OFFICE OF THE INFORMATION COMMISSIONER (QLD)	**)** **)**	S 64 of 1993 (Decision No. 95015)

Participants:

DAVID JEFFERY FAGAN
Applicant

- and -

MINISTER FOR JUSTICE AND ATTORNEY-GENERAL AND MINISTER FOR THE ARTS
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - review of the grounds for the respondent's decision to issue a certificate under s.42(3) of the *Freedom of Information Act 1992* Qld - documents in issue comprising four reports by the Criminal Justice Commission to the Minister administering the *Criminal Justice Act 1989* Qld concerning Japanese organised crime - whether there were reasonable grounds for the issue of the certificate having regard to the application of s.42(1)(a), s.42(1)(b) and s.42(1)(e) of the *Freedom of Information Act 1992* Qld to the matter contained in the documents in issue.

Freedom of Information Act 1992 Qld s.35, s.36, s.37, s.42, s.42(1)(a), s.42(1)(b), s.42(1)(e), s.42(2), s.42(3), s.71(1), s.71(2), s.84, s.88, s.89
Acts Interpretation Act 1954 Qld s.33(2)(a)
Criminal Justice Act 1989 Qld s.2.47, s.2.47(2)(e)
Freedom of Information Act 1982 Cth s.4, s.22, s.34(2), s.37
Freedom of Information Amendment Act 1995 Qld
Judicial Review Act 1991 Qld
Reprints Act 1992 Qld

Aldred and Department of Foreign Affairs and Trade, Re (Commonwealth Administrative Appeals Tribunal, Hartigan J (President), No. A88/140, 8 February 1990, unreported)
Anderson and Department of Special Minister of State, Re (Commonwealth Administrative Appeals Tribunal, Deputy President Smart QC, No. N83/896, 26 October 1984, unreported)
Arnold Bloch Leibler and Co and Australian Taxation Office (No. 2), Re (1985) 9 ALD 7
"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Department of Industrial Relations v Forrest & Anor (1990) 21 FCR 93
Marzol and Australian Federal Police, Re (Commonwealth Administrative Appeals Tribunal, Deputy President Jennings QC, No. N85/103, 3 April 1986, unreported)
McEniery and the Medical Board of Queensland, Re (1994) 1 QAR 349
News Corporation Ltd and Ors v National Companies and Securities Commission (1986) 57 ALR 550

DECISION

I am satisfied that there were reasonable grounds for the issue by the respondent, under s.42(3) of the *Freedom of Information Act 1992* Qld, of the Ministerial certificate dated 18 June 1993.

Date of Decision: 26 May 1995

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F N ALBIETZ
INFORMATION COMMISSIONER

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OFFICE OF THE INFORMATION COMMISSIONER (QLD) **)**

S 64 of 1993
(Decision No. 95015)

Participants:

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MINISTER FOR JUSTICE AND ATTORNEY-GENERAL AND MINISTER FOR THE ARTS
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REASONS FOR DECISION

Background

1. The applicant, who is a journalist, seeks review of the grounds for the respondent's decision to issue a certificate under s.42(3) of the *Freedom of Information Act 1992 Qld* (the FOI Act or the Queensland FOI Act), in respect of four reports relating to Japanese organised crime which were prepared by the Criminal Justice Commission (the CJC) for submission, pursuant to s.2.47(2)(e) of the *Criminal Justice Act 1989* Qld, to the Minister having administrative responsibility for the *Criminal Justice Act*. [I note that s.2.47 of the *Criminal Justice Act* has, in reprints issued pursuant to the *Reprints Act 1992* Qld, been re-numbered as s.58. However, since the Ministerial certificate, and the evidence and submissions lodged on behalf of the respondent, use the previous numbering, it will minimise confusion if I also refer in these reasons for decision to the previous numbering of this provision of the *Criminal Justice Act*. Relevant parts of the provision are reproduced at paragraph 59 below.]

2. This was the first instance in Queensland of the issue of a Ministerial certificate under the FOI Act. Since then, only one other case has come before me (in which my review has not yet been completed). The issue of a Ministerial certificate means that the nature of the investigation and review which the Information Commissioner is empowered to conduct under Part 5 of the FOI Act is more limited, being of a supervisory character, rather than a full review of the merits of the claims to exemption made in the Ministerial certificate. In respect of the categories of decision described in s.71(1) of the FOI Act, the Information Commissioner is empowered to conduct a complete review of the merits of the decision, and a formal determination by the Information Commissioner in effect substitutes for the decision of the agency or Minister which was under review: see s.88 and s.89 of the FOI Act. While s.71(2) empowers the Information Commissioner to investigate and review the grounds for a decision to issue a certificate under s.36, s.37 or s.42 of the FOI Act, s.84 makes it clear that the Information Commissioner's role is confined to determining whether there were reasonable grounds for the issue of a certificate.

3. Mr Fagan lodged his FOI access application dated 14 January 1993 with the Office of the Premier (the Premier having previously been the Minister responsible for the administration of the *Criminal Justice Act*). Mr Fagan requested access to:

> *Any report to the Premier by the Criminal Justice Commission on the extent and effect of Japanese organised crime in Queensland.*

The FOI access application was transferred to the respondent, who had by then become the Minister responsible for the administration of the *Criminal Justice Act.*

4. On 11 March 1993, Ms Lee McGlynn, Ministerial Policy Advisor to the respondent, wrote to Mr Fagan in the following terms:

> *To determine your application, it is necessary for me to consult with and obtain the view of another agency in relation to matter contained in the documents to which you seek access and which may be of substantial concern to those respective agencies as provided for by Section 51 of the Act.*
>
> *Consultation extends the normal time limitation for determination of your application by fifteen (15) days.*
>
> *At the conclusion of the consultation I will advise you of the outcome with respect to the consultation and my determination of your application.*

5. On 31 March 1993, Ms McGlynn wrote again to Mr Fagan, in these terms:

> *Pursuant to Section 35(2) of the Act, notice is hereby given that the existence of any official document or documents of the Minister in relation to your request is neither confirmed nor denied. Assuming the existence of any such document or documents, it would be exempt under Section 42(1) of the Act.*

(I note, for the reference of FOI administrators generally, that there is a question as to the appropriateness of invoking a s.35 "neither confirm nor deny" response in such circumstances. The terms of Ms McGlynn's previous letter to Mr Fagan referred to the need for consultation with another agency in relation to the documents to which Mr Fagan had requested access, thereby implicitly confirming the existence of documents falling within the terms of Mr Fagan's FOI access application.)

6. Mr Fagan's application for internal review was dealt with by the respondent who, in a letter dated 8 April 1993, confirmed Ms McGlynn's decision. By letter dated 16 April 1993, Mr Fagan applied for review under Part 5 of the FOI Act in respect of the respondent's decision.

7. On 12 May 1993, the Parliamentary Criminal Justice Committee (the PCJC) tabled a report in the Legislative Assembly which included an edited version of a submission made to the PCJC by the CJC, at p.28 of which the existence of a CJC report on Japanese organised crime (and the fact that the applicant had obtained information as to its existence) was acknowledged. This would have made it difficult for the respondent to sustain reliance on the s.35 "neither confirm nor deny" response to Mr Fagan's FOI access application.

8. On 18 June 1993, the respondent issued a certificate under s.42(3) of the FOI Act in relation to four documents falling within the terms of Mr Fagan's FOI access application.

9. The text of the respondent's certificate is as follows:

> *I DEAN MACMILLAN WELLS, Minister for Justice, Attorney-General and Minister for the Arts, having considered the documents described below DO HEREBY CERTIFY in accordance with Section 42(3) of the Freedom of Information Act 1992 ("the Act") that the matter contained in:-*
>
> > *(a) The Report dated 16th day of September 1991 made pursuant to Section 2.47(2)(e) of the Criminal Justice Act 1989 by the Criminal Justice Commission;*

(b) The Report dated 20th day of September 1991 made pursuant to Section 2.47(2)(e) of the Criminal Justice Act 1989 by the Criminal Justice Commission;

(c) The Report dated 9th day of October 1991 made pursuant to Section 2.47(2)(e) of the Criminal Justice Act 1989 by the Criminal Justice Commission; and

(d) The Report dated March 1991 (Copy No. 1) made pursuant to Section 2.47(2)(e) of the Criminal Justice Act 1989 by the Criminal Justice Commission.

is of a kind mentioned in paragraphs (a), (b) and (e) of Section 42(1) of the Act but not of a kind mentioned in Section 42(2) of the Act, and is thus exempt matter within the meaning of the Act.

D A T E D at Brisbane this 18th day of June 1993.

(signed)
DEAN WELLS
Minister for Justice,
Attorney-General and
Minister for the Arts

10. By letter dated 6 July 1993, Mr Fagan applied to me for review, under Part 5 of the FOI Act, of the grounds for the respondent's decision to issue the certificate under s.42(3) of the FOI Act.

11. On 6 July 1993, Mr Fagan also wrote to the respondent, applying under Part 4 of the *Judicial Review Act 1991* Qld for a statement of reasons in respect of the respondent's decision to issue the certificate under s.42(3) of the FOI Act. Mr Fagan wrote to me on 7 September 1993 enclosing a copy of the statement of reasons he obtained from the respondent, and saying: "*This might help consideration of my application for review ...*". The respondent's statement of reasons records grounds for issue of the certificate which were substantially expanded upon in the evidence and submissions lodged on the respondent's behalf in the course of my review. It is primarily to the evidence and submissions that I have had regard, for the sake of appreciating the respondent's case.

The review process: evidence and submissions of the participants

12. The respondent has supplied me with copies of the four documents identified in the Ministerial certificate, and they have been carefully examined in the light of the evidence and written submissions lodged by the participants.

13. On 16 August 1993, the Crown Solicitor, on behalf of the respondent, lodged a detailed written submission (the first submission), together with a signed statement of Mr Paul Roger, Director of the Intelligence Division of the CJC (Mr Roger's statement), providing evidence in support of the Attorney-General's case in this external review. Relevant parts of the evidence given by Mr Roger are referred to below. Copies of the first submission and Mr Roger's statement (from which a small number of deletions were made, on the basis that the deleted matter would identify information claimed to be exempt) were provided to Mr Fagan and the opportunity was extended to him to lodge a written submission in response.

14. The applicant responded by letter dated 17 September 1993, the relevant parts of which are as

follows:

> *The relevant section of the Act leaves an applicant in my position very narrow grounds on which to state a case. In effect, I am left to argue that the Attorney-General had no reasonable ground on which to issue a conclusive certificate over material I had applied for under the Freedom of Information Act. He, conversely, has only to argue he had a reasonable ground. The odds of this argument heavily favour the Attorney and Crown Law.*
>
> *...*
>
> *... The various exemptions are to apply after the reasonable behaviour by the decision-maker of attempting to consult and attempting particular release. This was not applied in this case.*
>
> *... The attempts to at first deliberately delay release of material and then rely on a refusal to confirm or deny the existence of documents re-enforces the attitude of declining to behave in a reasonable way, to consider release of any material and to give reasons for a decision.*
>
> *The publicity the Criminal Justice Commission had given its investigations and its fight against organised crime had already placed knowledge of such reports in the public arena. Without seeing the documents ... it is still hard to believe there was not material of a general nature, assessing the extent of the problem that could have been released. There was no attempt to do this.*

15. The Crown Solicitor, on behalf of the respondent, took the opportunity to reply to Mr Fagan's submission, in particular the second issue raised by Mr Fagan, by lodging a further written submission (the second submission) accompanied by a statutory declaration (dated 5 November 1993) of Mr Lewis Francis Wyvill QC, who was at that time the Acting Chairman of the CJC. Mr Wyvill's evidence was directed to demonstrating that public statements by the CJC about its targeting of organised crime syndicates (including Japanese organised crime) had been made only in general terms, as evidenced by copies of media releases, extracts from Annual Reports and a CJC submission to the PCJC (specifically that referred to in paragraph 7 above), which were annexed to Mr Wyvill's statutory declaration. Mr Wyvill declared that:

> *10.* *In respect of its investigation which is directed towards ascertaining the existence, nature and extent of Japanese organised crime in Queensland ("the Investigation"), the* [CJC] *has made public statements only of a general nature to the extent that one of the organised crime groups targeted by the* [CJC] *is the Japanese ... It has also acknowledged the fact that the "Yakuza is of particular interest to Queensland law enforcement through their possible connection to Japanese business, tourism and investment." ...*
>
> *...*
>
> *12.* *There have been no public statements made by the* [CJC] *containing any details of the Investigation.*
>
> *13.* *The* [CJC] *has not officially disclosed to any person for public release any part of the contents of the documents the subject of the Certificate Issued under Section 42(3) of the Freedom of Information Act on 18 June 1993 by the Honourable the Attorney-General.*

16. The respondent's second submission contested the proposition that there are portions of the documents in issue which are general in nature and which, if disclosed, could not have any of the prejudicial effects contemplated by s.42(1) of the FOI Act. The submission nevertheless requested that if, having examined the documents in issue, I had reservations about whether disclosure of particular portions of the documents in issue might have any of the prejudicial effects contemplated by s.42(1)(a), s.42(1)(b) or s.42(1)(e), the respondent be given the opportunity to address me further concerning those particular portions.

17. By letter dated 24 November 1993, I invited the respondent to provide further comments in support of its case in respect of five passages which I identified from the documents in issue. I also referred to an argument that appeared to be put in the respondent's submissions concerning the application of s.42(1)(e) of the FOI Act to reports under s.2.47(2)(e) of the *Criminal Justice Act*, and suggested that this argument required further elaboration, and may require supplementation by further evidence.

18. A further submission (the third submission) and further evidence comprising a statutory declaration dated 25 January 1994 by the aforementioned Mr Paul Roger (Mr Roger's statutory declaration) were filed on behalf of the respondent.

19. The respondent's second submission and Mr Wyvill's statutory declaration had previously been supplied to Mr Fagan, who had declined the opportunity to reply to them. The respondent's third submission and a copy of Mr Roger's statutory declaration (edited to remove matter claimed to be exempt) was also provided to Mr Fagan. Mr Fagan did reply to that material by an undated letter received in my Office on 15 February 1994. The Crown Solicitor, on behalf of the respondent, lodged a written reply by letter dated 18 April 1994. As that reply merely summarised earlier submissions of the respondent going to the three points raised in Mr Fagan's most recent letter, I considered it unnecessary to provide that reply to Mr Fagan for comment.

20. Where appropriate, extracts from the above material will be referred to in more detail in these reasons for decision.

Relevant provisions of the FOI Act

21. The exemption provisions relied upon by the respondent to certify that the matter contained in the documents in issue is exempt matter are s.42(1)(a), s.42(1)(b) and s.42(1)(e) of the FOI Act which are in the following terms:

> ***42.(1)*** *Matter is exempt matter if its disclosure could reasonably be expected to -*
>
> *(a) prejudice the investigation of a contravention or possible contravention of the law (including revenue law) in a particular case; or*
>
> *(b) enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained;*
>
> ...
>
> *(e) prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law);*

22. Section 42(2) provides for exceptions, in respect of matter which would otherwise be exempt under s.42(1), if certain criteria are satisfied. Section 42(2) provides:

> ***(2)*** *Matter is not exempt under subsection (1) if -*
>
> *(a) it consists of -*
>
> *(i) matter revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law; or*
>
> *(ii) matter containing a general outline of the structure of a program adopted by an agency for dealing with a contravention or possible contravention of the law; or*
>
> *(iii) a report on the degree of success achieved in a program adopted by an agency for dealing with a contravention or possible contravention of the law; or*
>
> *(iv) a report prepared in the course of a routine law enforcement inspection or investigation by an agency whose functions include that of enforcing the law (other than the criminal law or the law relating to misconduct or official misconduct within the meaning of the Criminal Justice Act 1989*); or
>
> *(v) a report on a law enforcement investigation that has already been disclosed to the person or body the subject of the investigation; and*
>
> *(b) its disclosure would, on balance, be in the public interest.*

23. The provision which empowered the respondent to issue the certificate in this case is s.42(3) of the FOI Act which, at the relevant time, provided as follows:

> ***(3)*** *For the purposes of this Act, a certificate signed by the Minister certifying that matter is of a kind mentioned in subsection (1), but not of a kind mentioned in subsection (2), establishes, subject to Part 5, that it is exempt matter.*

Section 42(3) was amended by the *Freedom of Information Amendment Act 1995* Qld, but that amendment was expressly stated not to be retrospective, and it is the above provision which applies for the purposes of this review: see generally *Re Woodyatt and Minister for Corrective Services* (Information Commissioner Qld, Decision No. 95001, 13 February 1995, unreported). The term "the Minister" in s.42(3) means the Minister responsible for the administration of the FOI Act (see s.33(2)(a) of the *Acts Interpretation Act 1954* Qld), i.e., it is only the Minister for Justice and Attorney-General who is permitted to issue certificates under s.42(3).

24. The jurisdiction of the Information Commissioner to review such certificates is conferred by s.71(2) of the FOI Act which provides:

> ***(2)*** *The functions of the Commissioner also include investigating and reviewing the grounds for a decision to issue a certificate under section 36, 37 or 42.*

25. Section 84 of the FOI Act governs the nature of the review in such cases. It provides:

> ***84.(1)*** *If a certificate has been given in respect of matter under section 36, 37 or 42, the Commissioner may, on the application of an applicant for review, consider the grounds on which the certificate was given.*
>
> ***(2)*** *If, after considering the matter, the Commissioner is satisfied that there were not reasonable grounds for the issue of the certificate, the Commissioner must -*
>
> *(a) make a written decision to that effect; and*
>
> *(b) include in the decision the reasons for the decision.*
>
> ***(3)*** *A certificate the subject of a decision under subsection (2) ceases to have effect at the end of 28 days after the decision was made unless, before that time, the Minister notifies the Commissioner in writing that the certificate is confirmed.*
>
> ***(4)*** *The Minister must cause a copy of a notice given under subsection (3) to be -*
>
> *(a) tabled in the Legislative Assembly within 5 sitting days after it was given; and*
>
> *(b) given to the applicant.*
>
> ***(5)*** *A notice under subsection (3) must specify the reasons for the decision to confirm the certificate.*
>
> ***(6)*** *If the Minister withdraws a certificate the subject of a decision under subsection (2) before the end of the period of 28 days mentioned in subsection (3), the Minister must, as soon as practicable, notify the Commissioner and each participant.*

Formal requirements for a valid certificate

26. In *Department of Industrial Relations v Forrest & Anor* (1990) 21 FCR 93, a Full Court of the Federal Court of Australia considered the requirements for validity of a certificate issued under s.34(2) of the *Freedom of Information Act 1982* Cth (the Commonwealth FOI Act), which has its counterpart in s.36(3) of the Queensland FOI Act. Northrop J said (at p.102):

> *At the hearing before this Court, attention was directed to the form of certificate given by the Secretary to the Department of the Prime Minister and Cabinet on 20 October 1988 and the Court raised the question whether the certificate satisfied the requirements of s.34 of the FOI Act. The certificate states that the document which is claimed to be an exempt document "is a document of a kind referred to in ss.34(1)(c) and 34(1)(d) of that Act". On its face, this description is so wide as to be almost meaningless. ... Having regard to the consequences resulting from a conclusive certificate given under Pt IV of the FOI Act, great care should be given to the question of whether a certificate should be given, the form of a certificate and whether it specifies clearly the basis on which it is claimed a document is an exempt document.*

27. In their joint judgment in the same case, Lockhart and Hill JJ said (at p.118):

> *In our opinion for a certificate to be of the kind referred to in s.34(2), namely, a*

certificate certifying that a document is one of a kind referred to in a paragraph of subs (1) of that section, requires that the particular part of subs (1) upon which reliance is placed be specified in the certificate. It is fundamental for the validity of the certificate that its reader can discern from its face, when read in conjunction with s.34, the particular kind of document in respect of which the exemption has been claimed and the certificate issued. In the present case the certificate says that the document is "of a kind referred to in s.34(1)(c) and 34(1)(d)" of the FOI Act. The description thus means that the document may be any one or more of the following:

> *"a copy of" or "a part of" or "contain an extract from" "a document that has been submitted to the Cabinet for its consideration" or "a document that is proposed by a Minister to be so submitted" or "an official record of the Cabinet" or "a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet".*

The certificate in our view is so uncertain in its description as to render it invalid.

28. Having examined the Minister's certificate dated 18 June 1993, and the documents identified in it, I am satisfied that the Minister's certificate is in valid form, and does not exhibit any defects of the kind addressed in the *Forrest* case.

No jurisdiction to review the reasonableness of the respondent's conduct in deciding to issue a certificate

29. During the course of this review, the applicant has on several occasions submitted that I should find that the respondent did not act reasonably in deciding to issue a Ministerial certificate, against the background of the respondent's initial "neither confirm nor deny" response to the applicant's FOI access application (see, for example, the first three paragraphs of the extract from the applicant's submission which is quoted at paragraph 14 above).

30. However, I do not have jurisdiction in this review under Part 5 of the FOI Act to determine whether the action taken during the course of dealing with the applicant's FOI access application, culminating in the issue of the Ministerial certificate, was reasonable in some broad or general sense. The applicant may have gained that impression from the wording of s.71(2) of the FOI Act which refers to the Information Commissioner "*investigating and reviewing the grounds for a decision to issue a certificate under section 36, 37 or 42*". However, when one has regard to the closing words of s.84(1), I think it is clear that the Information Commissioner's jurisdiction is confined to considering the grounds on which the certificate was given (in the sense explained in paragraphs 39 and 46 below) rather than to any wider issues relating to the respondent's decision to issue a certificate. I consider that it is not within my jurisdiction, in a review under Part 5 of the FOI Act, to assess the reasonableness of the respondent's conduct, in a course of conduct culminating in the issue of a Ministerial certificate.

Were there reasonable grounds for the issue of the Ministerial certificate?

31. According to the terms of the Ministerial certificate dated 18 June 1993, the respondent has certified, in effect, that all of the matter contained in the four documents in issue is exempt matter under each of s.42(1)(a), s.42(1)(b) and s.42(1)(e). There was no attempt to apportion parts of the documents in issue to particular exemption provisions, nor was this attempted in the respondent's submissions during the course of my review. Based upon my examination of the four documents in issue, I consider that there is a strong case that all of the matter in issue is exempt matter under s.42(1)(a). While some of the matter in issue is clearly exempt matter under s.42(1)(b), according to principles which I explained in *Re McEniery and the Medical Board of Queensland* (1994) 1 QAR 349, I am not satisfied that all of the matter in issue is exempt matter under s.42(1)(b).

32. There were two distinct limbs to the respondent's arguments based on s.42(1)(e). The first concerned prejudice to the effectiveness of investigative techniques used by the CJC, and prejudice to the effective maintenance of an appropriate intelligence database. The second, which was more fully developed in response to my suggestion noted in paragraph 17 above, was that the provision of the documents in issue to the relevant Minister pursuant to s.2.47(2)(e) of the *Criminal Justice Act*, in itself constituted a lawful method or procedure for preventing or dealing with a contravention or possible contravention of the law, the effectiveness of which would be prejudiced by disclosure of the documents in issue. While some of the matter in issue is certainly exempt in accordance with the first limb of the respondent's arguments based on s.42(1)(e), I do not think those arguments can be applied to all of the matter in issue. The second limb of the respondent's argument based on s.42(1)(e), however, might potentially apply to all of the matter in issue.

33. Thus, much of the matter in issue is exempt matter under each of s.42(1)(a), s.42(1)(b) and s.42(1)(e), but not all of it. Nevertheless, if there were reasonable grounds for certifying that all of the matter in issue is exempt matter under at least one of the exemption provisions nominated in the Ministerial certificate (even if various parts are exempt under only one of the nominated exemption provisions, and not others), the respondent is entitled to a finding that I am satisfied that there were reasonable grounds for the issue of the certificate. In the light of my comments above, I therefore propose to give more detailed consideration only to the arguments advanced under s.42(1)(a), and to address some comments to the second limb of the respondent's case based on s.42(1)(e).

34. The documents in issue are of considerable sensitivity, and on examining them, I had few doubts as to their eligibility for exemption, even on a merits review basis, let alone the more restrictive scope of review under s.84 of the FOI Act. Such doubts as occurred to me related only to specific passages, and these were identified to the respondent during the course of my review. The applicant, too, seemed to accept that his chances of successfully challenging the certificate were not strong, and his case primarily concentrated on the suggestion that there must be parts of the documents in issue that are of a "general nature", assessing the extent of the problem of organised crime, which ought to be released in the interests of informing the Queensland public, and which should not have any of the prejudicial effects contemplated by s.42(1) of the FOI Act, especially since the fact that the CJC was investigating Japanese organised crime had passed into the public domain.

35. This prompted an argument on behalf of the respondent which requires some detailed consideration. It is summarised in the following extract from the respondent's second submission:

> *Clearly, in undertaking this review, the question of what is to be considered matter in respect of each of Documents A, B, C and D becomes an issue of some importance. If one were to approach the review on the extreme basis that every single word in Documents A, B, C and D was "matter" for the purposes of the Act then in respect of each individual word it would be most difficult to sustain the*

argument that such words standing alone would be exempt matter under s.42 of the Act. Indeed, such an interpretation of matter would for all practical purposes, deprive the exemption provisions in the Act of all practical operation.

Accordingly, it is submitted that in determining whether matter is exempt matter, and in the context of this review whether reasonable grounds exist for the relevant certification in relation to such matter, one must adopt a generalised approach to the definition of "matter".

In this regard, it is submitted that the generalised approach applied in a number of cases which have examined the corresponding provisions of s.42(1) in the Freedom of Information Act 1982 (Cth) should be adopted. This is particularly so as regards this review, where the issue is not whether the matter contained in Documents A, B, C and D is exempt matter under s.42 of the Act but whether there were reasonable grounds for the certification made by the Honourable the Attorney-General.

[Passages were then cited from *Re Marzol and Australian Federal Police* (Commonwealth Administrative Appeals Tribunal, Deputy President Jennings QC, No. N85/103, 3 April 1986, unreported) at pp.12 and 13-14; *Re Arnold Bloch Leibler and Co and Australian Taxation Office (No. 2)* (1985) 9 ALD 7 at pp.13-14; and *News Corporation Ltd and Ors v National Companies and Securities Commission* (1986) 57 ALR 550 at p.561 and p.562.]

From these authorities, the following propositions, it is submitted, emerge:

(a) The process of review should not be conducted on a "sentence by sentence, line by line or piecemeal" approach, see Re Arnold Bloch Leibler & Co, but with an acceptable degree of "generalisation": see News Corporation Ltd & Ors -v- National Companies and Securities Commission;

(b) That where the documents in question are not divisible it would be misleading to delete parts thereof: see Re Marzol and the Australian Federal Police;

(c) The "jig-saw" argument is an appropriate consideration to take into account in the context of s.42 of the Act. To release parts of Documents A, B, C or D could provide the "missing piece" needed to complete the jig-saw puzzle and bring about the detriment referred to in ss.42(1)(a), (b) & (e) of the Act: see News Corporation Ltd & Ors -v- National Companies and Securities Commission.

It is therefore submitted that Documents A, B, C and D should be treated for the purposes of this review as entire documents. In the context of this review under s.84 of the Act, a generalised approach should be adopted as it would not be appropriate to sever each document and consider the status of each subdivided portion as has been impliedly suggested by Mr Fagan.

36. The approach suggested in the last-quoted paragraph is not, in my opinion, the correct approach to be adopted generally to the examination of documents for the purpose of determining whether they are subject to exemption provisions of the Queensland FOI Act. Nor am I satisfied that it is appropriate having regard to the nature of the particular documents in issue, and the fact that I am reviewing whether there were reasonable grounds for the issue of a Ministerial certificate in respect of the documents in issue.

37. The authorities to which the respondent refers arose under s.37 of the Commonwealth FOI Act (which corresponds to s.42 of the Queensland FOI Act). Section 37 of the Commonwealth FOI Act requires an evaluation of the effects of disclosure of a document in issue, and if it is decided that the document satisfies the test for exemption, s.22 of the Commonwealth FOI Act requires that consideration be given as to whether it is possible, with deletions, to make a copy of the document that would not be an exempt document. (All exemption provisions in the Commonwealth FOI Act require consideration of the whole document in issue to determine whether it is an exempt document, with s.22 then requiring that attention be given to the possibility of severance. The term "exempt matter" is defined in s.4 of the Commonwealth FOI Act to mean "matter the inclusion of which in a document causes the document to be an exempt document".)

38. The Queensland FOI Act, on the other hand, contemplates that documents may be comprised either totally or partly of exempt matter, and the exemption provisions of the Queensland FOI Act require an evaluation of the matter in issue, rather than of a document in issue, so that attention is directed from the outset to the possibility of severance in accordance with s.32 of the Queensland FOI Act. Thus, s.42(1) of the Queensland FOI Act provides that "*Matter is exempt matter if its disclosure could reasonably be expected to ...*" (my underlining) have any of the prejudicial effects identified in the ten paragraphs of s.42(1).

39. Furthermore, s.42(3) permitted the respondent to certify that "*matter is of a kind mentioned in subsection (1), but not of a kind mentioned in subsection (2) ...*" (my underlining). The certificate issued by the respondent on 18 June 1993 certifies that the matter contained in the four documents identified in the certificate is exempt matter under s.42 of the FOI Act. For there to have been reasonable grounds for the issue of the Ministerial certificate, it must be established that there were reasonable grounds for certifying that the matter contained in the four documents in issue is exempt matter under s.42 of the FOI Act.

40. The cases under the Commonwealth FOI Act which are cited in the above extract from the respondent's submission really only illustrate particular problems encountered with the particular documents in issue in those cases; for example, the report in issue in *Re Marzol* was not regarded as appropriate for severance in accordance with the terms of s.22 of the Commonwealth FOI Act. The remarks of Woodward J in the *News Corporation* case at p.562 to the effect that "*if the Freedom of Information legislation is to remain workable, it must be open to a respondent, and to the AAT, to deal with large numbers of documents with a degree of generalisation appropriate to the case*" (my emphasis) must be understood in light of the fact that his Honour was there dealing with a case involving more than 6,000 documents relating to a complex investigation, and that the "jig-saw" argument was appropriate for application in the context of that investigation.

41. Even under the Commonwealth FOI Act, examples can be found of cases involving consideration of "conclusive certificates" which have proceeded on the basis of apportionment of the parts of a document in issue, for which there had been held to be reasonable grounds for issuing the certificate, so as to permit severance and disclosure of those parts of the document in issue in respect of which no reasonable grounds were considered to exist for the issue of a "conclusive certificate": see, for example, *Re Anderson and Department of Special Minister of State* (Commonwealth Administrative Appeals Tribunal, Deputy President Smart QC, No. N83/896, 26 October 1984, unreported) at p.8; *Re Throssell and Department of Foreign Affairs* (Commonwealth Administrative Appeals Tribunal, Neaves J, No. A86/42, 11 December 1987, unreported) at p.12; *Re Aldred and Department of Foreign Affairs and Trade* (Commonwealth Administrative Appeals Tribunal, Hartigan J (President), No. A88/140, 8 February 1990, unreported) at p.34. There are also many examples in reported cases under the Commonwealth FOI Act of a "conclusive certificate" being issued in respect of part only of a document: see, for example, *Re Robinson and Department of Foreign Affairs* (Commonwealth Administrative Appeals Tribunal, Deputy President Todd, No.

N84/295, 29 August 1986, unreported) at p.2, paragraph 3.

42. The respondent has submitted that in reviewing whether matter contained in a document is exempt matter under the FOI Act, the process of review should not be conducted on a "sentence by sentence, line by line, or piecemeal approach" (quoting from *Re Arnold Bloch Leibler & Co*) but with an acceptable degree of generalisation (paraphrasing some remarks of Woodward J in the *News Corporation* case at p.562; I note that Woodward J spoke of a "degree of generalisation appropriate to the case.") Similar remarks can be found in other cases where the Commonwealth Administrative Appeals Tribunal has considered the appropriateness of severance in accordance with s.22 of the Commonwealth FOI Act. For example, in *Re Robinson,* Deputy President Todd said (at p.7):

> *... proceedings before the Tribunal came, at times, close to a word-by-word battle over disclosure. Not surprisingly, adopting this approach it is tempting to conclude that parts of speech which viewed in isolation are innocuous have no basis for exemption. In circumstances such as the present, this temptation must be resisted, for it would be too easy, having before one a document in which only those words which, when viewed in isolation, are exempt have been deleted, to reconstruct the entire document by process of educated guesses and thereby cause the damage against which s.33(1)(a) is designed to protect. To have engaged in such an exercise would, in the present case, have produced sentences comprising solely of definite and indefinite articles, prepositions and blank spaces. Such sentences, although not strictly misleading (see s.22), do not go any way towards answering the terms of the applicant's request for access, making the exercise quite futile.*

43. I am in general sympathy with the above remarks, but I caution against the application of any fixed rule. A common sense judgment must be made in the circumstances of each case, in light of the amount and nature of the information in issue, as to what constitutes an intelligible segment of matter, to which the particular applicant would wish to be given access. It is not difficult to envisage situations where a single word, or a few words, may constitute an intelligible segment of matter to which the applicant would wish to be given access, e.g., a name, or the title of an office, or the title of a source document.

Whether there were reasonable grounds for the respondent to certify the matter in issue to be exempt matter under s.42(1)(a) of the FOI Act

44. I must determine whether there were reasonable grounds for the respondent to certify that disclosure of the matter contained in the four documents in issue could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law in a particular case.

45. In *Re McEniery* (where I addressed in detail the requirements of s.42(1)(b) of the FOI Act) and in *Re "T" and Queensland Health* (1994) 1 QAR 386 (where I considered the meaning of s.42(1)(e) of the FOI Act), I said that the words "could reasonably be expected to" bear the same meaning in the context of s.42(1) as that which I explained (in the context of considering the identical words in s.46(1)(b) of the FOI Act) at paragraphs 154-161 of *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279. In particular, I said at paragraph 160 of *Re "B"*:

> *... The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.*

46. I therefore have to be satisfied (in terms of s.84 of the FOI Act) that there were reasonable grounds

for the Minister to have formed an expectation, that was reasonably based, of prejudice to an investigation of a contravention or possible contravention of the law in a particular case, if the matter in issue were to be disclosed. This sounds circuitous i.e., assessing whether there were reasonable grounds for forming an expectation that must be based on reasonable grounds. But there is a distinction in theory, (albeit one that may only infrequently present itself as a significant distinction in practice) although it is somewhat elusive to explain and illustrate. The distinction lies in the difference between the Information Commissioner's usual "merits review" function and the more limited, "supervisory" nature of the review available under s.84 of the FOI Act. If I were conducting a review on the merits of a claim for exemption under s.42(1)(a), the relevant issue would be whether I was satisfied, from an examination of the matter in issue and all other relevant evidence, that an expectation of disclosure causing prejudice of the kind contemplated by s.42(1)(a) was reasonably based. If, for example, there was conflicting evidence, or different inferences were reasonably open from known primary facts, one version supporting a reasonable basis for the expectation required to found the application of s.42(1)(a), and the other not, it would be my function to resolve the conflict in evidence or determine the correct or logically preferable inference to be drawn from the known primary facts, so as to arrive at what I considered to be the correct decision on the application of s.42(1)(a) to the matter in issue. If, however, the Minister as decision-maker took a different view (to that which I might be minded to take on a "merits review" basis), but one that was reasonably open, as to how the conflict of evidence should be resolved, or preferred a different inference that was reasonably open to be drawn from the known primary facts, it may still be possible to say that there were reasonable grounds for the Minister to have formed an expectation, that was reasonably based, of disclosure of the matter in issue causing prejudice of the kind contemplated by s.42(1)(a). In a review under s.84 of the FOI Act, the question is not whether I would have formed the requisite expectation on the basis of the relevant available material, but whether there were reasonable grounds on which the respondent could have formed the requisite expectation.

47. I am satisfied, on the basis of paragraph 16 of Mr Roger's statement and paragraphs 5-10 of Mr Wyvill's statutory declaration, that the CJC was, at the time of the issue of the Ministerial certificate, engaged in a long-term and still current investigation directed towards ascertaining the existence, nature and extent of Japanese organised crime activity in Queensland, and the identity of organisations and individuals involved in related illegal activities.

48. In a segment of paragraph 19 of Mr Roger's statement (which could not be disclosed to the applicant during the course of my review, nor reproduced in these reasons for decision: see s.87 of the FOI Act) I was informed of the specific activities being investigated, which I am satisfied would, if proved, contravene various Queensland and Commonwealth laws.

49. I am satisfied, therefore, that there was a current investigation of possible contraventions of the law in a number of particular cases. The grounds on which it is said that prejudice to the CJC's investigation could reasonably be expected, if the matter in issue were to be disclosed, are summarised in the following extract from Mr Roger's statement:

> *The* [CJC] *has expended substantial effort and resources in painstakingly building a network of contacts and co-operation from which this information* [i.e. information contained in the four documents in issue] *is drawn. The lynch pin of this network and co-operation is the Commission being perceived as willing and able to protect the confidentiality of information provided.*
>
> *This is especially the case in relation to Japanese organised crime information. This information derives from law enforcement agencies in other countries as well as Australia. These other countries do not have freedom of information legislation and view the disclosure of such information as the very antithesis of sound law*

enforcement intelligence practice.

It follows that granting access to information such as that contained in each of the reports the subject of Mr Fagan's application would be seen by the source law enforcement agencies as a serious breach of the confidentiality. Further that breach would be perceived as being the result of the [CJC] *being unwilling or unable to protect the confidentiality of information it receives.*

This in turn would have the result that such law enforcement sources from which the [CJC] *has gathered information in the past, and would need to gather information in the future, would become unwilling to provide such information in the future as the* [CJC] *would be seen as being unable to meet their requirements of confidentiality.*

The consequence would be that the [CJC] *would cease to receive information or co-operation from Australian and foreign law enforcement agencies. That is a vital artery would be severed with a consequential serious effect not only on the* [CJC's] *current investigation into Japanese organised crime, but also its gathering of intelligence information concerning Japanese organised crime in the future; in particular, this would be so in respect of the highly sensitive assistance given by co-operative law enforcement agencies.*

...

[Upon disclosure of the documents in issue under the FOI Act] *the subjects of the* [CJC's] *investigation would become aware of the* [CJC's] i*nvestigation of their activities. Based upon my experience, I am strongly of the view that upon so becoming aware the* [CJC's] *investigation would be severely prejudiced because the subjects of the investigation would*:

(a) *be informed of the nature and extent of the evidence which the* [CJC] *holds;*

(b) *be informed of the reliance or emphasis which the* [CJC] *has given to particular items of evidence;*

(c) *become aware of the direction of the* [CJC] *investigation, the nature of its surveillance, the priorities of its investigations, the resources available to the* [CJC] *and the hypotheses and methods of investigation adopted by the* [CJC]*;*

(d) *be informed of which of their activities the* [CJC] *is or is not aware;*

(e) *curtail the activities of which the* [CJC] *is aware;*

(f) *expand upon activities of which the* [CJC] *is apparently unaware;*

(g) *determine how the* [CJC] *became aware of activities and take active steps to prevent such detection in the future;*

and

(h) *destroy all incriminating evidence in relation to those activities which, as I have previously stated, may include the harming or killing of persons who have provided or are thought to have provided such evidence.*

...

In summary, the disclosure of this information to Mr Fagan:

(a) *Would involve a grave breach of confidence in respect of other law enforcement agencies which would substantially prejudice future co-operation by those agencies with the* [CJC].

This would be to the prejudice of the [CJC's] *current and ongoing investigation into major and organised crime, in particular Japanese organised crime, as inter-agency co-operation is axiomatic to successfully pursuing the fight against organised crime.*

(b) *The* [CJC's] *investigative methods and procedures would be revealed and hence, able to be circumvented, frustrated or avoided.*

(c) *Disclosure of it would risk the discovery of the existence or identities of confidential informants thereby placing them at considerable risk.*

(d) *Previously willing and co-operative sources would dry up due to their perception that the* [CJC] *could not protect their identities or the confidentiality of their information.*

(e) *The subjects of the investigation by the* [CJC] *would become aware of the investigation of their activities and as a result would in probability curtail, or redouble their efforts to disguise, their activities, and destroy any incriminating evidence. The investigation by the* [CJC] *would thereby be severely hampered.*

50. Having carefully examined all of the matter in issue, in light of the respondent's evidence and written submissions, I am satisfied that there were reasonable grounds for the respondent to have formed an expectation, that was reasonably based, of prejudice to the CJC's investigation identified in paragraph 47 above, if the matter in issue were to be disclosed. It follows that I am satisfied that there were reasonable grounds for the issue of the Ministerial certificate dated 18 June 1993 in respect of all of the matter contained in the four documents identified in that certificate, insofar as the application of s.42(1)(a) of the FOI Act is concerned.

51. As noted in paragraph 17 above, I wrote to the respondent during the course of the review identifying five passages in the documents in issue in respect of which the case for exemption seemed, to varying degrees, weaker than the case for exemption in respect of the balance of the documents in issue. Those five passages were specifically addressed in Mr Roger's statutory declaration and the respondent's third submission. Upon examining that material, I was satisfied that the second, third and fourth of the passages I had identified comprised exempt matter under s.42(1)(a). While I retain some reservations about some matter contained in the first and fifth passages, which it would be necessary for me to work through and resolve if I were reviewing on its merits a claim for exemption in respect of those two passages, I am satisfied that there were reasonable grounds for the issue of the Ministerial certificate in respect of the first and fifth passages, according to the standard to which I have referred in paragraph 46 above.

52. I will make some further comments about the fifth passage because the applicant took particular issue with the case made in respect of it in the respondent's third submission and Mr Roger's statutory declaration. In paragraph 6 of his statutory declaration, Mr Roger said:

> ... *while the matter* [in the fifth passage which I had identified] *contains quotations from published literature, there is also interspersed comments and analysis by the* [CJC] *and in any event the bringing together and collation of the published literature, is in itself analysis as it leads to a particular interpretation of that information, and it would reveal the information that the* [CJC] *is using as "indicators" for the investigation of Japanese Organised Crime, which could*
>
> *(a) alert possible targets to the* [CJC's] *method of operation thus allowing the targets to counter this by changing their behaviour thereby prejudicing the prevention, detection and/or investigation of a contravention or possible contravention of the law.*
>
> *In other words, whilst the* [CJC] *utilises information from open sources in preparing an intelligence report, the bringing together of information from several areas and the subsequent interpretation of that information takes on a new meaning; it is like a jig-saw puzzle, an individual piece by itself is of little value and therefore requires less protection but, when all the pieces of a jig-saw are brought together and the final product assembled, a total picture emerges.*

53. Mr Roger's evidence was addressed to the application of s.42(1)(e) of the FOI Act, however, I consider that evidence is equally applicable to s.42(1)(a) of the FOI Act.

54. In response to Mr Roger's evidence on this issue, Mr Fagan said:

> *I find it difficult to accept that the Attorney-General can be found to have behaved reasonably in issuing a conclusive certificate over such material. Indeed, this paragraph leaves me with the impression I could have saved my application fee and a great deal of time by many people by going to a book shop.*

55. My reservations concerning the fifth passage are that, in the context of the entire document of which it forms a small part, it appears to me to be intended to provide an historical/descriptive account, drawn from published sources, of the development of Japanese organised crime groupings and the extension of their activities to other countries. It did strike me as being the kind of matter to which Mr Fagan was referring in the last paragraph from his submission quoted at paragraph 14 above. I also incline to the view that the respondent's case tends to overstate the real significance of the fifth passage.

56. Against that, the respondent contends that the particular material from open sources evidences the matters of specific interest to the CJC in its investigation, and that disclosure could reasonably be expected to prejudice its investigation. In *Re "S" and Commissioner of Taxation* (Commonwealth Administrative Appeals Tribunal, Deputy President McDonald, No. W88/120, 15 June 1989, unreported), the Commonwealth AAT upheld a claim of exemption under s.37(1)(a) of the Commonwealth FOI Act in respect of documents which were otherwise available either through a public register and/or to the applicant S, as being documents generated by him to the Commissioner of Taxation. In the circumstances of a current audit of S's tax affairs, the Tribunal held that disclosure of those documents would, or could reasonably be expected to, lead to prejudice of the investigation by alerting a particular line of inquiry being pursued.

57. The respondent contends that the reasoning in *Re "S"* is applicable to extracts from published literature contained in the fifth passage: if the effect of disclosure of information in a report relating to a current investigation would be to prejudice the investigation, then exemption under s.42(1)(a) will be established, no matter that some of the information is in the public domain. The respondent contends that it is the selection of certain parts of the published literature on Japanese organised

crime, in the context of a particular investigation, which has the potential to cause prejudice to the particular investigation. I think there is sufficient force in this argument, and in the fact that the fifth passage contains some comments which relate the historical/descriptive material to the CJC's areas of concern in a Queensland context, to prevent me from being satisfied that there were no reasonable grounds for the issue of the Ministerial certificate in respect of the matter contained in the fifth passage.

58. My finding as to the application of s.42(1)(a) to the matter in issue makes it unnecessary to consider s.42(1)(b) and s.42(1)(e), but I will make some brief comments about what I have described above as the second limb of the respondent's case based on the application of s.42(1)(e).

59. In response to my suggestion referred to in paragraph 17 above, the respondent's third submission argued that the provision to the relevant Minister of the four documents in issue, pursuant to s.2.47(2)(e) of the *Criminal Justice Act*, in itself constituted a lawful method or procedure for preventing or dealing with a contravention or possible contravention of the law, the effectiveness of which could reasonably be expected to be prejudiced by disclosure of the four documents in issue. Section 2.47 of the *Criminal Justice Act*,so far as relevant for present purposes, provides:

> ***2.47*** *Role and functions*
>
> ***(1)*** *The Intelligence Division is the unit within the Commission to function as a professional and specialist criminal intelligence unit providing an effective criminal intelligence service as the hub about which an integrated approach to major crime, in particular -*
>
> *(a) organised crime; and*
>
> *(b) criminal activity transcending the normal boundaries of criminal activity that is the subject of local police action;*
>
> *may be structured.*
>
> ***(2)*** *It is the function of the Intelligence Division -*
>
> *(a) to build up a data base of intelligence information concerning criminal activities and persons concerned in criminal activities, using for the purpose information acquired by it from -*
>
> *(i) its own operations;*
>
> *(ii) the Official Misconduct Division of the Commission;*
>
> *(iii) the Police Service;*
>
> *(iv) sources of the Commonwealth or any State or Territory, which supplies such information to it;*
>
> *(v) any other source available to it;*
>
> *and to disseminate such information to such persons, authorities and agencies, and in such manner, as the Commission considers appropriate to the discharge of its functions and responsibilities.*

...

(e) subject to the Commission's approval, to report to the Minister and the Minister of the Crown responsible for the Police Force on matters of criminal intelligence pertinent to the deliberations, policies and projects of the Government.

60. The respondent relies on evidence given in paragraph 7 of Mr Roger's statutory declaration, as follows:

> *7. The* [CJC] *says that the provision to the relevant Minister of the documents in issue pursuant to section 2.47(2)(e) of the* Criminal Justice Act 1989 *does amount to a lawful method or procedure for dealing with a contravention or possible contravention of the law under section 42(1)(e) of the* Freedom of Information Act 1992.
>
> *7.1 Briefing of the relevant Minister alerts the government to the contravention or possible contravention of the law and allows the government to take steps to prevent or deal with such contravention by legislating and/or putting in place guidelines, rules or regulations or other statutory instruments to close or limit the avenues utilised by the perpetrators of, and combat the methods used to enable, the contravention or possible contravention of the law. Further, it informs the government in relation to its dealings with certain persons and organisations and in part prevents and deals with contravention of laws by going some of the way to ensuring that the government does not unknowingly through contractual arrangements encourage those persons and organisations in the contravention or possible contravention of the law.*
>
> *7.2 In the past the Commission has briefed relevant Ministers in considerable detail and with complete candour.*
>
> *7.3 This practice of briefing to the extent it has occurred in the past may cease if parts of the briefing documents are disclosed under the Freedom of Information Act.*
>
> *7.4 The effectiveness of the lawful method or procedure for dealing with a contravention or possible contravention of the law by briefing the relevant Minister will be prejudiced in that without the detailed written report the ability of the government to consider fully in depth the relevant matters will be greatly reduced.*

61. I accept the importance of the government of the day, through the relevant Minister, obtaining reports of the kind in issue, for reasons of the kind that are briefly indicated in paragraph 7.1 of Mr Roger's statutory declaration. I think this process can fairly be described as a "lawful method or procedure for preventing ... or dealing with a contravention or possible contravention of the law" within the terms of s.42(1)(e). I am also satisfied from my examination of the documents in issue that they do contain information which could assist the government to prevent or deal with contraventions or possible contraventions of the law. The effectiveness of this method or procedure for preventing or dealing with contraventions or possible contraventions of the law could reasonably be expected to be prejudiced if the CJC withheld criminal intelligence information which the government needed to have to be able to make a fully informed decision with respect to a pertinent

deliberation, policy or project. However, I have difficulty with the concept that disclosure under the FOI Act of a report, prepared under s.2.47(2)(e) of the *Criminal Justice Act*, could reasonably be expected to cause the CJC in the future to prepare less candid reports for the relevant Minister. That seems to me to involve an acceptance that the CJC would be prepared to discharge one of its significant statutory functions in a manner that was less than fully effective. It is difficult, in any event, to conceive of any kind of information having sufficient sensitivity for the CJC to be tempted to withhold it from a report, for fear that its disclosure would prejudice current investigations, or reveal a confidential source etc, that would not already qualify for exemption under one or more paragraphs of s.42(1). Certainly, the documents now in issue have qualified for exemption in this way. In the circumstances of the present case it is unnecessary, and probably unprofitable, to pursue the difficulty I have noted in this paragraph.

Section 42(2)

62. I should add that it is clear from my inspection of the documents in issue that they do not contain matter which falls within any of the paragraphs of s.42(2) of the FOI Act. Hence, I am satisfied that there were reasonable grounds for the respondent to certify that the matter contained in the four documents identified in the Ministerial certificate dated 18 June 1993 is not matter of a kind mentioned in s.42(2).

Conclusion

63. I am satisfied that there were reasonable grounds for the issue by the respondent, under s.42(3) of the FOI Act, of the Ministerial certificate dated 18 June 1993.

F N ALBIETZ
INFORMATION COMMISSIONER