37 or s.42. In that event, however, the scheme of the FOI Act is silent as to what should happen next, on the part of the applicant or the respondent agency or Minister, to enable the applicant to obtain the benefits of a successful application for review. It is not fair to applicants, indeed it tends to defeat the purpose of the legislature having made provision for review of decisions of this kind, if the applicant cannot be informed of, and obtain, what should be the consequent entitlements of a successful application for review, as I have described them in situations (a)(ii), (a)(iii) and (b)(ii) above.

25. I consider that adequate provision to overcome this problem could be made by an amendment to s.89 of the FOI Act to give the Information Commissioner power, when a decision under review is set aside, to give directions to the respondent agency or Minister. In *Re Jephcott and Department of Community Services* (1986) 14 ALD 93, the Commonwealth Administrative Appeals Tribunal used the power conferred by s.43(1)(c)(ii) of the *Administrative Appeals Tribunal Act 1975* Cth to give (at p.102, paragraph 20) appropriate directions to the respondent agency after setting aside its decision to invoke a "neither confirm nor deny" response. Even if, contrary to my recommendation in paragraph 27 below, the Information Commissioner is confined to giving a decision in the terms referred to in paragraph 24 above, it would be possible to frame appropriate directions, for example: "If the respondent does not, within 28 days of the date of this decision, commence an application under the *Judicial Review Act 1991* Qld for review of this decision, I direct the respondent either to give the applicant access to the document requested in the applicant's FOI access application, if it exists, or, if it does not exist, to inform the applicant in writing that it does not exist." (Appropriate directions can also be framed to cover the situation in (a)(ii) above). If the respondent's decision to invoke a s.35 "neither confirm nor deny" response were ultimately vindicated following judicial review, the efficacy of that decision would not be compromised by a direction in the terms suggested.

26. The reason for the s.87(2)(a) prohibition on inclusion in the Information Commissioner's decision and reasons for decision of exempt matter, or matter of a kind mentioned in s.35, is presumably to preserve the efficacy of the decision under review until such time as it is clear that a judicial review application by an unsuccessful respondent against a decision of the Information Commissioner will not be pursued or, having been pursued, has proved unsuccessful. The FOI Act, however, is silent on whether a respondent's application for judicial review of a decision by the Information Commission holding a s.35 "neither confirm nor deny" response to be invalid, can or should be made or conducted without notice to the applicant, or otherwise in such a manner that the efficacy of the initial "neither confirm nor deny" response is preserved pending the outcome of the judicial review application.

27. A further problem is that s.89 of the FOI Act requires the Information Commissioner to give a decision accompanied by reasons for decision, a copy of which must be given to each participant. In situations (a)(ii) and (a)(iii) described above, it is likely to be impractical to give a sensible account of the reasons for holding that a document, which does in fact exist, does not contain exempt matter under s.36, s.37 or s.42, while complying with the requirement not to include any information as to the existence or non-existence of the requested document. I consider that both the respondent and a Court exercising judicial review would be assisted by having a full account of the Information Commissioner's reasons for holding that a requested document which does in fact exist, does not contain exempt matter under s.36, s.37 or s.42. At present, s.89 does not contemplate the possibility of the Information Commissioner, where appropriate, giving a separate set of reasons for decision to the respondent following a successful application for review of a decision to invoke a s.35 response in respect of a document that does in fact exist. I consider the most practical method of proceeding in such circumstances, and the fairest to the applicant, is for the Information Commissioner to prepare reasons for decision which acknowledge the existence of, and directly address the exempt status of, a requested document which does in fact exist. Those reasons for decision should be delivered first to the respondent, and if the respondent does not commence an application for judicial review of the Information Commissioner's decision within 28 days thereafter, should then be delivered to the applicant. If a judicial review application is commenced, special attention would have to be given to the position of the applicant for review under Part 5 of the FOI Act, in particular whether that applicant should be informed of the Information Commissioner's favourable decision, even if only in the terms noted in paragraph 24 above.

28. I respectfully suggest that the problems, which I have outlined in paragraphs 16 and 21-27 above, in the legislative scheme for external review of decisions to invoke a s.35 "neither confirm nor deny" response, require reasonably urgent attention by the legislature. Perhaps, as a first step, they could be addressed by the Inter-Departmental Committee which, I am aware, is soon to be established to report to the government on the operational efficiency of the FOI Act.

29. Fortunately, the problems which I have discussed above do not arise in the present case, which can be adequately dealt with under the existing provisions of the FOI Act.

The external review process

30. The applicant's husband (on behalf of the applicant) has endeavoured to persuade me that officers of the Department have acknowledged the existence of documents which match the description contained in the applicant's FOI access application. However, I do not accept that the applicant or her husband have received any confirmation from officers of the Department to the effect that the Department has possession or control of documents emanating from the particular source identified in the FOI access application. I do accept, however, that it has been made known to the applicant that allegations concerning her have been made.

31. The Department's submission was provided to me on 19 April 1994 and addressed such issues as the confidentiality of information provided in child protection investigations, Departmental guidelines in relation to sources of child protection notifications, whether such information is relevant to the enforcement or administration of the law, and whether disclosure of documents of the nature sought by the applicant would enable the identity of a confidential source of information to be ascertained.

32. Copies of the material identified in paragraph 33 below were forwarded to the applicant, who was given the opportunity to provide a written submission addressing the issue of whether or not the documents to which the applicant requested access would, if they exist, contain exempt matter under s.42(1)(b) of the FOI Act. I have taken careful account of the material submitted to me on behalf of the applicant, but I find it unnecessary to refer to it in my reasons for decision.

Respondent's evidence in relation to the application of s.42(1)(b)

33. The material parts of the Department's evidence are contained in the following documents:

    1. Procedural Guidelines for Child Protection Intake; Administrative Memorandum 92/6; Policy, Practice and Procedures Memorandum 88/2.

    2. Introduction to *Children's Services Act 1965-1980*; copy of section 144 *Children's Services Act 1965*.

    3. Statement by Carol Peltola (then Assistant Division Head, Protective Services), 'Non-disclosure of Identity of Source of Notifications in Child Protection Matters'.

34. The 'Procedural Guidelines for Child Protection Intake' sets out the Department's policy generally on the guidelines to be followed when an officer receives an allegation concerning the neglect or abuse of a child. The guidelines set out the details which must be sought by the officer, and what procedures are to be adopted to record the information (Chapter 1) and to determine the response to be taken (Chapters 2-3). The response may be either to provide advice and counselling where the harm which has occurred, or is likely to occur, is not significant and the Department's involvement is not justified, or to commence an investigation if there is reasonable cause to believe that a child has or is likely to suffer significant harm (Chapters 4, 6 and 7).

35. The Department accepts anonymous calls, but tries to encourage callers to identify themselves. The Department's response to a person who makes an allegation will include the advice that the person's name, or information likely to identify him or her, will not be given to the family (citing s.144 of the *Children's Services Act 1965*) and that it is Departmental policy that identifying information will not be released under the FOI Act (Chapter 5).

36. The Department has also provided me with copies of guidelines to staff in dealing with child protection matters which direct that transmitting confidential Departmental documents by facsimile should be done only when information which identifies the notifier in relation to Child Protection matter is removed (Administrative Memorandum 92/6). Further the Department has provided me with a copy of the 'Director General's Standing Instructions for the Intake, Response to and Initial Management of Child Protection Notifications' (Policy, Practice and Procedures Memorandum 88/2), in which it is stated:

> *It must be made clear to notifiers that neither their names nor any information likely to identify them will be divulged to any person (other than those investigating the notification at any time).*

37. In the document headed 'Non-disclosure of Identity of Source of Notifications in Child Protection Matters', the author Ms Peltola (then Assistant Division Head, Protective Services) stated at page 2:

> *... the protection of the identity of notifiers of suspected child abuse and neglect is integral to the Department's role in the administration of the* Children's Services Act 1965. *The Department cannot act under the Act to protect a child unless it receives information about the child's need for protection. Most notifiers of suspected child abuse are willing to provide information about their concerns only if they can be assured that their identity will not be revealed to the family concerned. If the identity of notifiers was not protected the Department's access to information about children in need of protection would be severely limited, and the safety of children would be jeopardised.*

38. Ms Peltola went on to discuss the reasons why notifiers are generally unwilling to report concerns unless their identity is withheld from the family concerned and explained that they include:

> a fear of recrimination;
>
> a fear that a positive relationship with the family or the child will be jeopardised;
>
> a fear of possible defamation action; and finally
>
> a fear that the child may lose an important source of support if that person is revealed to be the notifier.

39. Lastly, Ms Peltola discussed the area of false reports and referred to a view, which she regarded as invalid, that reports made with a malicious intent are likely to be untrue and that reports which are found to be unsubstantiated must have been made with a malicious intent. Ms Peltola commented that reports which are clearly made in good faith may be unfounded, and reports which are made for malicious reasons may be substantiated. She stated that it is therefore not useful to differentiate between reports on the basis of motive or intent of the notifier. Ms Peltola concluded by stating at page 4:

> *In the experience of the Department there are very few reports where the notifier has clearly made a false report, ie has deliberately reported to the Department information which he or she knew at the time to have been untrue. It can be argued that in these instances the notifier has forfeited any rights to protection of identity. However, action taken against this small minority would be counter to the common good of ensuring public confidence that the identity of notifiers is protected. To qualify this protection in any way would have repercussions which would discourage notifiers and thus jeopardise the safety of children.*

Application of s.42(1)(b) in the present case

40. A detailed analysis of s.42(1)(b) of the FOI Act is set out in my reasons for decision in *Re McEniery and the Medical Board of Queensland* (1994) 1 QAR 349. At paragraph 16 of that decision, I said that matter will be eligible for exemption under s.42(1)(b) if the following three requirements are satisfied:

(a) there exists a confidential source of information;

(b) the information which the confidential source has supplied (or is intended to supply) is in relation to the enforcement or administration of the law; and

(c) disclosure of the matter in issue could reasonably be expected to:

(i) enable the existence of a confidential source of information to be ascertained; or

(ii) enable the identity of a confidential source of information to be ascertained.

41. A "confidential source of information" means a person who has supplied information on the understanding, express or implied, that his or her identity will remain confidential (see paragraphs 21 and 22 of my decision in *Re McEniery*). In the absence of express agreement, the first requirement of s.42(1)(b) will be satisfied if it is clear, from an examination of the circumstances surrounding the imparting of the relevant information, that there was a common implicit understanding, on the part of both the provider of the information and the recipient, that the identity of the provider was to be treated as confidential. At paragraph 50 of my reasons for decision in *Re McEniery*, I described the factors which may (according to the circumstances of the particular case) be relevant in determining whether or not there was such a common implicit understanding:

> *50. The determination of whether the relevant information was supplied by the informant and received by the respondent on the implicit understanding that the informant's identity would remain confidential (and hence whether the informant qualifies as a confidential source of information for the purposes of s.42(1)(b)) requires a careful evaluation of all the relevant circumstances including,* inter alia*, the nature of the information conveyed, the relationship of the informant to the person informed upon, whether the informant stands in a position analogous to that of an informer (cf. paragraph 25 above), whether it could reasonably have been understood by the informant and recipient that appropriate action could be taken in respect of the information conveyed while still preserving the confidentiality of its source, whether there is any real (as opposed to fanciful) risk that the informant may be subjected to harassment or other retributive action or could otherwise suffer detriment if the informant's identity were to be disclosed, and any indications of a desire on the part of the informant to keep his or her identity confidential (e.g. a failure or refusal to supply a name and/or address, cf.* Re Sinclair, McKenzie's *case, cited in paragraph 36 above).*

42. I consider that the circumstances surrounding the communication of a child protection notification, as outlined in the Department's evidence, support a finding that there will ordinarily be an express agreement, or (failing that) a common implicit understanding, between a person who makes an allegation about the neglect or abuse of a child, and the Department, that the person's identity as the source of the allegation is to remain confidential. An expectation or implicit understanding by a person making an allegation of child abuse or neglect, to the effect that his or her identify would be treated in confidence, would be a reasonable one, having regard to the nature of the information conveyed and to the procedures that the Department follows in order to take appropriate action in respect of such allegations. If documents of the type to which the applicant has requested access do exist, they would ordinarily contain matter in respect of which the first requirement for exemption under s.42(1)(b) of the FOI Act would be satisfied.

43. At paragraphs 36-43 of my decision in *Re McEniery*, I discussed the second requirement of s.42(1)(b), that is, that the information communicated by a confidential source must relate to the enforcement or administration of the law. In particular, I expressed my opinion that the comments of Jones J (President) of the Victorian Administrative Appeals Tribunal in *Re Croom and Accident Compensation Commission* (1989) 3 VAR 441, at page 453-457, correctly captured the sense of the words "enforcement or administration of the law" as they are used in s.42(1)(b) of the Queensland

FOI Act. Jones J stated, in part, as follows:

> ... *s.31* [of the Freedom of Information Act 1982 Vic - a provision analogous to s.42 of the Queensland FOI Act] *embraces not only agencies involved in the detection, punishment and prevention of criminal law violations but also the enforcement of law through civil and regulatory action by agencies entrusted with that task. It is not confined to the criminal law but encompasses a broad range of areas of the law. The concept of administration of the law is a broad one. It is wider than the concepts of 'investigation' and 'enforcement' but its breadth is limited by the context. What is being addressed by the legislature is administration of the law as a further process to investigation of breaches of the law or the enforcement of the law. As Peter Bayne points out, administration in this context can embrace such functions as the collection of information to monitor compliance.*

44. Further, at paragraph 43 of my decision in *Re McEniery*, I commented on a statement from the judgment of Young CJ, in the decision of the Full Court of the Supreme Court of Victoria in *Accident Compensation Commission v Croom* [1991] 2 VR 322, as follows:

> *I could accept at face value Young CJ's statements to the effect that words like "enforcement or administration of the law" require a connection with the criminal law or with the process of upholding or enforcing civil law, with the proviso that the process of upholding or enforcing the civil law can, in appropriate cases, (and the process of upholding or enforcing criminal law will almost invariably) commence with and involve action taken within government agencies.*

45. Information of the nature described in the Department's evidence above clearly relates to the enforcement or administration of the law, as that term is to be understood in the context of s.42(1)(b). Information alleging neglect or abuse of a child relates to the Department's enforcement or administration of the law dealing with the protection of children under the *Children's Services Act 1965*, and could possibly also relate to offences under the Criminal Code.

46. The third requirement of s.42(1)(b) is that disclosure of the matter in issue could reasonably be expected to enable the existence or identity of a confidential source of information to be ascertained. Of the third requirement of s.42(1)(b), I said in *Re McEniery* (at paragraphs 44 and 45):

> *44. The phrase "could reasonably be expected to" in s.42(1) of the FOI Act bears the same meaning as it does in s.46(1)(b) of the FOI Act, and which was explained in* Re "B" and Brisbane North Regional Health Authority *at paragraphs 154-160. In the context of s.42(1)(b) of the FOI Act, it requires a judgment to be made by the decision-maker as to whether it is reasonable to expect that disclosure of particular matter in a document would enable the existence or identity of a confidential source of information to be ascertained. A mere risk that disclosure would enable existence or identity to be ascertained is not sufficient to satisfy the test imposed by these words. The words call for the decision-maker applying s.42(1) to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.*
>
> *45. In the present case, there is no doubt that disclosure of the matter in issue will enable the identity of the informant to be ascertained - the matter comprises such clearly identifying details as name and address. In other cases, the*

> *judgment required may be a more subtle and demanding one, such as whether the applicant for access under the FOI Act could deduce that only a certain person could have known and passed on to a government agency a particular item of information contained in a requested document.*

There is no doubt that the disclosure of documents of the type to which the applicant requested access, assuming they existed, would enable the identity of a person who has provided information in relation to the enforcement or administration of the law, to be ascertained.

47. Having considered the elements of s.42(1)(b), and s.42(2), I am satisfied that the Department was entitled to exercise the discretion conferred by s.35 of the FOI Act to issue a response to the applicant's FOI access application which neither confirmed nor denied the existence of documents of the type to which the applicant requested access.

48. I note that because of the language in which s.35 of the FOI Act is framed, if a requested document would contain even a small amount of exempt matter under s.42, the agency's discretion to invoke a s.35 "neither confirm nor deny" response in respect of the whole of the requested document is enlivened. The Department's evidence in this case does not suggest that the Department would not be prepared, in an appropriate case, to give an applicant (who has become aware, through official sources, of the existence of allegations of child abuse or neglect) access to the substance of an allegation against the applicant, provided that could be done without disclosing information which could reasonably be expected to enable the identity of a confidential source to be ascertained. The problem with the applicant's FOI access application was that it was framed to seek access to a complaint from a particular source, and the identity of a confidential source of a complaint of child abuse or neglect will ordinarily be exempt matter under s.42(1)(b) of the FOI Act. It is possible, always according to what is considered appropriate in the circumstances of a particular case, that a request framed in more general terms, for access to any complaints against the applicant, would be met not with a s.35 "neither confirm nor deny" response, but with the disclosure of copies of requested documents from which any exempt matter under s.42(1)(b) had been deleted (i.e., any matter which would identify the source of the complaints).

Sources who supply false information

49. The applicant's husband, in several submissions to me during the course of this review, has expressed the belief of himself and the applicant that a particular source has provided false information to the Department for improper motives. The issue of informants who supply false information was discussed at paragraphs 56-64 of my decision in *Re McEniery*, where I set out the rationale for the legal position which applies in such cases, and which may seem anomalous to people in a position similar to the applicants who feel they have been unjustly accused without knowing who the accuser is. I also made some comments on this issue in *Re Bussey and Council of the Shire of Bowen* (Information Commissioner Qld, Decision No. 94010, 24 June 1994, unreported) at paragraphs 34-37. I will forward copies of those decisions to the applicant in the hope that she may appreciate the reasons for the stance which the law adopts on this difficult issue.

Conclusion

50. I affirm the respondent's decision, in accordance with s.35 of the *Freedom of Information Act 1992* Qld, to neither confirm nor deny the existence of documents of the type to which the applicant has requested access on the basis that if such documents existed they would contain exempt matter under s.42(1)(b) of the *Freedom of Information Act 1992* Qld.

.....
F N ALBIETZ
INFORMATION COMMISSIONER