

OFFICE OF THE INFORMATION )  
COMMISSIONER (QLD) )

S 204 of 1993  
(Decision No. 95034)

Participants:

IAN JUSTIN OLSSON  
Applicant

- and -

DEPARTMENT OF TRANSPORT  
Respondent

### **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - document described as draft Cabinet submission - no final document presented to Cabinet - whether draft document ever proposed by a Minister to be submitted to Cabinet - application of s.36(1)(b) of the *Freedom of Information Act 1992* Qld - whether document in issue a draft qualifying for exemption under s.36(1)(f) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - applicant having previously been permitted to inspect matter claimed to be exempt - respondent contends that giving access was inadvertent - whether prior access or publication relevant to a claim of exemption under s.36(1) of the *Freedom of Information Act 1992* Qld.

*Freedom of Information Act 1992* Qld s.28(1), s.30(1), s.34, s.36(1)(b), s.36(1)(c),  
s.36(1)(f), s.36(2), s.71(1)(b), s.79(1), s.81, s.88(2)  
*Freedom of Information Amendment Act 1993* Qld  
*Freedom of Information Amendment Act 1995* Qld  
*Acts Interpretation Act 1954* Qld s.20

*Beanland and Department of Justice and Attorney-General, Re* (Information Commissioner Qld, Decision No. 95026, 14 November 1995, unreported)  
*Hudson and Department of the Premier, Economic and Trade Development, Re* (1993)  
1 QAR 123  
*Woodyatt and Minister for Corrective Services, Re* (Information Commissioner Qld, Decision No. 95001, 13 February 1995, unreported)  
*State ex rel Zuern v Leis* 564 NE 2d 81 (1990) (Supreme Court of Ohio)

## **DECISION**

I set aside the decision under review. In substitution for it, I find that those parts of the draft Cabinet submission dated 13 June 1989 and headed "Russell Island Investigations", which were not disclosed to the applicant with the respondent's letter dated 18 November 1993, are exempt matter under s.36(1)(f) of the *Freedom of Information Act 1992* Qld.

Date of Decision: 19 December 1995

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F N ALBIETZ  
**INFORMATION COMMISSIONER**

Participants:

IAN JUSTIN OLSSON  
Applicant

- and -

DEPARTMENT OF TRANSPORT  
Respondent

### **REASONS FOR DECISION**

#### **Background**

1. The applicant seeks review of the respondent's decision to refuse him access to parts of a draft Cabinet submission relating to Russell Island, prepared in June 1989. The respondent contends that the matter in issue is exempt matter under s.36(1)(b) and s.36(1)(c) of the *Freedom of Information Act 1992 Qld* (the FOI Act), provisions which have been amended twice since the applicant lodged his FOI access application in February 1993. The applicant contends that he has already been granted access to the matter in issue by way of inspection, and that the respondent cannot now refuse him access, either by way of further inspection, or in any other form allowed under s.30(1) of the FOI Act.
2. By an undated letter received by the Department of Transport (the Department) on 9 February 1993, the applicant sought access under the FOI Act to documents relating to a variety of matters including, "*any information on the subject of the bridge and other links, ferry subsidies etc to Russell Island*". The letter makes it clear that this is a formal application for access under the FOI Act. According to the undisputed assertion of the applicant, he was, between that time and 6 October 1993, given access by way of inspection to a substantial number of documents, including some which related to Russell Island, and was provided with photocopies of a number of documents which he had selected from the documents he was permitted to inspect. Despite the applicant having been given access to a number of documents, no formal notice of decision, in the terms required by s.34 of the FOI Act, was given by the Department in response to Mr Olsson's FOI access application.
3. By letter dated 27 October 1993, Mr Olsson applied for external review by the Information Commissioner, under Part 5 of the FOI Act, of the Department's refusal to give him access, by way of the provision of a photocopy, to one document, being a draft Cabinet submission relating to Russell Island. In that letter, Mr Olsson indicated that he had been permitted to inspect the draft Cabinet submission, and thereupon requested the Department for a copy of it, but that the Department had refused to give him a copy of the document.

#### **The external review process**

4. After consulting Mr Olsson with a view to clarifying the circumstances of his application, the

Deputy Information Commissioner contacted the Department and requested its FOI Co-ordinator, Mr B Butterworth, to reconsider the Department's position in light of the fact that Mr Olsson had already seen the draft Cabinet submission. The Department wrote to Mr Olsson on 18 November 1993 in the following terms:

*I refer to your verbal approaches to this office and your letter to the Information Commissioner, regarding access to a draft Cabinet Submission.*

*It is claimed that during the inspection of documents responsive to your request of 9 February 1993 under the Freedom of Information Act, you were permitted to inspect such a document.*

*I have identified the document as a Draft Cabinet Submission dated 13 June 1989 headed "Russell Island Investigations". At the time of your application such a document would have been regarded as exempt under s.36 of the Freedom of Information Act and access therefore could have been given only inadvertently.*

...

*I still regard the document as exempt and access to the total document cannot be properly given; however, I have extracted from the document matter which I regard as factual see s.36(2), and copies showing only this material are attached.*

5. The applicant has therefore obtained access to parts of the document in issue considered by the Department to comprise "merely factual matter" within the terms of s.36(2) of the FOI Act, as in force at 18 November 1993. I note that the s.36(2) exception for merely factual matter was removed by amendments to the FOI Act which took effect from 20 November 1993: see the *Freedom of Information Amendment Act 1993* Qld. As the evidence has unfolded, it appears that the Department was mistaken in its belief that the balance of the document in issue was exempt matter under s.36 of the FOI Act, as in force prior to 20 November 1993. As is noted at paragraph 13 below, a Cabinet submission based on the draft Cabinet submission in issue has never been submitted to Cabinet (though it appears that the Department believed otherwise at the time), and there was at that time no current proposal by a Minister to put before Cabinet a submission based on the draft Cabinet submission in issue (as to the significance of this point, see *Re Hudson and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123 at p.135; paragraph 28). In these circumstances, the document in issue would not have qualified for exemption under s.36(1), as in force prior to 20 November 1993.
6. By letter dated 22 November 1993, I wrote to the Department indicating my view (which has not been challenged by the Department) that I had jurisdiction to conduct a review on the basis of a deemed refusal of access to the matter in issue (see s.79 of the FOI Act), stating:

*It appears that your Department made arrangements to give Mr Olsson access to a large number of documents on an informal basis. Mr Olsson claims that he was permitted to inspect a draft Cabinet submission, dating from 1989, concerning Russell Island. When Mr Olsson requested a copy of this document, it was refused. No formal decision letter, however, was given to Mr Olsson refusing access to the document, and setting out the reasons for the decision and*

*the other matter of which notification is required in accordance with s.34(2) of the Freedom of Information Act 1992 (Qld) (the FOI Act). Thus, while in one sense there was an actual refusal of access to this document (the oral refusal of Mr Olsson's oral request for a copy of the document) the correct position is that as of the date of Mr Olsson's application for review by the Information Commissioner dated 27 October 1993, all the elements of s.79(1) of the FOI Act were satisfied, and Mr Olsson was entitled to apply for external review under s.79, and I have jurisdiction to review accordingly.*

7. The course of this review has been affected by the amendments made to s.36 of the FOI Act in November 1993, and in March 1995 (see the *Freedom of Information Amendment Act 1995* Qld). Following publication of my reasons for decision in *Re Woodyatt and Minister for Corrective Services* (Information Commissioner Qld, Decision No. 95001, 13 February 1995, unreported), I wrote to the Department on 2 March 1995, informing it of my view that Mr Olsson, like Mr Woodyatt, had an accrued right, by virtue of s.20 of the *Acts Interpretation Act 1954* Qld, to have his application for review determined in accordance with s.36 of the FOI Act as it was in force at the time he lodged his FOI access application. I invited the Department to present its case for exemption of the matter in issue on that basis. Before the Department could respond, however, the March 1995 amendments to s.36, which were clearly expressed to have retrospective effect, came into force.
8. By letter dated 16 May 1995, I wrote to Mr Olsson outlining the March 1995 amendments to s.36, and advising him of my preliminary view that the matter in issue was exempt matter under s.36, as amended. Mr Olsson indicated that he did not accept my preliminary view and provided an affidavit dated 2 June 1995 in support of his contention that the matter in issue is not exempt matter. This affidavit was provided to the Department, which was advised that the onus remained on it to establish all elements of the claimed exemption. The Department lodged in reply a statutory declaration by Mr Butterworth, dated 2 August 1995, to which Mr Olsson made a brief rejoinder dated 21 August 1995.

### **The applicable legislation**

9. In my recent decision in *Re Beanland and Department of Justice and Attorney-General* (Information Commissioner Qld, Decision No. 95026, 14 November 1995, unreported) I explained that the effect of s.110 of the FOI Act (a new provision added by the *Freedom of Information Amendment Act 1995*) was to make the changes to s.36 (and other provisions) effected by the *Freedom of Information Amendment Act 1995* applicable to all applications made under the FOI Act, whether commenced before or after the *Freedom of Information Amendment Act 1995* came into force (see paragraphs 55-56 of *Re Beanland*). I must therefore apply s.36, as now in force, to the matter in issue.
10. The Department has claimed that the matter in issue is exempt under s.36(1)(b) and s.36(1)(c) of the FOI Act. I also consider that s.36(1)(f) is relevant. Those paragraphs now provide:

**36.(1) Matter is exempt matter if -**

...

- (b) *it was prepared for submission to Cabinet and is proposed, or has at any time been proposed, by a Minister to be submitted to Cabinet; or*

- (c) *it was prepared for briefing, or the use of, a Minister or chief executive in relation to a matter -*
- (i) *submitted to Cabinet; or*
- (ii) *that is proposed, or has at any time been proposed, to be submitted to Cabinet by a Minister; or*
- ...
- (f) *it is a draft of matter mentioned in paragraphs (a) to (e);*

**Sections 36(1)(b) and 36(1)(f)**

11. The statutory declaration of Mr Butterworth described the draft Cabinet submission and explained the basis of the Department's contention that it is exempt under s.36(1)(b) of the FOI Act, as follows:

4. *The document in question consists of ten (10) typed pages, two maps of Russell Island and a one page schedule of Redevelopment Cost estimates. Page 1 of the document bears the following heading:*

SECURITY CLASSIFICATION " "  
*DRAFT* Submission No. ....  
*DATE 13/6/89* Copy No. ....  
FOR CABINET  
RUSSELL ISLAND INVESTIGATIONS

5. *Paragraphs 1 & 2 then remind the Honourable Ministers of previous Cabinet Decisions, in particular that of 1 August 1988 calling for a draft strategic plan for the redevelopment of the island. Paragraph 15 lists a number of recommendations in relation to the matter including that the program of initiatives outlined in para 14 be endorsed by Cabinet. It was my decision that the document was a draft Cabinet Submission.*
6. *I have attached a copy ... of a letter from Premiers Department wherein Mr E.F.F. Finger, Director-General, states that the submission is to go before Cabinet on Monday, 19th June 1989. The handwritten notation on the lower part of the page relates that the draft has been submitted to the Minister and that the outcome is a formal Cabinet Submission by the Minister on 19 June 1989. Political changes appear to have prevented the actual submission occurring. Attempts to identify the relevant Minister have not been conclusive and efforts to obtain an affidavit of intention have not been successful.*
7. *Nevertheless the details above convinced me, as the decision-maker, that the document had been prepared for submission to Cabinet and that there was a clear proposal by a yet unidentified Minister at the time, for it to be submitted to Cabinet. My decision was that the then s.36(1)(b) applied. I am of the opinion that the current s.36(1)(b) now applies.*

12. This is not particularly satisfactory evidence from an agency which bears the onus of establishing that its decision under review was justified (see s.81 of the FOI Act). One of the

requirements of s.36(1)(b) of the FOI Act is that a Minister proposes, or at some stage has proposed, that particular matter be submitted to Cabinet. Of course the best evidence of such an intention would be sworn evidence from the relevant Minister. However, for reasons which are not explained, the Department has been unable to establish who the relevant Minister was, and so has not provided evidence of that nature. Direct evidence as to the intentions of the relevant Minister not being available to me, it is necessary for me to consider whether there is sufficient material before me from which to infer that a Minister had the requisite intention. If I am not satisfied that this is the case, then I must find that the exemption provision has not been established.

13. In reaching a conclusion on this point, I have taken into account the following facts, established from my examination of the draft Cabinet submission and the information and evidence supplied by the participants:
- At some time prior to the creation of the draft Cabinet submission, a Minister was directed to investigate certain matters relating to Russell Island.
  - As part of this investigation an *ad hoc* inter-departmental committee was established to consider these matters.
  - The draft Cabinet submission (containing the matter in issue) was sent to the Commissioner for Main Roads for comment, under cover of a letter dated 13 June 1989 from the then Director-General of the Premier's Department, Mr E F F Finger.
  - That letter indicated that it was intended to place the submission before Cabinet on 19 June 1989.
  - A handwritten notation made on the letter, by Mr I Mathers of the Department, indicates that the draft submission was forwarded to the Commissioner for discussion with the Minister.
  - Another handwritten notation made by Mr Mathers on the letter indicates that the outcome of the discussion was that a formal Cabinet submission would be put to Cabinet by the Minister on 19 June 1989.
  - No submission based on the draft was put to Cabinet.
14. A member of my staff contacted Mr Mathers, who in 1989 had held the position of Assistant Commissioner (Metropolitan) Main Roads. Mr Mathers had some recollection of the issue and provided parts of the information referred to above. However, Mr Mathers stated that he had only a vague recollection of the particular letter and that he could not recall the source of the information which he recorded in the notes. He did, however, indicate that in his view, it was always clear that it was intended that the Minister report back to Cabinet on the issue.
15. Mr Olsson has not challenged the contention of the Department that the Minister proposed that the submission go to Cabinet. Despite the lack of clear evidence, I have come to the conclusion that the proper inference to be drawn from the material before me is that it was, at one time, the intention of a Minister to take to Cabinet a submission substantially based on the draft Cabinet submission now in issue.
16. While the Department claims that the matter in issue is exempt under s.36(1)(b) of the FOI Act,

I do not think it qualifies for exemption under that provision. It is a requirement of s.36(1)(b) that the matter in issue must have been prepared for submission to Cabinet. The document in issue was clearly a draft sent to the Commissioner for Main Roads for comment. As such, it is more appropriately characterised as being exempt under s.36(1)(f) of the FOI Act.

**Effect of the applicant's inspection of the document**

17. This external review is unusual in that the applicant has previously inspected the matter in issue, although, the Department contends, only through inadvertence on its part. In his affidavit the applicant explains the circumstances in which this occurred as follows:

2. *In the period between 9 February 1993 and 27 October 1993, I accessed the documents, including a Draft Cabinet Submission dealing with the feasibility of a toll road bridge to Russell Island and island restructuring.*
3. *At the time of accessing the documents, I was a sub-consultant to the Department of Transport and I obtained vital information that supported my consultancy work, a land-use study for the Southern Brisbane Bypass.*
4. *On perusal I found a Russell Island Briefing of Ministers document dated 1.2.89 of interest and I requested and received a copy of that document ... from the Queensland Department of Transport, Manager (FOI and Administrative Law) Legal and Legislative Review Unit, Mr Butterworth.*
5. *On perusal, I also found of similar interest and scope, a Draft Cabinet Submission dealing with the feasibility of a toll road bridge to Russell Island and island restructuring and I requested copies of it but Mr Barry Butterworth refused to release to me copies of the document.*
6. *Later, Mr Butterworth released parts of the Draft Cabinet Submission dealing with the feasibility of a toll road bridge to Russell Island and Island Restructuring ....*

18. Mr Butterworth's account of the incident was in these terms:

2. *On 25 March 1993, Mr Olsson was invited to arrange an appointment to inspect the documents. Mr Olsson made a number of visits to inspect documents up until 28 April 1993 when the documents were returned to the source areas. Photocopies of over 60 documents were provided to Mr Olsson. During one of these inspection periods, Mr Olsson called my attention to a document labeled "DRAFT DATED 13/6/89 FOR CABINET - RUSSELL ISLAND INVESTIGATIONS" with a statement to the effect that he did not think he should have it.*
3. *I apologised to Mr Olsson explaining that other copies of the document had been removed from other files but that this copy had been missed. I agreed with his assessment of the document advising that in fact it was exempt under section 36 of the Freedom of Information Act 1992 being Cabinet Matter. At the conclusion of the session Mr Olsson asked for a copy of the document but this was refused.*

19. Mr Olsson disputes the contents of Mr Butterworth's statutory declaration, saying that he never drew the attention of Mr Butterworth to the draft Cabinet submission, and that he simply marked it for copying, along with a number of other documents. Mr Olsson says that Mr Butterworth may be confusing this document with another, to which he did draw Mr Butterworth's attention. Mr Butterworth has declined to respond to these points and I do not consider it is necessary to resolve this conflict of evidence. The relevant facts to be drawn from this evidence are that Mr Olsson has had access to the matter in issue by way of inspection, but that the Department contends that this occurred only through an error on its part.
20. In support of his contention that his prior access to the draft Cabinet submission should be taken into account, Mr Olsson made the following submission in his application for external review:

*In respect to the disclosure of the Cabinet submission draft, I cite Zuern v Leis (1990) 564 NE 2d 81, 56 Ohio St 3rd 20, where voluntary disclosure can preclude later claims that records are exempt from release as public records.*

*Yet it can be argued that such documents can now be released for another reason. What were seen as highly confidential documents even of a deliberative process of policy formulation such as calculations underlying budget figures can now be released.*

*If a government states a budget estimate with numerical specificity, the public may presume that a particular set of calculations exist and assumptions underlie estimate and thus records which show those calculations and assumptions are subject to disclosure under Freedom of Information Act as per American Society of Pension Actuaries v IRS (1990) 746 FSupp 188.*

*Furthermore, "Blue Ribbon Panel" fiscal report on city's economic conditions was a public document and subject to disclosure as panel supported whole or in part by public moneys as per Municipality of Anchorage v. Anchorage Daily News (1990), 794 P 2d 584.*

*These three cases are significant precedents and certainly question exemptions made in the Re Howard and the Treasurer Case as there was disclosure of 1984-85 budget papers to ACTU in Australia as per Re Howard and the Treasurer of the Commonwealth of Australia (1985) 7 ALD 626, 3 AAR 169.*

21. Mr Olsson later supplemented this submission with a number of points raised in his affidavit:

7. *I am of the opinion that by entering into a financial agreement to be provided information ie paying the \$30.00 access fee, that that non-exempt Draft Cabinet Submission was accessed by me and there were no exemptions placed on it beforehand. Therefore, the access process under the provision of Freedom of Information Act was a completed contract. I am still entitled to the paperwork (ie the documents or a record of the documents that are part of the contract).*

8. *I am of the opinion that I should be provided a copy of the Draft Cabinet Submission in its entirety, as it cannot be exempted after its physical release irrespective of what legislation was passed at a later stage.*

9. *Because there has been no Reverse FOI action, I am of the opinion that the amended FOI legislation cannot apply to releases made under older legislation. Otherwise, the information contained in Annexures 1 and 2 would have had to be recalled and so would every other successful Freedom of Information application to date, including the Woodyatt application.*
  10. *I am of the opinion that if Mr Butterworth cannot provide a full copy of the information, he should still provide a copy of the information to me so that I can transcribe the information to a fuller extent than the parts he provided and that this transcription should be certified as a true copy of the words written. It is only by this process that the contract can be completed.*
  11. *I am of the opinion that I have an unfettered right to the released unamended document, that I perused and any attempt to deny access to that which is released, that which is mine, isn't covered by any section of present or past legislation. There is not a section in the FOI Act that denies access after access has been given.*
  12. *I am of the opinion that forwarding the released document or allowing me to view the released document is my right as Mr Butterworth reneged on the contract to perform the copying when requested.*
  13. *I am of the opinion that I should be compensated for my time and effort in pursuing this case as it is a denial of my legal and contractual rights to justice if Mr Butterworth does not provide the information forthwith.*
22. Insofar as they relate to matter not already dealt with above, these submissions may be divided into three lines of argument. The first is that because the document has been made available to a member of the public (in this case Mr Olsson) the Department has waived its right to claim an exemption. The second is that once an applicant has been given access to a document in one form, the Department cannot thereafter deny that applicant access to the document in any form, or at least in the same form in which the applicant was originally granted access. The third is that Mr Olsson has some contractual right to access enforceable against the Department. I will deal with each argument in turn.
23. As to the first argument, I do not think that the United States authorities cited by Mr Olsson are of great assistance in this case. I have examined the decision of the Supreme Court of Ohio in *State ex rel Zuern v Leis* 564 NE 2d 81 (1990), and a number of United States Court of Appeals authorities which the Ohio Supreme Court referred to in coming to its decision. It is my view that those decisions turn on the wording of the particular exemptions considered in those cases. The decisions of the United States Court of Appeals relied upon in *Zuern* deal with the counterpart of the deliberative process exemption in the FOI Act (although there are significant differences between the US and Queensland provisions). I do not dispute that prior publication by an agency of a document, whether to the applicant or to another person, might well be a relevant factor in applying a public interest balancing test if a claim was made to exemption under s.41(1) of the FOI Act. Indeed, waiver or prior publication is likely to be a relevant factor in the application of many of the exemption provisions in the FOI Act. For example, in addition to exemption provisions which contain a public interest balancing test, waiver will be relevant when considering whether a document is subject to legal professional privilege (s.43), and prior

publication will be relevant in considering the question of breach of confidence under s.46(1)(a) of the FOI Act. However, this susceptibility to argument based on waiver or prior publication arises due to the nature or wording of particular exemption provisions, rather than any general principle that waiver or prior publication precludes a claim to exemption.

24. Unfortunately for the applicant in this case, s.36(1) is one provision where waiver or prior publication has no effect on the exempt status of a document, except in the limited circumstance where the matter has been "officially published by decision of Cabinet" (s.36(2)). In fact, that very exception reinforces the argument that there is no overriding exception of waiver or prior publication in relation to s.36(1), because it makes it clear that some forms of publication (i.e., publication other than by a decision of Cabinet), are not sufficient to deprive matter of exempt status. It is therefore my view that waiver or prior publication will not affect the status of matter which is exempt matter under s.36(1), unless such action falls within the terms of s.36(2) of the FOI Act. In this case, there is no suggestion of any action which falls within the terms of s.36(2).
25. As to the second argument, s.88(2) of the FOI Act provides that the Information Commissioner does not have power to direct that access be granted to a document which is an exempt document. Whatever action the agency may have taken in the past in relation to a particular applicant, I must determine whether matter in issue is exempt matter according to the material facts and circumstances, and the applicable law in force, at the time of my decision: see *Re Woodyatt* at paragraphs 35 and 58; *Re Beanland* at paragraph 58. As I have found that the matter in issue is now exempt, I am prohibited from directing that access be given to Mr Olsson. The applicant might, contrary to my view (expressed in paragraph 6 above, that no decision satisfying the requirements of s.34 of the FOI Act was made), wish to assert that a decision has already been made to grant him access to the document. However, if that were the case, I would have no jurisdiction to deal with the matter: my jurisdiction under s.71(1)(b) being limited to review of decisions "refusing to grant access to documents". Thus, if Mr Olsson believes he has any legitimate claim on this basis, he must seek a remedy in another forum.
26. As to the third argument, I have no jurisdiction or power to deal with a contention based on a claimed contractual obligation between an applicant for access and an agency. My jurisdiction is limited to that conferred by Part 5 of the FOI Act. I therefore make no comment on Mr Olsson's claims in this regard. If he wishes to pursue those claims, he must do so in another forum.
27. I do not consider that, in this case, the fact that the applicant has inspected the document in question can assist him, having regard to the issues which I have jurisdiction to determine under Part 5 of the FOI Act.

**Exercise of the discretion to release matter which is exempt**

28. In *Re Woodyatt* at paragraphs 11-12, in *Re Beanland* at paragraphs 69-72, and in my third Annual Report to Parliament (1994/95) at Chapter 3, I have criticised the unnecessary breadth, and potential for abuse, of s.36(1) of the FOI Act following the 1993 and 1995 amendments. This case illustrates one aspect of the concerns I have expressed. In paragraph 3.30 of my third Annual Report, I said:

*It is also difficult to see any justification for the words "or has at any time been proposed [to be submitted to Cabinet by a Minister]" in s.36(1)(b) and s.36(1)(c)(ii). Given that documents actually submitted to Cabinet, or subject*

*to a current proposal for submission to Cabinet, are covered elsewhere in the section, these words extend protection to matter never submitted to Cabinet, and in respect of which a proposal by a Minister to submit the matter to Cabinet has been abandoned. There is no logical justification for giving matter of this kind the benefit of the cloak of Cabinet secrecy.*

- 29. In this case, the document in issue is a draft document which a Minister at one time proposed to take to Cabinet. The proposal, however, was abandoned, and no submission based on the document in issue has ever gone to Cabinet. Its disclosure would not even reveal matter that has been considered by Cabinet, let alone disclose any confidential deliberations of Cabinet. It would simply show that a Minister in a former government proposed at one time, over 6 years ago, to take a matter to Cabinet, a proposal which was abandoned shortly after, and has not since been revived.
- 30. I do not suggest that no document of this nature should ever warrant protection under the FOI Act. However, I do consider that it is wrong in principle that a document of this nature should automatically qualify for exemption from disclosure merely because it falls within a class of documents defined in unnecessarily broad terms, rather than by reference to whether disclosure of the actual contents of the document would have any prejudicial effects. Section 41 of the FOI Act affords ample protection from disclosure of a document of the kind in issue, if prejudicial consequences would attend the disclosure of the particular information contained in such a document.
- 31. In my opinion, this is an appropriate case for the exercise by the respondent of the discretion which it possesses, by virtue of s.28(1) of the FOI Act, to disclose matter to an applicant for access, notwithstanding that it is technically exempt matter: *cf.* paragraph 12 of *Re Woodyatt*. However, I cannot direct the Department to do so. Section 88(2) of the FOI Act provides that I do not have the power to direct that access be granted to a document which I determine to be an exempt document.

**Conclusion**

- 32. The applicant has been given access to parts of the draft Cabinet submission since this external review commenced. I consider it appropriate therefore to set aside the decision under review, being the Department's deemed refusal of access to the draft Cabinet submission in issue. In substitution for it, I find that those parts of the draft Cabinet submission in issue which were not disclosed to the applicant with the respondent's letter dated 18 November 1993, are exempt matter under s.36(1)(f) of the FOI Act.

.....  
F N ALBIETZ  
**INFORMATION COMMISSIONER**