

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

L 6 of 1993
(Decision No. 94012)

Participants:

WENDELL RUBEN HEARL
Applicant

- and -

MULGRAVE SHIRE COUNCIL
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - parts of FOI access request framed in terms which seek answers to questions rather than access to existing documents - whether application for review "misconceived" and "lacking in substance" within the terms of s.77(1) of the *Freedom of Information Act 1992 Qld* - some parts of FOI access request making unsubstantiated assertions of collusion between the respondent and unnamed "marijuana growers" - whether application for review "vexatious", "misconceived" and "lacking in substance" within the terms of s.77(1) of the *Freedom of Information Act 1992 Qld* - agreement to reframe FOI access request to state more precisely the class of documents to which access is sought - words and phrases: "vexatious".

FREEDOM OF INFORMATION - refusal of access - documents claimed to be exempt under s.43(1) of the *Freedom of Information Act 1992 Qld* - common law principles pertaining to legal professional privilege - application of s.43(1) of the *Freedom of Information Act 1992 Qld*.

Freedom of Information Act 1992 Qld s.7, s.14, s.21, s.25(1), s.25(2), s.43(1), s.52, s.77, s.77(1), s.80, s.88(1)(b)

Freedom of Information Regulation 1992 Qld s.6, s.7, s.8

Harbours Act 1955 Qld s.97A

Aspar Autobarn Co-operatives Society v Dovala Pty Ltd (1987) 74 ALR 550

Cannon and Australian Quality Egg Farms Limited, Re (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported)

Dalleagles Pty Ltd v Australian Securities Commission (1991) 6 ACSR 498

Grant v Downs (1976) 135 CLR 674

Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd (1985) 3 NSWLR 44

Packer v DCT (Qld) (1985) 55 ALR 242

Smith and Administrative Services Department, Re (Information Commissioner Qld, Decision No. 93003, 30 June 1993, unreported)

Southern Equities Corporation Ltd v West Australian Government Holdings Ltd (Sup Ct of WA, Full Court, No. 1347 of 1990, 16 June 1993, unreported)

Trade Practices Commission v Sterling (1979) 36 FLR 244

DECISION

1. In accordance with s.77 of the *Freedom of Information Act 1992 Qld* (the FOI Act), I decide not to review further the respondent's decisions in response to the following parts of the applicant's initial FOI access request dated 10 May 1993 (as numbered in paragraph 3 of my reasons for decision) -

- (a) parts 1, 2, 3, 4, 6, 7, 16, 17 and 23; and
- (b) parts 9, 10 and 11 insofar as those parts relate to resumption of land for beach access;

on the basis that the application for review of those decisions is misconceived and lacking in substance.

2. In accordance with s.77 of the FOI Act, I decide not to review further the respondent's decisions in response to the following parts of the applicant's initial FOI access request dated 10 May 1993 -

- (a) parts 9, 10 and 11 insofar as those parts relate to alleged resumption of land for "marijuana growing";
- (b) parts 12, 13, 18, 19, 20, and 21;
- (c) the first part of part 14; and
- (d) the first question in part 22;

on the basis that the application for review of those decisions is vexatious, misconceived and lacking in substance.

3. In respect of part 14 of the applicant's initial FOI access request, insofar as it requests reports on the Moon River Caravan Park resumption, I set aside the respondent's decision of 20 July 1993 and in substitution for it I decide that the applicant may (subject to payment of any fees required by sections 6, 7 or 8 of the *Freedom of Information Regulation 1992*) be given access to the 96 pages identified by the respondent which deal with that subject (being the documents forwarded to me under cover of the respondent's letter dated 24 August 1993).

4. The respondent's decisions of 20 July 1993 in response to parts 5, 8, 15 and the second question of part 22, of the applicant's initial FOI access request dated 10 May 1993, are set aside, and in substitution for them I decide that:

- (a) the applicant may (subject to payment of any fees required by sections 6, 7 or 8 of the *Freedom of Information Regulation 1992*) be given access to 238 of the 255 pages which have been identified by the Council as falling within the terms of the reframed FOI access request agreed to by the applicant (the terms of which are set out at paragraph 40 of my reasons for decision); and

- (b) the remaining 17 pages are exempt documents under s.43(1) of the FOI Act (being the 17 pages identified as folios 11, 12, 13, 15, 61, 63, 68, 69, 193, 195, 198, 199, 202, 205, 207, 208 and 216 in a schedule headed "Documents Subject to Exemption" which accompanied the Council's letter to me dated 1 November 1993).

Date of Decision: 27 June 1994

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F N ALBIETZ
INFORMATION COMMISSIONER

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Participants:

WENDELL RUBEN HEARL
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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision refusing access to requested documents on the basis that most of the requested documents do not exist, or (as to some 17 documents) that they are exempt from disclosure under s.43(1) of the *Freedom of Information Act 1992 Qld* (the FOI Act) (the legal professional privilege exemption).
2. Mr Hearl's initial FOI access request dated 10 May 1993 exemplifies some of the problems with the framing of an FOI access request to which I referred in my reasons for decision in *Re Cannon and Australian Quality Egg Farms Limited* (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported) at paragraphs 8 to 16, and many other problems as well. Chief among its problems is that it is framed predominantly as a request to supply information in the form of answers to questions, rather than in the form of access to documents.
3. Mr Hearl's initial FOI access request, as numbered by the FOI decision-maker of the Mulgrave Shire Council (the Council), reads as follows:

Would you please supply the following information under the Freedom of Information.

1. *Details of land Council claims I had changed from Fisheries Habitat Reserve to freehold?*
2. *The area of land changed?*
3. *The location of the land I had changed?*
4. *The date I had the land changed?*
5. *All correspondence the Council has on this change.*
6. *The details of how I sort and was given approval for this change and the name of the Government Department that made the change.*
7. *The details of my application for this land.*
8. *Copies of letters written to any Department to have the land changed to public use land.*
9. *The detailed procedure for council to resume land for marijuana growing and the procedure for Beach access?*
10. *Stage by stage of each type of resumption?*
11. *How the council arrives at the price paid for both beach access and*

- marijuana growing?*
12. *Where did the meeting between the Councillors and the marijuana growers take place?*
 13. *Name of all councillors who voted to give the land to the marijuana growers on every occasion a vote was taken?*
 14. *All officers reports on the proposed acquisition and comparable reports of Moon River Caravan Park resumption.*
 15. *Details of correspondence or communication with the Police advising them my land had been changed to public use land, and a copy of council records that support the advice given to the Police?*
 16. *The name or names of the Police this information was given to?*
 17. *Details of the area of land and the location of this land.*
 18. *Details of instructions given to Drug growers to kill my family, who made the request and the number of drug growers involved?*
 19. *Reasons given for wanting the drug growers to kill my family.*
 20. *How the drug money was to be distributed?*
 21. *Did any of the meetings with the drug growers take place in the (Chairman's Office) if so how many?*
 22. *Did the council still require any of the land for the drug growers after it changed hands to Chapman or TNN Cairns? Provide all council records, officers reports and state government letters or other relevant documents from which Cr. Pyne and Cr. Marsh obtained their information for their media statements?*
 23. *Full details of how my owing the land was just the remnants of the Joe Era (Cr. S. Marsh)?*

(This is a verbatim extract from Mr Hearl's letter dated 10 May 1993. I have not attempted to make any corrections to it.)

4. The terms in which Mr Hearl's initial FOI access request is framed make no concession to readers who are not aware of the history of his past dealings with the Council. For instance, in respect of item 1, no particulars are given as to when, where and by whom (on behalf of the Council) claims were allegedly made that the applicant had land changed from Fisheries Habitat Reserve to freehold. It appears, however, that Council officers were well aware of the background to this part of Mr Hearl's FOI access request, which is related to various disputes dating back to the early 1970s over a particular parcel of land owned by Mr Hearl. It also appears that Mr Hearl was at one stage, but is no longer, an elected member of the Council.
5. Mr Hearl's FOI access request was described in a subsequent letter to me from the Council's principal officer as "malicious, defamatory or vexatious". There is no provision of the FOI Act which entitles an agency to refuse to deal with an FOI access request on that basis. If, however, such a case reaches the stage of review under Part 5 of the FOI Act (which this case has now reached), s.77 empowers the Information Commissioner to decide not to review if satisfied that the application for review is "frivolous, vexatious, misconceived or lacking in substance".
6. The Council's initial response to Mr Hearl, dated 2 July 1993, was as follows:

I have been unable to locate any information requested in regards to items 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.

In relation to item 23, I have assumed you are referring to your letter dated 21st March, 1988 and attachments (which are enclosed) and particularly the attachment of a copy of a newspaper article FNQ Sunday dated 20th March, 1988. I have been unable to locate any references to this article.

With regard to item 9, I have been unable to locate any reference whatsoever to the resumption of land "for marijuana growing". However, there are some records held on land acquired by Council for beach access, however, this matter falls into the category of a non-personal nature. If you are desirous of applying for access to these documents, you will need to make a non-personal application accompanied by a fee of \$30.00.

7. At this stage, it is pertinent to quote from the article referred to in the Council's initial response, which appeared in *FNQ Sunday* on 20 March 1988 under the headline "Waterway access stumps Council":

The question of public or private access to a waterway at the bottom of Reed Rd, Trinity Park, has been bounced straight back into the lap of the State government. ...

The question arose when developer Wendell Hearl deepened and widened a section of Moore Creek alongside Riverside Parade from Reed Rd to the ocean and prohibited local residents from launching their boats into the channel on the basis of recent amendments to State Government Acts governing inundated lands.

Mr Hearl has maintained that the works he carried out formed a canal which added to the amenity of the housing estate he was developing on the surrounding land which he owned. Because the widened waterway covers land which he owns, he believes the amendments passed last year give him the right to restrict access and prevent the public from using it.

The Council, on the other hand, does not accept the waterway is a canal, maintaining the development was not approved as a canal subdivision which Council officers say "would have been more involved and likely to attract additional conditions".

Rather, Council believes the widening and deepening did not alter the waterway's status as a drain, therefore placing it outside the jurisdiction of the Harbours Act, which governs tidal, navigable rivers.

According to a staff report to the Council, the relevant sections refer to "inundated land (which is land held in fee simple which has become inundated by water subject to tidal influence as a result of excavation) and allows the proprietor to mark the boundaries of the inundated land and the proprietor to restrict, regulate or prohibit the use or movement of vessels on, over, through or beneath the waters above that inundated land".

Shire Chairman Cr Tom Pyne said the area was originally a fish habitat reserve and the developer had sought and received Government consent to put a drain through to the ocean and that the Council had been "caught in the middle" of the current controversy. Councillors requested an opinion from [Minister for Water Resources and Maritime Services] Mr Neal who suggested Council should seek an opinion from its own legal advisers.

He suggested in his letter to last week's council meeting that if Mr Hearl is entitled to his claim the Council has two alternatives - it can resume the waterway or install a public boat ramp at another suitable site. Councillors agreed neither alternative was acceptable because of initial and ongoing expense and lack of any suitable site nearby.

...

Cr Pyne [said] it was "a sad day when the water isn't free, when people have the right to put fences across the water and particularly when such actions are backed by State Government legislation". Cr Stan Marsh noted Mr Ahern's recent pledge to "clean up" various legislative anomalies which form part of the legacy of the Bjelke-Petersen era and suggested the Moore Ck waterway situation and the precedent it could set was one of those which deserved his attention.

8. It appears from non-exempt documents which the Council has supplied to me that the relevant parcel of land (which the applicant prefers to refer to as Portion 143) includes mangrove swamp traversed by a small tidal watercourse, Moore Creek. The land was formerly subject to a special lease but its conversion in 1973 to freehold title registered to Mr Hearl was undertaken without any reservation or exclusion from the title in respect of Moore Creek. That section of Moore Creek was not at that stage navigable, but Mr Hearl subsequently undertook excavation works which resulted in a navigable channel. At various times Mr Hearl has sought to prevent members of the public from using what he asserts to be his private property. On one occasion Mr Hearl dumped rocks on a small natural ramp which members of the public had been using to launch small boats into Moore Creek. After the Council removed the rocks, Mr Hearl erected a fence across that part of Moore Creek to which he asserted his freehold title. Mr Hearl's actions had prompted many complaints and petitions to Council from concerned local residents, and the situation was apparently a local government issue of some controversy at the time of publication of the newspaper article quoted above.
9. On one occasion in 1987 Mr Hearl was charged and convicted of assault on a person seeking to have access to the channel. Mr Hearl's defence appears to have been that he was entitled to restrain a trespasser on his private property. The Magistrate apparently accepted evidence that the location of the assault was not on Mr Hearl's private property but on a Fisheries Habitat Reserve. Mr Hearl's FOI request appears to be aimed, in part, at demonstrating that that finding was mistaken.
10. Many people, including government officials, have had difficulty in accepting that a waterway of this kind could be private property. Certainly, over the years, a number of different government agencies seem to have given inconsistent advice as to the extent of any rights of public use that may exist in respect of that part of Moore Creek and the land bordering it which is within the boundaries of Mr Hearl's freehold title. I note in this regard that one of the non-exempt documents which the Council has agreed to release to Mr Hearl is the letter to Council from the former Minister for Water Resources and Maritime Services, Mr Neal, which is referred to in the newspaper article quoted above. This letter makes it clear that the position of the Minister and his Department at that time was that the neighbouring Fisheries Habitat Reserve did not extend as far as Portion 143 at the time that Mr Hearl obtained freehold title to Portion 143. Whether this position changed when Mr Hearl's construction works created a tidal, navigable channel is not addressed. Mr Hearl's assertion of private property rights in that part of Moore Creek which falls within his freehold title was bolstered by the enactment in 1987 of a new s.97A of the *Harbours Act 1955 Qld* (the effect of which is referred to in the sixth paragraph of the newspaper article set out at paragraph 7 above). Fortunately, it is not my function to assess the correct legal position, and the material set out above is provided by way of background to assist a better understanding of the nature of the dispute under the FOI Act which it is my function to deal with.

11. On the day following publication of the newspaper article, 21 March 1988, Mr Hearl had written the letter to the Shire Clerk of the Council which is also referred to in the Council's initial response to Mr Hearl's FOI access request. In that letter, Mr Hearl had enclosed a copy of the newspaper article saying:

In view of the seriousness of this statement, I have enclosed a copy of my certificate of title and would the Council please clarify if the area referred to in this article covers any of my property. Please mark on the certificate of title the areas referred to in the article.

My wife has had an abusive phone call from the caravan park since this article in which the caller claimed the Council is intending to have my freehold property reverted back to a fisheries habitat reserve.

The situation is becoming somewhat confusing as my freehold property never was a declared habitat reserve and did not have an existing drain downstream from Reed Road.

12. Mr Hearl applied for internal review of Council's decision of 2 July 1993 by a more senior officer of the Council, in accordance with s.52 of the FOI Act. In doing so, he informed the Council that he had possession of a letter from Mr Warburton, the former Minister for Police & Emergency Services stating that the Mulgrave Shire confirmed Portion 143 was Fish Habitat Reserve. (I have sighted Mr Warburton's letter to the applicant dated 17 July 1992 and it is not quite so specific that it refers to Portion 143. What it in fact says is: "... telephonic advice from the Mulgrave Shire Council and Harbours and Marine Department [to the police] confirmed the area and its waterways were, within the terms of the Fisheries Regulation, a Fish Habitat Reserve" (the underlining is mine).)
13. The internal review decision made by the Council's principal officer, Mr N Mills, on 20 July 1993 confirmed the initial decision in all respects, and in respect of the additional matter raised by Mr Hearl said:

Notwithstanding an extensive search of the Council's records, no plans "showing Portion 143 as fisheries habitat reserve" can be located, nor can any other records be found that relate to other documents you apparently claim "substantiate the Council giving information to government departments advising Portion 143 is fisheries habitat reserve".

The letter from Mr Warburton does not contradict the Council's position in this regard, since it refers only to telephone advice having been given by an unnamed person on behalf of the Council.

The Review Process

14. By letter dated 4 August 1993, Mr Hearl wrote to me, as Information Commissioner, in the following terms:

Please find enclosed a list of questions I asked the Mulgrave Shire Council under the F.O.I. and their reply.

As you will note the reply is not satisfactory and probably not the truth according to the report in the FNQ Sunday 20th March 1988. (enclosed)

I trust you can have my Questions more accurately answered.

15. I responded to Mr Hearl by letter dated 18 August 1993 stating that I was prepared to review the Council's decisions, but pointing out that:

Some of the items contained in your FOI access request dated 10 May 1993 seek information rather than access to existing documents. The FOI Act cannot be used to require a government agency to create a document in order to supply information in which a requester is interested. The FOI Act can only be used to obtain access to documents already in existence.

16. I also invited Mr Hearl to provide me with any objective evidence available to him which tended to show that the Council was in possession or control of documents falling within the terms of his FOI access request. Mr Hearl has not responded to that invitation.

17. With the benefit of material supplied by the Council, I was alerted to the existence of the longstanding issue between Mr Hearl and the Council concerning public access to land owned by Mr Hearl at Reed Road and Moore Creek, the general nature of which is briefly sketched in paragraphs 7-11 above. Despite the patent lack of precision and particularity in the framing of Mr Hearl's FOI access request, it appeared to me that parts 1-8 inclusive, 15-17 inclusive, 23 and the second question of part 22 were directed to aspects of this dispute. On 20 September 1993, the Deputy Information Commissioner wrote to Mr Hearl in the following terms:

The external review that I am conducting is made difficult by the ill-defined terms of your initial FOI access application. The initial decision-maker, Mr Barry Ottone of the Mulgrave Shire Council (the MSC) has numbered the categories of documents sought by your initial FOI access application (a copy of your application as numbered by Mr Ottone is enclosed with this letter).

The terms of the categories numbered 9-22 inclusive seek documents relating to an alleged relationship between the MSC and marijuana growers. The MSC has responded that there are no documents in existence which relate to any such issues. If you have any evidence which tends to show that there are such documents in existence, then I request that you forward that evidence to me. In the absence of some indication that documents concerning these categories must be in existence, then I cannot progress my external review on those categories of documents.

...

It appears to me that there has been a longstanding issue between yourself and the MSC concerning public access to land owned by you at Reed Road and Moore Creek.

...

In order to progress my external review, I think it is necessary to get you to more clearly define the nature of the documents to which you are seeking access. Leaving to one side for the moment the issues concerning documents relating to the alleged relationship between marijuana growers and the MSC, it appears to me that the issue concerning your land at the intersection of Reed Road and Moore Creek could be more appropriately addressed if your request for access were reframed in the following terms:

All documents held by the Mulgrave Shire Council (including

correspondence between the Mulgrave Shire Council and any government department) concerning public access to the land owned by Mr Hearl located at the intersection of Reed Road and Moore Creek.

Would you please write to me advising whether this appropriately captures the nature of the documents to which you are seeking access.

18. In paragraphs 8-12 of my reasons for decision in *Re Cannon*, I explained that it is open to an agency to negotiate with an applicant to agree on more precise terms for the reframing of an FOI access request. The Information Commissioner also possesses such a power, on a review under Part 5 of the FOI Act, by virtue of s.88(1)(b) of the FOI Act.
19. Mr Hearl subsequently telephoned my Office on 22 September 1993 and indicated that he would like to amend the suggested terms for a reframed access request to include a reference to the real property description of his land. In a letter dated 24 September 1993, he confirmed the terms of a reframed FOI access request as per that telephone conversation.
20. On 13 October 1993, I wrote to Mr Hearl in the following terms:

I refer to your letter of 24 September 1993, and a telephone call to my office on 22 September 1993. As a result of that letter and telephone call, it appears to me that you are happy to accept my reframing of your initial application for access to documents, subject to insertion of a partial property description of the land involved. I therefore propose to proceed with my external review on the basis of that reframed request, which reads as follows:

"All documents held by the Mulgrave Shire Council (including correspondence between the Mulgrave Shire Council and any government department) concerning public access to land owned by Mr Hearl, namely Portion 143 located at the intersection of Reed Road and Moore Creek."

I have therefore called upon the Mulgrave Shire Council (MSC) to identify any further documents which fall within the request, including a number of documents previously provided to me by the MSC. I have requested the MSC to particularise which documents it is prepared to release to you and which documents the MSC says fall within exemption provisions under the FOI Act. I have asked for a response from the MSC within 21 days.

You have not provided to me any documentary evidence which demonstrates the existence of a relationship between the MSC and marijuana growers, which is alleged in categories 9-22 inclusive of your initial access request. I therefore do not propose to deal any further with those categories of request but I propose that the external review in this matter will proceed on the basis of the agreed reframed request.

21. I also wrote to the Council on 13 October 1993 requesting that it identify any further documents which fall within the terms of the reframed FOI access request, and to specify which documents it was prepared to release to Mr Hearl and which documents it claimed were exempt from disclosure under the FOI Act.
22. The Council advised me by letter dated 1 November 1993 that it had identified 255 pages of

documents responsive to the revised FOI access request, and that it was prepared to give Mr Hearl access to all but 17 pages, which were claimed to be exempt under s.43(1) of the FOI Act. The Council stipulated that since many of the 238 pages it was prepared to release did not concern Mr Hearl's personal affairs, Mr Hearl would be required to pay a \$30 application fee to obtain access by way of inspection and 50¢ per page for any photocopies he requested of documents which do not concern his personal affairs. On 11 November 1993, I authorised the Council to give Mr Hearl access to the 238 pages which the Council was prepared to release. I also informed Mr Hearl and invited him to make arrangements with the Council concerning access. (As at 22 June 1994, inquiries of the Council revealed that Mr Hearl still had not made arrangements to obtain access to those 238 pages.)

23. Following examination of the 17 pages claimed to be exempt, I wrote to the applicant on 13 December 1993 informing him of my preliminary view that all 17 pages would be privileged from production in a legal proceeding on the ground of legal professional privilege, in accordance with the test for legal professional privilege enunciated by the High Court of Australia in *Grant v Downs* (1976) 135 CLR 674, and hence were exempt documents under s.43(1) of the FOI Act. I also forwarded for Mr Hearl's reference a copy of my reasons for decision in *Re Smith and Administrative Services Department* (Information Commissioner Qld, Decision No. 93003, 30 June 1993, unreported) in which I explained the nature of the legal professional privilege exemption in s.43(1) of the FOI Act. I asked Mr Hearl to inform me by 6 January 1994 whether or not he was prepared to accept my preliminary view in respect of the 17 pages claimed to be exempt under s.43(1).
24. Subsequently, Mr Hearl handed into the office of the Mulgrave Shire Council a photocopy of my letter to him dated 13 December 1993 with the following remark handwritten upon it:

This is a reply I expected from a pack of corrupted mongrel bred dingos.

The Council forwarded that photocopy to me, for my information.

25. Mr Hearl subsequently forwarded directly to me a letter dated 29 December 1993, in which he indicated his desire to obtain the 17 pages claimed to be exempt, and sought to revive his still unsubstantiated allegations of collusion between the Council and unnamed marijuana growers.
26. A further letter was sent to Mr Hearl stating that if he wished to contest the Council's claim in respect of the 17 pages said to be exempt under s.43(1) of the Act, he was now invited to address a submission in support of his case.
27. Mr Hearl's response by letter dated 20 January 1994 did not address a submission on relevant issues, but said:

I do not accept the preliminary view and am not prepared to withdraw my application for external review.

The main reason the FOI was brought in was to allow the Public access to information various Government Departments and Local authorities have on private citizens.

Should all or part of the files not be made available it would be little use having the FOI.

The Mulgrave Shire claims to be an open and honest Council, what could they possibly have to hide.

...

This is the MSC not the KGB that I am asking you to get these documents from.

I trust you will have a more favourable reply this time.

Determination of Outstanding Issues

(1) The applicant's initial FOI access request

28. I am concerned that the applicant's letter to me dated 29 December 1993, in seeking to revive his unsubstantiated allegations of collaboration between the Council and unnamed "marijuana growers", seems to indicate a different understanding of the agreement which I believed had been reached involving the reframing of his FOI access request in the agreed terms set out in the letter quoted at paragraph 20 above, with the external review to proceed on the basis of that reframed request. In case the applicant does not share that understanding, I propose to deal formally with the applicant's application for review and initial FOI access request, both of which contain patent defects.
29. The most basic is that the applicant's FOI access request is predominantly framed as a series of questions seeking answers, rather than as a request for access to documents. That this was the applicant's intention is, I think, clear from examination (as a sample) of parts 1 to 8 inclusive of his FOI access request, and the terms of his application for review (which are set out at paragraph 14 above). Parts 1, 2, 3, 4, 6 and 7 seek answers to questions, while parts 5 and 8 seek documents on the very same topics. The application for review asks me to have Mr Hearl's "questions more accurately answered".
30. The FOI Act is not an Act which gives persons a legally enforceable right to obtain answers to questions asked of government agencies, or even to have government agencies extract answers to questions from documents in their possession. The legally enforceable right conferred by s.21 of the FOI Act is a right to be given access under the Act, and subject to the Act, to documents of an agency and official documents of a Minister. The term "document of an agency" is defined in s.7 of the FOI Act as follows:

"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.*

The term "official document of a Minister" is also defined in s.7 as follows:

"official document of a Minister" or "official document of the Minister" means a document in the possession or under the control of a Minister, or the Minister concerned, that relates to the affairs of an agency, and includes -

- (a) *a document to which the Minister is entitled to access; and*
- (b) *a document in the possession or under the control of a member of the staff of, or a consultant to, the Minister in the person's capacity as such a member or consultant.*

Section 25(1) of the FOI Act makes it clear that a person applies to an agency or Minister for access to a document of the agency or an official document of the Minister. Section 25(2) makes it clear that the application for access must provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency or the Minister to identify the document.

31. My remarks in the opening sentence of paragraph 30 should not be taken to suggest that it is improper for an agency to provide answers to questions asked of it, or extract answers to questions from documents in its possession, if it is prepared to do so in the interests of assisting a member of the public. Any such suggestion would be contrary to s.14 of the FOI Act. Similarly, there is no impediment in the scheme of the FOI Act to an agency negotiating with an applicant for access under the FOI Act with a view to creating a new document to provide the information which the applicant seeks, where that would be more convenient for either or both of the applicant and the agency. Circumstances can be envisaged where it would clearly further the objects of the FOI Act for an agency and an applicant to come to an arrangement about creating a new document to provide the information which the applicant seeks, for example, where information can be extracted from existing documents and reworked into a form which is able to be released without objection (and which will satisfy the applicant) whereas the information in the context in which it appears in existing documents would fall within one or more of the exemption categories in the FOI Act. I would not wish to discourage agencies from assisting applicants in that manner in an appropriate case. I have in fact been prepared to recommend arrangements of that kind when seeking to achieve a negotiated resolution of an FOI dispute under s.80 of the FOI Act. However, in the context of a formal determination under Part 5 of the FOI Act, I am obliged to strictly apply the provisions of the FOI Act, and they confer no legal right to obtain answers to questions, as opposed to obtaining access to existing documents.
32. The numbered parts of Mr Hearl's initial FOI access request which, according to their terms, seek access to documents rather than answers to questions are parts 5, 8, 14, 15 and the second question of part 22. Arguably, the terms of the other parts of Mr Hearl's initial FOI access request could be, and should be, interpreted so as to give them efficacy in terms of the FOI Act, i.e. by reading them as a request for any information in documentary form which would provide the details specified in the various parts of the FOI access request. This would ordinarily, in my opinion, be the most appropriate approach to interpretation of an FOI access request framed as a series of questions; however, for the reasons given at paragraph 29 above, I do not believe that such an approach would correctly reflect Mr Hearl's intentions in the framing of his initial FOI access request. Nevertheless, considerations of that nature prompted me to seek Mr Hearl's agreement to a reframing of those parts of his FOI access request which appeared to have some substance.

33. Arguably, too, the Council should have consulted with the applicant with a view to assisting the applicant to make his FOI access request in a form which complied with s.25(2) of the FOI Act (see *Re Cannon* at paragraphs 8-10). I do not know whether Council sought to consult with the applicant, but if there was any failure in that regard, it has been remedied during the process of review under Part 5 of the FOI Act through the consultation which I have undertaken with the applicant, which resulted in the agreed reframing of the terms of his FOI access request to encompass all parts of the original FOI access request which had some substance. The terms of the reframed access request are wide enough to cover any information in a documentary form held by the Council which would record details sought in parts 1, 2, 3, 4, 5, 6, 7, 8, 15, 16, 17, 23 and the second question of part 22.
34. The remaining parts of the initial FOI access request in effect ask the Council to answer questions in respect of unsubstantiated allegations of collaboration between the Council and "marijuana growers" to injure the plaintiff's interests and family. If those allegations cannot be substantiated by the applicant, then in my opinion they are plainly vexatious and defamatory. In letters dated 18 August 1993 and 20 September 1993, I invited the applicant to forward to me any evidence in his possession which substantiates these allegations and tends to show that the Council has possession or control of documents which are responsive to these parts of his initial FOI access request. In a letter to Mr Hearl dated 13 October 1993, I referred to the fact that he had not provided to me any evidence which demonstrates the existence of a relationship between the Council and marijuana growers. Despite those invitations and promptings, the applicant has at no stage produced any material to me which substantiates his allegations concerning collaboration between marijuana growers and the Council, or which tends to show that the Council has possession or control of documents which are responsive to those parts of his initial FOI access request.
35. In these circumstances, I consider it appropriate that I exercise the power conferred on me by s.77(1) of the FOI Act to decide not to review further the Council's decisions in response to:
- (a) parts 9, 10 and 11 insofar as they relate to allegations of resumption of land for marijuana growing;
 - (b) parts 12, 13, 18, 19, 20 and 21;
 - (c) the first part of part 14; and
 - (d) the first question of part 22;
- of the applicant's initial FOI access request, on the basis that I am satisfied that Mr Hearl's application for review of those decisions is vexatious, misconceived and lacking in substance.
36. I consider that the term "vexatious" is used in the context of s.77 of the FOI Act in the sense illustrated by the Shorter Oxford Dictionary when it says "*Of legal actions: instituted without sufficient grounds for the purpose of causing trouble or annoyance to the defendant*" (cf. *Aspar Autobarn Co-operatives Society v Dovala Pty Ltd* (1987) 74 ALR 550 at p.554, where this meaning was approved by the Federal Court of Australia in a comparable statutory context).
37. I have also decided under s.77 of the FOI Act not to review further the Council's decision in response to other parts of Mr Hearl's initial FOI access request which are framed so as to seek answers to questions rather than access to documents (notably parts 1, 2, 3, 4, 6, 7, 16, 17 and 23, and parts 9, 10 and 11 insofar as they relate to resumption of land for beach access) on the basis that the application for review of those decisions is misconceived, and lacking in substance, for the reasons referred to in paragraph 30 above. I also consider that the application for review of the Council's response in respect of parts 1 to 7 (inclusive) of the initial FOI access request is frivolous and vexatious. Take, for example, parts 1 and 6. I am satisfied from the documents examined

during the course of this review that Mr Hearl has not (and knows that he has not) made an application to any government department for, or been given any approval to, change Fisheries Habitat Reserve to freehold. The object of his request seems to be to make a point to Council that no such documents exist (though he has not particularised when, where, and by whom any such claims were made by or on behalf of the Council).

38. I note that any documents that might exist (and are in the possession of the Council) which record details of the kind sought in parts 1, 2, 3, 4, 6, 7, 16, 17 and 23 of Mr Hearl's initial FOI access request, are covered by the terms of the agreed, reframed FOI access request.
39. In respect of part 9 of the initial FOI access request, insofar as it relates to resumption of land for beach access, the Council advised Mr Hearl in its initial response (see paragraph 6 above) that it held some records on land acquired by the Council for beach access, and that Mr Hearl would have to pay a \$30 application fee to pursue access to them. Copies of those records have been provided to me by the Council, and examined. The documents are in fact responsive to part 14 of Mr Hearl's initial FOI access request insofar as part 14 requests reports on the Moon River Caravan Park resumption. The Council has identified 96 pages which it is prepared to release to the applicant on payment of the \$30 application fee which the Council had previously advised Mr Hearl he was required to pay. Those documents will include any record (in the possession of the Council) of the details which Mr Hearl requested in parts 9, 10 and 11 of his initial FOI access request, insofar as those parts relate to resumption of land for beach access.
40. The remaining parts of the initial FOI access request which did seek access to information in documentary form have, by agreement with the applicant, been reframed into an FOI access request in the following terms:

All documents held by the Mulgrave Shire Council (including correspondence between the Mulgrave Shire Council and any government department) concerning public access to the land owned by Mr Hearl, namely Portion 143 located at the intersection of Reed Road and Moore Creek.

41. The Council has agreed to allow Mr Hearl access to 238 pages which fall within the terms of the reframed FOI access request, and I have previously authorised the Council to give Mr Hearl access to those 238 pages. The Council claims that a further 17 pages which fall within the terms of the reframed FOI access request are exempt from disclosure under s.43(1) of the FOI Act.

(2) Documents claimed to be exempt under s.43(1) of the FOI Act

42. Section 43 of the FOI Act provides as follows:

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

(2) Matter is not exempt under subsection (1) merely because it appears in an agency's policy document.

43. In my reasons for decision in *Re Smith and Administrative Services Department*, I made the following observations in respect of legal professional privilege (at paragraph 82):

... The nature and scope of legal professional privilege at common law has been the subject of consideration by the High Court of Australia in a number of recent cases. A concise summary of the general principles which can be extracted from those High Court judgments is contained in the decision of Mr K Howie, Member of the Victorian Administrative Appeals Tribunal, in Re Clarkson and Attorney-General's

Department, (1990) 4 VAR 197, at p. 199:

"The nature of legal professional privilege has been closely examined by the High Court in a number of decisions, in particular *Grant v Downs* (1976) 135 CLR 674, *Baker v Campbell* (1983) 153 CLR 52, *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, and *Waterford v Commonwealth of Australia* (1987) 163 CLR 54.

From these decisions, the following principles emerge:

(1) To determine whether a document attracts legal professional privilege consideration must be given to the circumstances of its creation. It is necessary to look at the reason why it was brought into existence. The purpose why it was brought into existence is a question of fact.

(2) To attract legal professional privilege the document must be brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings. Submission to legal advisers for advice means professional legal advice. It includes the seeking or giving of advice. Use in legal proceedings includes anticipated or pending litigation.

(3) The reason for legal professional privilege is that it promotes the public interest. It assists and enhances the administration of justice by facilitating the representation of clients by legal advisers. There are eloquent statements of the importance of this public interest in each of the cases referred to above.

(4) Legal professional privilege attaches to confidential professional communications between salaried legal officers and government agencies. It must be a professional relationship which secures to the advice an independent character. The reason for the privilege is the public interest in those in government who bear the responsibility of making decisions having free and ready confidential access to their legal advisers. Whether or not the relationship exists is a question of fact.

(5) If a document contains material that does not fulfil the required test, that does not necessarily deny the document the protection of the privilege. What matters is the purpose for which the document was brought into existence. If it was for the required purpose, it is not to the point that the document may contain advice which relates to matters of policy as well as law. However, an analysis of the document may assist in determining its moving purpose.

(6) A client may waive legal professional privilege: see in particular the *Maurice* case.

(7) Some vigilance is necessary to ensure that legal professional privilege is not successfully invoked to protect from production

documents that do not properly fall within its ambit. Otherwise the important public purposes it is intended to serve will be undermined.

(8) Legal professional privilege does not attach to documents brought into existence for the purpose of guiding or helping in the commission of a crime or fraud, or for the furtherance of an illegal purpose, including an abuse of statutory power, or for the purpose of frustrating the process of the law itself: see the *Kearney* case."

44. I note that the High Court cases referred to in this passage, while being authoritative as to those aspects of legal professional privilege which were in issue on the facts of each case, did not purport to exhaustively state all aspects of legal professional privilege which have been accepted by Australian courts; see, for example, *Trade Practices Commission v Sterling* (1979) 36 FLR 244, *Packer v DCT (Qld)* (1985) 55 ALR 242, *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44, *Dalleagles Pty Ltd v Australian Securities Commission* (1991) 6 ACSR 498, *Southern Equities Corporation Ltd v West Australian Government Holdings Ltd* (Sup Ct of WA, Full Court (Malcolm CJ, Seaman and White JJ), No. 1347 of 1990, 16 June 1993, unreported. Note: an appeal from this decision was argued in the High Court in October 1993 and the High Court's decision is reserved).

Application of the law to the documents in issue

45. The 17 pages claimed by the Council to be exempt under s.43(1) have been obtained and examined. I am not at liberty to disclose the nature of the documents in issue in any way that would disclose the type of advice sought by the Council or the advice that was given. I can say, however, that each document falls into one of the following categories:
- (a) requests for advice by the Council to a private firm of solicitors engaged by the Council;
 - (b) requests by the Council's solicitors for further instructions from the Council in order to facilitate the preparation of legal advice;
 - (c) provision of additional instructions from the Council to its solicitors;
 - (d) legal advice by the Council's solicitors to the Council.
46. The documents fall squarely within the scope of the common law principles of legal professional privilege referred to above. I am satisfied that all 17 pages would be privileged from production in a legal proceeding on the ground of legal professional privilege, and hence comprise exempt matter under s.43(1) of the FOI Act.

Conclusion

47. In accordance with s.77 of the *Freedom of Information Act 1992 Qld* (the FOI Act), I decide not to review further the Council's decisions in response to the following parts of the applicant's initial FOI access request dated 10 May 1993 -
- (a) parts 1, 2, 3, 4, 6, 7, 16, 17 and 23; and
 - (b) parts 9, 10 and 11 insofar as those parts relate to resumption of land for beach access;
- on the basis that the application for review of those decisions is misconceived and lacking in substance.
48. Again, in accordance with s.77 of the FOI Act, I decide not to review further the Council's decisions in response to the following parts of the applicant's initial FOI access request dated 10 May 1993 -
- (a) parts 9, 10 and 11 insofar as those parts relate to alleged resumption of land for "marijuana growing";
 - (b) parts 12, 13, 18, 19, 20, and 21;
 - (c) the first part of part 14; and
 - (d) the first question in part 22;
- on the basis that the application for review of those decisions is vexatious, misconceived and lacking in substance.
49. In respect of part 14 of the applicant's initial FOI access request, insofar as it requests reports on the Moon River Caravan Park resumption, I set aside the Council's decision of 20 July 1993 and in substitution for it I decide that the applicant may (subject to payment of any fees required by sections 6, 7 or 8 of the *Freedom of Information Regulation 1992*) be given access to the 96 pages identified by the Council which deal with that subject (being the documents forwarded to me under cover of the Council's letter dated 24 August 1993).
50. The remaining parts of the applicant's initial FOI access request have, by agreement with the applicant, been reframed in the terms set out in paragraph 40 of these reasons for decision. I have previously authorised the Council to give the applicant access to 238 of the 255 pages which fall within the terms of the reframed FOI access request. I find that the remaining 17 pages are exempt documents under s.43(1) of the FOI Act. The formal decision needed to give effect to these findings is set out in the following paragraph.
51. The Council's decisions of 20 July 1993 in response to parts 5, 8, 15 and the second question of part 22, of the applicant's initial FOI access request dated 10 May 1993, are set aside, and in substitution for them I decide that -
- (a) the applicant may (subject to payment of any fees required by sections 6, 7 or 8 of the *Freedom of Information Regulation 1992*) be given access to 238 of the 255 pages which have been identified by the Council as falling within the terms of the reframed FOI access request agreed to by the applicant (the terms of which are set out at paragraph 40 of my reasons for decision); and
 - (b) the remaining 17 pages are exempt documents under s.43(1) of the FOI Act (being the 17

pages identified as folios 11, 12, 13, 15, 61, 63, 68, 69, 193, 195, 198, 199, 202, 205, 207, 208 and 216 in a schedule headed "Documents Subject to Exemption" which accompanied the Council's letter to me dated 1 November 1993).

.....
F N ALBIETZ
INFORMATION COMMISSIONER