OFFICE OF THE INFORMATION COMMISSIONER (QLD))) S 192 of 1993 (Decision No. 95008)

Participants:

JM
Applicant

- and -

QUEENSLAND POLICE SERVICE
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - applicant challenging sufficiency of search by the respondent for requested documents (including a videotape claimed to be in the respondent's possession) - whether there are reasonable grounds for believing that the requested documents exist and are in the possession or under the control of the respondent - whether the search efforts made by the respondent to locate the requested documents have been reasonable in all the circumstances of the case.

FREEDOM OF INFORMATION - refusal of access - documents in issue are available for purchase by the applicant under administrative arrangements made by the respondent, but would not be available for purchase by other members of the community - whether the respondent is entitled to refuse the applicant access to the documents in issue pursuant to s.22(b) of the *Freedom of Information Act 1992* Qld - meaning of the phrase "reasonably available for purchase by members of the community" - observations on the proper approach to the interpretation and application of s.22(a) and s.22(b) of the *Freedom of Information Act 1992* Qld - observations on the meaning of the phrase "reasonably open to public access" in s.22(a) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.7, s.22, s.22(a), s.22(b), s.29(2)
Freedom of Information Regulation 1992 Qld s.6(2), s.7(2)
Acts Interpretation Act 1954 Qld s.32CA
Freedom of Information Act 1982 Vic s.14
Justices Act 1886 Qld s.154
Recording of Evidence Regulation 1992 Qld
Registration of Births, Deaths and Marriages Act 1962 Qld s.22(3)
Traffic Act 1949 Qld s.14A
Transport Infrastructure (Roads) Regulation 1991 Qld s.4.02

Arnold Bloch Leibler and Department of Planning and Housing, Re (1992) 5 VAR 600
Cannon and Australian Quality Egg Farms Limited, Re (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported)
Shepherd and Department of Housing, Local Government & Planning, Re (Information Commissioner Qld, Decision No. 94007, 18 April 1994, unreported)
Smith and Administrative Services Department, Re (1993) 1 QAR 22

DECISION

The decision under review is set aside, and, in substitution for it, I decide that -

(a) following the disclosure to the applicant of further documents during the course of my review, I am satisfied that the respondent has located, and (apart from those referred to in (b) below) given the applicant access to, all the documents in its possession or control which fall within the terms of the applicant's FOI access application; and

(b) the respondent is entitled to refuse the applicant access to the applicant's criminal history, and to the Court brief relating to the applicant's trial at the Magistrates Court at Brisbane on 19 October 1988 (to which two Fine Option Orders are annexed), in accordance with s.22(b) of the *Freedom of Information Act 1992* Qld.

Date of Decision: 12 May 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 to refuse him access under the *Freedom of Information Act 1992* Qld (the FOI Act) to certain documents which the respondent contends are available for purchase by the applicant outside the framework of the FOI Act. The applicant also raises a "sufficiency of search" issue in that he claims that the respondent has failed to locate, and give him access to, a videotape and other documents which he asserts are in the respondent's possession.

2. By application dated 6 May 1993, the applicant sought access to "*all documents in Police possession including Special Branch and other forces in Queensland*". In its terms, the application was not even confined to documents which concerned the applicant (let alone specific incidents or subject matters of concern to the applicant); it sought all documents which were in the possession of the Queensland Police Service (the QPS). As was appropriate in the circumstances, by a letter dated 10 May 1993, the QPS requested that the applicant specify the documents he was seeking: see paragraphs 7-8 of my decision in *Re Cannon and Australian Quality Egg Farms Limited* (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported). The applicant replied to the respondent's request by letter dated 23 May 1993 which stated:

> *The documents I want to see are - any documents that will give me a lead as to why I was secretly on Police files other than when I was arrested and framed in Brisbane some time ago: I will need to know why the Special Branch harassed me and solicited me during their time of operation and taped me in a toilet block adjacent to the corner of William Street and Queen Street, Brisbane.*

3. In a decision of 18 August 1993, Superintendent J Doyle of the QPS identified four documents as falling within the terms of the applicant's FOI access application, and decided to refuse access to all four documents under s.22(b) of the FOI Act, because the documents (the applicant's criminal history, a Court brief and two Fine Option Order forms) were reasonably available for purchase by the applicant under arrangements made by the QPS.

4. By letter dated 10 September 1993, the applicant sought internal review of Superintendent Doyle's decision, saying: "*I claim the right to all documents held by Police HQ and also a police tape taken in a toilet by the Special Branch.*" The internal review was undertaken by Assistant Commissioner G J Williams, who, in a decision dated 20 September 1993, affirmed Superintendent Doyle's decision.

5. By application dated 8 October 1993, the applicant sought external review under Part 5 of the FOI

Act in respect of Assistant Commissioner Williams' decision.

The external review process

6. The documents which were the subject of Assistant Commissioner Williams' decision were obtained and inspected. They related to the prosecution of the applicant in the Magistrates Court at Brisbane, on 19 October 1988, on charges of behaving in an offensive manner and resisting a police officer in the execution of his duty. Those documents comprised:

    a copy of the applicant's criminal history;

    the Court brief in respect of the 1988 charges; and

    two Fine Option Orders, which were attached to the Court brief.

7. In his application for external review, the applicant also raised a "sufficiency of search" issue, stating that he wanted to obtain a copy of all of the Police records and the videotape which he alleged had been taken of him by the Special Branch.

8. After initial consultations with the QPS, some further documents falling within the terms of the applicant's FOI access application were located by the QPS, namely:

    a copy of the transcript of the applicant's trial on 19 October 1988 in the Brisbane Magistrates Court;

    a letter dated 26 November 1989 from the applicant to the Commissioner of Police;

    a letter dated 21 August 1986 from the applicant to the Police Complaints Tribunal;

    a letter dated 28 October 1986 from the Police Complaints Tribunal to the applicant in response to his letter.

    The QPS agreed to give the applicant access to those documents, except for the trial transcript to which access was initially refused in reliance upon s.22 of the FOI Act. The trial transcript remained in issue until quite recently when the QPS decided that it was prepared to give the applicant access, under the FOI Act, to its copy of the trial transcript.

9. Details of the searches and inquiries undertaken in response to the applicant's FOI access application were obtained from the QPS. After evaluating these, I wrote to the applicant on 7 April 1994 identifying the issues raised by this external review and communicating my preliminary views in respect of those issues. In telephone conversations with my staff on 27 April and 16 May 1994, the applicant advised that he did not accept my preliminary views, but did not wish to make any submissions in writing other than what he had previously communicated in his earlier letters concerning the existence of the videotape.

10. As it was necessary to proceed to a formal decision, I requested evidence by way of statutory declaration or affidavit from relevant officers of the QPS concerning the "sufficiency of search" issue, and also concerning the use of video recording equipment by the QPS in the conduct of investigations. I also requested formal confirmation that, in the event of the applicant seeking to purchase the documents which were the subject of the decision by Assistant Commissioner Williams, those documents would, on payment of the appropriate fee, have been provided to the applicant without deletion.

11. The evidence received from the QPS was supplied to the applicant and he was given a further opportunity to make submissions and/or lodge evidence, in response. However, no submissions or evidence have been received from the applicant.

The "sufficiency of search" issue

12. The "sufficiency of search" issue in the present case concerns a general assertion by the applicant that all requested documents have not been revealed to him, as well as a specific allegation that the QPS holds a videotape of the applicant which he alleges was made of him by the QPS in a public toilet in William Street, using a door specially altered for the purposes of video-taping. I note that, in a letter dated 21 August 1986 to the former Police Complaints Tribunal, the applicant asserted the existence of the videotape, but the Police Complaints Tribunal declined to investigate the applicant's complaint.

13. As I indicated in paragraphs 12-61 of my decision in *Re Smith and Administrative Services Department* (Information Commissioner Qld, Decision No. 93003, 30 June 1993; now reported at (1993) 1 QAR 22) and in paragraphs 14-15 of my decision in *Re Cannon and Australian Quality Egg Farms Limited* (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported), I have jurisdiction to conduct a review under Part 5 of the FOI Act where an applicant, who has applied to an agency for access to a document, complains that access to the document has been denied because of the agency's failure to locate and deal with the document in its response to the relevant FOI access application.

14. I explained the principles applicable to "sufficiency of search" cases in my decision in *Re Shepherd and Department of Housing, Local Government & Planning* (Information Commissioner Qld, Decision No. 94007, 18 April 1994, unreported) at paragraphs 18 and 19, as follows:

> *18. It is my view that in an external review application involving 'sufficiency of search' issues, the basic issue for determination is whether the respondent agency has discharged the obligation, which is implicit in the FOI Act, to locate and deal with (in accordance with Part 3, Division 1 of the FOI Act) all documents of the agency (as that term is defined in s.7 of the FOI Act) to which access has been requested. It is provided in s.7 of the FOI Act that:*
>
> > "'**document of an agency**' or '**document of the agency**' means a document in the possession or under the control of an agency, or the agency concerned, whether created or received in the agency, and includes -
> >
> > (a) a document to which the agency is entitled to access; and
> >
> > (b) a document in the possession or under the control of an officer of the agency in the officer's official capacity;"
>
> *19. In dealing with the basic issue referred to in paragraph 18, there are two questions which I must answer:*
>
> > *(a) whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency (as that term is defined in s.7 of the FOI Act);*

and if so,

(b) whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.

15. Despite several requests, the applicant has not provided me with any evidence which objectively supports his assertions that the QPS filmed, or has possession of, a videotape of the kind described above. In a telephone interview with a member of my staff on 4 July 1994, the applicant was asked on what basis he asserted that it was the police who had taken the alleged videotape. The applicant replied that he had no grounds to believe that it was the police. However, he assumed that it was because of his subsequent arrest for behaving in an offensive manner (an incident which occurred in a public toilet at North Quay, but at least two years after the alleged videotaping incident) and subsequent contacts with plain clothes police. However, the applicant is adamant that he was videotaped and insists that it must have been by the police, in particular by the former Special Branch of the QPS.

16. The QPS has supplied me with substantial evidence going to both of the issues identified in paragraph 19 of *Re Shepherd*. In respect of the first issue, i.e., whether there are reasonable grounds to believe that a videotape of the applicant (made in a public toilet in William Street, Brisbane at some time prior to 21 August 1986) exists and is a document of the QPS, I have given consideration to the following evidence:

a statutory declaration of Inspector P J Bull executed on 12 August 1994. Inspector Bull was, in 1986, a Detective Sergeant with the Special Branch of the QPS and was in charge of operational teams performing intelligence gathering and VIP protection duties. He states that the surveillance work undertaken by the Special Branch did not include the use of video cameras, and he could not recall any instances when officers of the Special Branch were employed in surveillance duties involving public toilets.

a statutory declaration of Inspector D P Ferguson executed on 24 August 1994. Inspector Ferguson was assigned to the Special Branch as a Detective between September 1986 and October 1988 and he states that, to his knowledge, the Special Branch never had possession nor use of a video camera and that the video-taping of suspects in public toilets was never a function or duty of the Special Branch.

a statutory declaration of Senior Sergeant B W Cross executed on 12 August 1994. Senior Sergeant Cross has been the officer in charge of the electronic recording and centralised tape storage facility of the QPS for approximately 2 years, and previously, between 1976 and 1991, was attached to the Bureau of Criminal Intelligence (BCIQ). He states that in his 16 years of experience with the BCIQ, he was involved in the performance and command of all manner of intelligence and surveillance duties and that neither he, nor anyone under his command, was involved in surveillance activities targeting individuals behaving in an offensive manner in public toilets. He also states that it was not the policy of the BCIQ to target such behaviour, nor were any physical or technical resources of the BCIQ used to target such behaviour. Finally, Senior Sergeant Cross states that the costs of surveillance, both physical and technical, are extremely high, and, in his professional experience, sections tasked with the performance of such duties on behalf of the QPS are totally involved with far more serious criminal threats to the community.

17. In respect of the issue of whether the search efforts made by the QPS to locate the videotape and any other documents concerning the applicant held by the QPS, have been reasonable in all the circumstances of this particular case, I have given consideration to the following evidence:

the statutory declaration of Senior Sergeant Cross in which he states that there is no record of a videotape concerning the applicant currently being held by the Central Tape Storage Facility, nor is there a record of such a recording having previously been held by that facility.

a statutory declaration executed on 23 August 1994 by Detective Inspector P C Coyle, the officer in charge of the Counter Terrorist Section of the Bureau of Criminal Intelligence (which section currently holds the remaining files of the former Special Branch, i.e., those not destroyed in 1989). Detective Inspector Coyle states that there are no ex-Special Branch files held in the Counter Terrorist Section concerning the applicant, nor are there any video recordings or photographs which relate to the applicant.

a statutory declaration of Sergeant M J Fitch of the Police Information Centre executed on 29 August 1994. Sergeant Fitch states that on 7 June 1993 she conducted a search for records held by the Police Information Centre concerning the applicant and located four documents (being those documents which were the subject of Assistant Commissioner Williams' decision dated 20 September 1993), which documents were stored on microfilm. She further states that during her search she did not see any reference or record which indicated the existence of a videotape concerning the applicant.

a statutory declaration executed on 26 August 1994 by Sergeant G Hedges of the Headquarters Property Section of the QPS. Sergeant Hedges states that he made a thorough search of the computer indices used by the Headquarters Property Section and that he did not locate any exhibits which relate to videotapes under the name of the applicant.

a statutory declaration of Ms J Walker, executed on 26 August 1994. Ms Walker is employed as the officer in charge of the Registries Section of the QPS and is responsible for the maintenance and safe keeping of registry files. Ms Walker states that she examined and searched the indices and records of the Registry Section and found no evidence or record of any videotape ever having been filed or recorded on registry files relating to the applicant. Ms Walker states that she has been employed in the Registry Section, and its predecessor, for 16 years and has no recollection of ever filing videotapes relating to the Special Branch or Licensing Branch, or matters relating to the policing of offences such as "behaving in an offensive manner".

Conclusion on the "sufficiency of search" issue

18. The applicant has not supplied me with any evidence to support his assertions as to the existence, as a document of the respondent agency, of the videotape that he contends was taken of him in a public toilet. The QPS has supplied me with evidence from a number of individuals who were assigned to the Special Branch at the time the applicant first raised his concerns about having been videotaped. The evidence in each case is that the Special Branch never undertook surveillance work of the kind of which the applicant alleges he was the subject. Further, evidence was provided by an officer with some 16 years experience with the Bureau of Criminal Intelligence, Senior Sergeant Cross, who states that it was never the policy of the BCIQ to target such behaviour, nor were any of the physical or technical resources of the BCIQ used to target such behaviour. I accept this evidence which I find to be more credible than the applicant's assertions to the contrary. On the basis of the evidence detailed at paragraphs 16 and 17 above, I find that there are no reasonable grounds to believe that the QPS has, in its possession or control, a videotape of the kind asserted by the applicant. Even if I had concluded that such grounds existed, I am satisfied that the QPS has undertaken all reasonable searches and inquiries to locate a videotape of the kind alleged by the applicant to exist, and that such a videotape cannot be located in the possession or control of the QPS.

19. I am also satisfied, on the basis of the searches and inquiries detailed in the evidence lodged on behalf of the respondent, that the respondent has now located and dealt with (by deciding either to grant or to refuse access to) all documents in its possession or control which fall within the terms of the applicant's FOI access application.

Section 22 of the FOI Act

20. The respondent has refused to give the applicant access under the FOI Act to several documents, in reliance upon s.22 of the FOI Act which provides:

> ***Documents to which access may be refused***
>
> ***22.*** *An agency or Minister may refuse access under this Act to -*
>
> *(a) a document that is reasonably open to public access (whether or not as part of a public register) in accordance with another enactment, whether or not the access is subject to a fee or charge; or*
>
> *(b) a document that is reasonably available for purchase by members of the community in accordance with arrangements made by an agency; or*
>
> *(c) a document that is reasonably available for public inspection in the Queensland State Archives or a public library; or*
>
> *(d) a document that -*
>
> *(i) is stored for preservation or safe custody in the Queensland State Archives; and*
>
> *(ii) is a copy of a document of an agency; or*
>
> *(e) adoption records maintained under the* Adoption of Children Act 1964.

21. Section 22 is one of several provisions in the FOI Act which place qualifications on the legally enforceable right, conferred by s.21 of the FOI Act, to be given access under the FOI Act to documents of an agency and official documents of a Minister. The use of the word "may" in s.22 of the FOI Act means that the power to refuse access under the FOI Act to documents which fall within the terms of s.22(a), s.22(b), s.22(c), s.22(d) or s.22(e) may be exercised, or not exercised, at the discretion of the relevant agency or Minister (see s.32CA of the *Acts Interpretation Act 1954* Qld); i.e., an agency or Minister may choose to allow access to documents under the FOI Act even though they fall within one of the paragraphs of s.22 of the FOI Act.

22. Section 22(a) and s.22(b) are the only paragraphs of s.22 which require attention for the purposes of the present case, and I propose to make some observations on their intended sphere of operation.

23. The FOI Act embodies a self-contained and wide-reaching, though not completely comprehensive (see s.11 and s.11A of the FOI Act), scheme for obtaining access to documents of agencies and official documents of Ministers. That scheme is subject to its own charging regime, one element of which is that an applicant is not required to pay any fees or charges for access to documents which contain information concerning the applicant's personal affairs. Not infrequently, other statutes or

statutory instruments make provision for more limited or specialised schemes of access to specific categories of government-held information, often subject to a prescribed charging regime; for example, the register of land titles, the register of vehicles maintained under s.4.02 of the *Transport Infrastructure (Roads) Regulation 1991* Qld, the registers maintained by the Registrar of Births, Deaths and Marriages. Persons seeking information under one of these more specialised schemes of access to government-held information may be required to pay a prescribed fee or charge, irrespective of whether the information sought concerns their personal affairs.

24. Section 22(a) of the FOI Act is, in my opinion, obviously designed to ensure that these more specialised access schemes provided for in other enactments ("enactment" is defined in s.7 of the FOI Act to mean an Act or a statutory instrument) need not be overridden by the wide scope of the access regime provided for in the FOI Act.

25. Section 22(b) of the FOI Act undoubtedly has a similar object to s.22(a), but whereas s.22(a) is confined to access schemes provided for in other enactments, s.22(b) deals with access schemes established under administrative arrangements made by an agency, i.e., without the backing of an Act of Parliament or statutory instrument.

26. Where an agency or a Minister receives an application, made in accordance with s.25 of the FOI Act, for access to a document which is reasonably open to public access under another enactment, or reasonably available for purchase under arrangements made by an agency, s.22(a) and s.22(b), respectively, entitle the agency or Minister to refuse access under the FOI Act to the requested document, thereby forcing the applicant to obtain access to the requested document through the alternative specialised scheme of access, and pay any applicable fee or charge. In my opinion, the object of s.22(a) and s.22(b) is to provide for the continued efficacy of specialised schemes of access to government-held information, and their individual charging regimes, in the face of the broad scheme of access embodied in the FOI Act, and its charging regime.

27. That limited object of s.22(a) and s.22(b) must, in my opinion, be given effect in a way that is in harmony with the wider objects of the FOI Act as a whole, i.e., to extend as far as possible the right of the community to have access to information held by Queensland government (s.4), having regard to the reasons for enactment of the FOI Act which are summarised in s.5 of the FOI Act. I note in this regard that the Explanatory Notes provided to Members of the Legislative Assembly by the Attorney-General in respect of the *Freedom of Information Bill* say this about the provision which became s.22 of the FOI Act: "*Clause 22 outlines the situations where access may be refused under the Bill because generally access is already available*."

28. In my opinion, the words "public access" in s.22(a), and "members of the community" in s.22(b), must be read as having been intended to comprehend at least the particular applicant whose FOI access application is under consideration in any given case. Section 22(a) and s.22(b) cannot, in my opinion, have been intended to apply so as to deny a particular applicant access under the FOI Act to a particular document, in circumstances where the particular document is not reasonably open to access by the particular applicant under the terms of another enactment, or reasonably available for purchase by the particular applicant. (Rather s.22(a) and s.22(b) were intended to be a means for allowing agencies and Ministers a discretion to regulate which scheme of access, with its particular charging regime, is to be used, by an applicant for access under the FOI Act, to obtain access to a document which is available for access under an alternative scheme to the FOI Act.) In my opinion, s.22(a) and s.22(b) are not capable of being invoked in respect of a particular document requested by a particular applicant, unless it is certain that the particular document is reasonably open to access by the particular applicant under another enactment on payment of any applicable fee or charge (s.22(a)), or the particular document is reasonably available for purchase by the particular applicant under arrangements made by an agency (s.22(b)). If that is not the case, there is no justification in principle for interpreting s.22(a) or s.22(b) in a way that would detract from the right

of a particular applicant to have a valid FOI access application for a particular document dealt with under the relevant provisions of the FOI Act (other than s.22(a) or s.22(b)).

29. An important corollary to the above propositions is this. If -

(a) the terms of the other enactment contemplated by s.22(a), or the arrangements for purchase contemplated by s.22(b), place restrictions on the extent of access available to certain kinds of information under the particular specialised scheme of access; and

(b) those restrictions would operate to deny access to all or part of a particular document requested by an applicant for access under the FOI Act (even if the restrictions operate *vis-à-vis* that particular applicant, but not necessarily against other applicants for the same information);

then s.22(a) or s.22(b) would not be available, and the agency or Minister would be obliged to deal with the applicant's FOI access application for that particular document, or part thereof, in accordance with other relevant provisions of the FOI Act (i.e., other than s.22(a) or s.22(b)).

30. With these general principles in mind, I turn to address another interpretive difficulty which is inherent in the words "open to public access" in s.22(a), and (to a lesser extent) in the words "available for purchase by members of the community" in s.22(b). The issue is whether, to be eligible for consideration under the respective provisions -

(a) the document in issue must be open or available to every member of the public/community; or

(b) whether it is also sufficient that the document in issue falls within a class of documents which is open or available to members of the public/community, even though particular documents in that class are only open or available to particular persons to whom information in the particular documents relates.

31. Some specialised schemes of access to government-held information are open to any and all members of the public, e.g., the register of land titles. Other specialised schemes are open to any member of the public in the sense that any individual may obtain access to information which concerns them, but not to information of the same character concerning other individuals. (This is becoming increasingly common with increasing community concern about privacy safeguards.) I will give some simple examples to illustrate the kind of qualitative difference between specialised schemes of access to which I am referring. The details recorded on the register of land titles in respect of property at a certain address are quite literally "open to public access": not only the owner of that property, but any member of the public, can obtain access to those details, on payment of the applicable fee. On the other hand, while any member of the public can obtain access to his or her own birth details recorded on the register maintained under the *Registration of Births, Deaths and Marriages Act 1962* Qld, restrictions apply when a member of the public seeks access to the birth details recorded in respect of another member of the public: see s.22(3) of the *Registration of Births, Deaths and Marriages Act 1962*. Similarly, while any person may obtain access to information about his or her driver's licence and traffic history, by making an application in accordance with s.14A of the *Traffic Act 1949* Qld, information of that kind in respect of one person is not open to access by other persons, except with the first person's written agreement.

32. The issue of whether s.22(b) extends to specialised access schemes in the second category described in paragraph 30 above, is of direct relevance in this case. The documents in issue are available for purchase by the applicant under administrative arrangements made by the QPS, but would not be available for purchase by other members of the community. Moreover, under the FOI Act, the

applicant would not be obliged to pay any charge to obtain access to the documents in issue, since they contain information which concerns the applicant's personal affairs.

33. Until a concession was made by the respondent quite late in the course of this review, the question of whether the respondent was entitled, under s.22(a) of the FOI Act, to refuse the applicant access to a copy of the transcript of the applicant's trial in the Magistrates Court at Brisbane on 19 October 1988, was in issue in this case. Under s.154 of the *Justices Act 1886* Qld, a transcript of criminal proceedings before the Magistrates Court is not necessarily available to any member of the public upon request. The Clerk of the Court has the discretion to refuse to supply a copy if he or she is of the opinion that the person making the request does not have a sufficient interest in the proceedings, or in securing a copy of the record of the proceedings. Thus, s.154 of the *Justices Act* establishes a specialised scheme of access to a particular class of information (i.e., records of proceedings under that Act) which can be availed of by any member of the public, but records of a particular proceeding will only be made available to persons having a sufficient interest in that proceeding or in obtaining a copy of the record thereof. It is thus an example of a specialised scheme of access to information which corresponds to the second category identified in paragraph 30 above.

34. Inquiries which I pursued with the Registrar of the Magistrates Court at Brisbane established that there was no doubt that the applicant could obtain from the court a copy of the transcript of his trial, on payment of the applicable charge. However, there is obvious difficulty in arguing that the transcript of the applicant's trial is "reasonably open to public access" within the meaning of s.22(a) of the FOI Act. The natural meaning of the words "public access" suggests access by any member of the public, rather than access by particular individuals having a sufficient interest in, or connection with, the information in the particular document in issue.

35. If, on the other hand, the literal interpretation of the phrase "public access" means that trial transcripts, which are subject to restricted access under s.154 of the *Justices Act*, are not eligible for the application of s.22(a) of the FOI Act, then an application for access under the FOI Act to such a trial transcript, by a person in a position similar to the applicant in this case, must be dealt with under the FOI Act. The person could thereby obtain, free of charge, a transcript for which a charge is ordinarily payable (under s.154 of the *Justices Act* and the *Recording of Evidence Regulation 1992* Qld) so as to recoup some of the costs to government of maintaining its scheme for the recording of court proceedings and the preparation of transcripts on request. Similarly, any existing statutory schemes of access to government-held information, which allow individuals to have access for a fee to documents which concern them, but which documents are not literally "open to public access", may be by-passed by individuals seeking access to those documents under the FOI Act, especially where those documents contain information which can properly be characterised as information concerning the "personal affairs" of the applicant for access under the FOI Act, such that no fee or charge is payable for access under the FOI Act: see s.29(2) of the FOI Act, and s.6(2) and s.7(2) of the *Freedom of Information Regulation 1992* Qld.

36. Whether the words "open to public access" in s.22(a) must be interpreted according to their ordinary meaning, or whether it is possible to take a purposive approach so as to extend their coverage to access schemes falling with the second category identified in paragraph 30 above, is not an issue which I have to decide for the purposes of this case. It is apparent, however, that s.22(a) of the FOI Act may require review by the legislature to establish whether or not its present wording needs amendment in order to convey, with greater certainty, the sphere of operation which the legislature intended s.22(a) to have. It would be more in accordance with what seems to me to be one of the obvious purposes of s.22(a) and s.22(b) if specialised access schemes falling within the second category identified in paragraph 30 above were eligible for consideration under s.22(a) and s.22(b). In the case of s.22(a), that could be achieved by changing the words "reasonably open to public access", to "reasonably open to access by members of the community". (In the case of s.22(b), I do not think any change is necessary, for the reasons explained in the following paragraph). Such an

approach would not restrict the availability of government-held information (the document in issue must be reasonably open to access, or reasonably available for purchase, by the particular applicant for access under the FOI Act before s.22(a) or s.22(b) is able to be invoked - see paragraphs 28-29 above) but it will in many cases affect the fee or charge that is payable for access to particular information: some charging regimes in some specialised access schemes are likely to be more onerous than the present charging regime under the FOI Act. But, in my opinion, the preservation of the efficacy of such specialised access schemes, including their charging regimes, was one of the obvious purposes for the enactment of s.22(a) and s.22(b) of the FOI Act.

37. In the case of s.22(b), the words "members of the community" can, far more easily than the words "public access" in s.22(a), be interpreted in a way that is consistent with what I take to be one of the obvious purposes of the provision (as explained in the preceding paragraph). The ordinary meaning of the words "members of the community", and their context in s.22(b), do not suggest that they need to be interpreted in such a way as to make it a pre-condition to the application of s.22(b) that a document be reasonably available for purchase by any and all members of the community. It is sufficient, in my opinion, to attract the application of s.22(b) that a document is reasonably available for purchase by some members of the community (provided the particular applicant for access under the FOI Act is one of them - see paragraphs 28-29 above). In the present case, I am satisfied that the administrative arrangements made by the QPS for purchase of the documents in issue (which fall within the second category identified in paragraph 30 above) are eligible for consideration under s.22(b) of the FOI Act.

38. There is an intended safeguard, against improper or over-zealous reliance by agencies on s.22(a) and s.22(b), in the qualifying word "reasonably": thus a document must be "reasonably open to public access" or "reasonably available for purchase by members of the community". I will not attempt to predict all of the factors which may affect the issue of whether a document is "reasonably open to public access" or "reasonably available for purchase", but I will give some illustrative examples. If a publication is usually available for purchase from an agency, but supplies are out of stock, I think an applicant should be entitled to access, under the FOI Act, to an agency copy of the publication, during the period that the publication is not actually available for purchase. If a document is open to public access by inspection only, then the physical location of the document may affect the issue of whether it is "reasonably open to public access" under s.22(a). If a document is available for inspection only in one location, then (subject to practical considerations which may be present in any particular case) it may be difficult to say that the document is reasonably open to access by members of the public in other regions of Queensland. In such circumstances, an agency may not be entitled to rely upon s.22(a); rather, the applicant may be entitled to insist upon access under the FOI Act in the form of access most convenient to the applicant (*cf.* s.30 of the FOI Act, especially s.30(2)), e.g., by the provision of a photocopy of the relevant document.

39. The legislative history of s.22 suggests that the cost of access to a document under a specialised access scheme is a consideration which might be relevant to a determination of whether access is reasonably available. Clause 15(1) of the model Freedom of Information Bill recommended by the Electoral and Administrative Review Commission (EARC) in its Report on Freedom of Information (December 1990; Serial No. 90/R6) corresponds to s.22 of the FOI Act. In its commentary on clause 15(1), EARC said (at p.88, paragraph 7.240):

> *7.240 FOI legislation ordinarily confers a right of access to information which is not otherwise available for access. However, an exemption in respect of unwarranted or unnecessary disclosure should not be abused such as to force someone to obtain access by a more onerous process than access under FOI legislation. By the same token, the Commission recognises that government agencies should be able to sell particular information at reasonable market prices. The Commission considers therefore that an*

exemption in FOI legislation relating to documents otherwise publicly available should operate by reference to a reasonableness test (clause 15(1)(a)-(d)).

40. In practice, I consider that reasonableness of the cost of access to documents is more likely to be a significant consideration under s.22(b) rather than s.22(a). If a charging regime for access to government-held information is prescribed in an Act of Parliament or in a statutory instrument which was capable of being, but has not been, disallowed by Parliament, it would not ordinarily be appropriate to question the reasonableness of the charging regime which has received Parliament's express, or *de facto*, approval.

41. The charging regimes set up under administrative arrangements made by an agency will be deserving of more careful scrutiny as to their reasonableness, especially those which post-date the FOI Act and appear to impose more onerous charges than would be applicable for obtaining access under the FOI Act. I have no doubt that Parliament intended that government agencies should be able to sell certain kinds of information, for which there is a public demand, at reasonable market prices. However a charging regime which markedly exceeds reasonable market prices, or reasonable cost recovery for the provision of information, would require careful scrutiny, especially if it appeared to be designed as an obstacle aimed at inhibiting demand for access to particular information.

42. Before it would be proper for an FOI decision-maker to refuse access to a particular document under s.22(a) or s.22(b), the decision-maker should establish whether the applicant for access is clearly entitled to obtain full access to the document in issue under the relevant alternative access scheme, or whether that scheme reserves a discretion to the information provider to refuse access to particular applicants or to withhold parts of the particular document in issue (see my comments at paragraph 29 above). If there is any doubt, the FOI decision-maker should seek assurances from the information provider under the relevant alternative access scheme, that the applicant is entitled to full access to the particular document in issue, on payment of any applicable charge (see paragraphs 48-49 below).

43. Finally, I note that, according to the terms of s.22(a) and s.22(b), the very document (or part of a document - see the definition of "document" in s.7 of the FOI Act) to which access has been requested under the FOI Act must be available to the applicant under the relevant alternative access scheme, in the circumstances contemplated by s.22(a) and s.22(b), before those provisions can be properly invoked. It is not, for instance, sufficient that information of the kind recorded in the document in issue is available for access outside the FOI Act (*cf*. s.14 of the *Freedom of Information Act 1982* Vic and *Re Arnold Bloch Leibler and Department of Planning and Housing* (1992) 5 VAR 600). Likewise, if an applicant requests access to a document held by an agency which is reasonably open to public access under another enactment, but there is a copy of the document held by the agency which has handwritten notations recorded on it by officers of the agency, then access to the annotated copy could not be refused in reliance upon s.22(a), because it would not be the same document as is reasonably open to public access under another enactment.

Application of s.22(b) to the documents in issue

44. The applicant has been refused access to the following documents in reliance on s.22(b) of the FOI Act:

the applicant's criminal history; and

a Court brief, together with two Fine Option Orders which are attached to the Court brief.

45. In his decision of 20 September 1993, Assistant Commissioner Williams refused the applicant access to the documents noted above on the basis that the applicant could purchase the documents under administrative arrangements made by the QPS. Assistant Commissioner Williams made reference to a scheme operated by the Information Management Bureau of the QPS whereby individuals could obtain access to criminal offence reports, Court briefs and criminal histories, and stated that the provision concerning the release of such documents is contained in Policy Proposal 7 dated 18 December 1992, as follows:

> *It is the policy of the Queensland Police Service that information pertaining to individual criminal history records will only be released by the Officer in Charge, Information Bureau, on application in the prescribed form and payment of any applicable fees.*

46. Assistant Commissioner Williams also referred to those parts of the Statement of Affairs of the QPS dated 2 August 1993 (published pursuant to s.18 of the FOI Act) which deal with criminal histories and Court briefs. The material parts of the Statement of Affairs are as follows:

> *Criminal Histories* *Fee $33.30*
>
> *Applications for the supply of criminal histories are usually made by an individual or his solicitor or agent. A criminal history will only be supplied to the person whose name appears on the criminal history record or to his/her solicitor or agent, provided that a form of application and indemnification has been received. Generally a criminal history contains a record of previous convictions.*
>
> *Court Briefs* *Fee $15.00*
>
> *Copies of Court briefs are provided to applicants or their agents when proceedings before a Court have been finalised and the relevant appeal period has expired. Exempt material is removed from any documents supplied under this scheme. Applicants would include complainants and offenders for the provision of documents concerning their personal affairs.* (my underlining)

47. The QPS has established administrative arrangements, for access to certain classes of information, which are open to any member of the community, although particular information within each class will only be supplied to the person(s) whom the particular information concerns. For the reasons given in paragraph 37 above, I am satisfied that documents available for purchase under these administrative arrangements are eligible for consideration under s.22(b) of the FOI Act. The terms of the scheme of access also make clear, however, that the QPS reserves a discretion to withhold some information from the documents described above, even from a person who is *prima facie* entitled under the terms of the scheme to purchase a copy of the document.

48. By letter dated 17 November 1994, I requested written confirmation from the QPS that the applicant, upon making application under the administrative arrangements detailed in the QPS's Statement of Affairs, would receive the relevant criminal history and Court brief (with the attached Fine Option Orders) in their entirety, i.e., without any deletions. By letter dated 18 November 1994, the QPS confirmed that the applicant would be given complete copies of those documents if the prescribed fee was paid in accordance with the administrative arrangements. In particular, I was advised that no deletions would be made from the Court brief as the complainant noted on the brief was the Crown.

49. In this particular case, as the applicant would be entitled to complete copies of the remaining documents in issue, upon making application to the officer in charge of the Information Management Bureau of the QPS, I am satisfied that the respondent is entitled to refuse the applicant

access to the criminal history and the Court brief (with the attached Fine Option Orders) under s.22(b) of the FOI Act. However, had the QPS advised that it considered the Court brief to contain "exempt matter" that would require deletion (as is contemplated in its Statement of Affairs) prior to the applicant receiving the document, I would have required the QPS to deal with that part of the Court brief under the relevant provisions of the FOI Act.

Conclusion

50. Since the review process has dealt with documents which were not considered in the decision under review, it is appropriate that I set aside the decision under review. In substitution for it, I decide that -

(a) following the disclosure to the applicant of further documents during the course of my review, I am satisfied that the respondent has located, and (apart from those referred to in (b) below) given the applicant access to, all the documents in its possession or control which fall within the terms of the applicant's FOI access application; and

(b) the respondent is entitled to refuse the applicant access to the applicant's criminal history, and to the Court brief relating to the applicant's trial at the Magistrates Court at Brisbane on 19 October 1988 (to which two Fine Option Orders are annexed), in accordance with s.22(b) of the FOI Act.

.....
F N ALBIETZ
INFORMATION COMMISSIONER