

# OFFICE OF THE INFORMATION COMMISSIONER (QLD)

**Decision No. 03/2004**  
**Application 368/03**

## **Participants:**

PETER CANNON  
**Applicant**

MAGISTRATES COURT  
**Respondent**

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – jurisdictional issue – whether documents sought by the applicant are excluded from the application of the *Freedom of Information Act 1992* Qld by s.11(1)(e) of that Act – whether the documents were received or brought into existence in performing the judicial functions of the court, or of the Chief Magistrate.

*Freedom of Information Act 1992* Qld s.11(1)(e), s.11(2), s.75  
*Judicial Review Act 1991* Qld s.4, s.20, s.21  
*Magistrates Act 1991* Qld s.10(1), s.10(2), s.10(8), s.10(10)  
*Stipendiary Magistrates Act 1991* Qld s.10(2)

*Altman and The Family Court of Australia, Re* (1992) 15 AAR 236  
*Christie and Queensland Industry Development Corporation, Re* (1993) 1 QAR 1  
*Cornack v Fingleton* [2003] 1 Qd R 667; [2002] QSC 391  
*Devine and Department of Justice, Re* (Information Commissioner Qld,  
(S 54/99, 31 March 2000, published at [www.infocomm.qld.gov.au](http://www.infocomm.qld.gov.au))  
*Glenister v Dillon (No.2)* [1977] VR 151  
*Gribbin v Fingleton* [2003] 1 Qd R 698; [2002] QSC 390  
*Hamblin v Duffy* (1981) 34 ALR 333; 50 FLR 308  
*Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330  
*Mann v O'Neill* (1997) 191 CLR 204; (1997) 71 ALJR 903; (1996) 145 ALR 682  
*Payne v Deer* [2000] 1 Qd R 535; [1999] QSC 124  
*R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361

## **DECISION**

I decide that the documents requested by the applicant in an access application dated 13 December 2002 made to the respondent under the *Freedom of Information Act 1992 Qld*, are not excluded from the application of the *Freedom of Information Act 1992 Qld* by s.11(1)(e) of that Act. Accordingly, I have jurisdiction under Part 5 of that Act to review the respondent's refusal to give the applicant access to the requested documents.

Date of decision: 11 June 2004

.....  
D J BEVAN  
**INFORMATION COMMISSIONER**

## TABLE OF CONTENTS

	<b>Page</b>
Background .....	1
The review process .....	2
Interpretation of s.11(1)(e) of the FOI Act .....	3
Summary .....	5
Submissions made on behalf of the Magistrates Court .....	5
Submissions of the applicant .....	6
Application of s.11(1)(e) and s.11(2) to the documents in issue .....	6
Powers and functions of the Chief Magistrate .....	7
Judicial functions and administrative functions .....	9
Findings .....	12
Conclusion .....	12

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MAGISTRATES COURT  
**Respondent**

## **REASONS FOR DECISION**

### **Background**

1. The applicant seeks review of the respondent's decision to refuse him access to certain documents under the *Freedom of Information Act 1992 Qld* (the FOI Act) on the basis that the documents are excluded from the application of the FOI Act by s.11(1)(e) of the FOI Act.
2. By letter dated 13 December 2002, the applicant applied to the Magistrates Court for access, under the FOI Act, to copies of correspondence passing between his former wife, Ms Debra Cannon, and the former Chief Magistrate, Ms Fingleton. The correspondence related to a complaint made by Ms Cannon about the conduct of a Magistrate (Magistrate Taylor). Magistrate Taylor had presided at a preliminary hearing on 25 January 2001 of a matter concerning Ms Cannon and the applicant.
3. In his decision dated 11 April 2003 in response to the applicant's FOI access application, the then Acting Chief Magistrate, Mr B P Hine, cited s.11(1)(e), s.11(1)(f) and s.11(2) of the FOI Act, and stated:

*The correspondence received from Ms Debra Cannon concerned a formal complaint regarding Magistrate Taylor in exercising his judicial functions. I do not consider therefore that the [FOI Act] has any application as the documents held by me are in relation to judicial functions.*

4. By letter dated 8 May 2003, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Hine's decision.

**The review process**

5. By letter dated 14 May 2003, I informed Mr Hine that I proposed to undertake preliminary inquiries, in accordance with s.75 of the FOI Act, for the purpose of determining whether or not I had jurisdiction to deal with the applicant's application for review. That process would involve determining the preliminary issue of whether or not the documents to which the applicant had requested access were received or brought into existence in performing the judicial functions of the Magistrates Court or of the Chief Magistrate, and were thereby excluded from the application of the FOI Act by s.11(1)(e). Accordingly, Mr Hine was asked to provide me with copies of the documents in issue.
6. Copies of the documents in issue were obtained and examined. They comprised a letter dated 2 February 2001 from Ms Cannon to the former Chief Magistrate, and the former Chief Magistrate's letter of reply dated 19 February 2001.
7. I wrote to Mr Hine on 10 June 2003, expressing the view that there was a reasonably arguable case that the functions of the Chief Magistrate in receiving and dealing with a complaint from a litigant about the conduct of another sitting magistrate were administrative functions, rather than judicial functions of a court. I asked Mr Hine to confirm whether or not the Magistrates Court maintained that the matter in issue was excluded from the application of the FOI Act by s.11(1)(e) and, if so, to provide submissions in support of that contention.
8. By letter dated 16 June 2003, Mr Hine informed me that the Magistrates Court maintained that the documents in issue were excluded from the application of the FOI Act by s.11(1)(e), and that he intended to provide submissions in support of the Magistrates Court's view that, in any event, the documents in issue were exempt from disclosure to the applicant under s.42 and/or s.44(1) of the FOI Act. A copy of Mr Hine's letter was provided to the applicant.
9. By facsimile letter dated 26 June 2003, the applicant responded to a number of issues raised in Mr Hine's letter. Many of the submissions made by the applicant in that letter were not relevant to the jurisdictional issue which I am now addressing.
10. By facsimile transmission dated 18 August 2003, Crown Law (on behalf of the Magistrates Court) provided written submissions in support of a case that the documents in issue are excluded from the application of the FOI Act by s.11(1)(e) of the FOI Act. Crown Law subsequently explained that those submissions did not address the application to the documents in issue of s.42 or s.44(1) of the FOI Act (as Mr Hine had foreshadowed), because the Magistrates Court's preference was that I should first determine the preliminary jurisdictional issue of whether or not the documents in issue were excluded from the FOI Act by s.11(1)(e), before it invested further time and effort in preparing its case for exemption of the documents in issue.
11. By letter dated 18 August 2003, Crown Law's submissions were forwarded to the applicant, with an invitation for him to respond. The applicant's response, dated 8 September 2003, was provided to Crown Law. Crown Law responded with brief supplementary written submissions dated 14 May 2004.

12. Accordingly, this decision deals only with the question of whether or not the two documents in issue are excluded from the application of the FOI Act by s.11(1)(e) of the FOI Act. In making this decision, I have taken into account:

- the applicant's FOI access application dated 13 December 2002, and his application for external review dated 8 May 2003;
- the decision dated 11 April 2003 made by Mr Hine on behalf of the Magistrates Court;
- Mr Hine's letter dated 18 June 2003;
- the written submissions dated 18 August 2003 and 14 May 2004 lodged by Crown Law on behalf of the Magistrates Court; and
- the applicant's written submissions dated 8 September 2003.

**Interpretation of s.11(1)(e) of the FOI Act**

13. Section 11(1)(e) and s.11(2) of the FOI Act provide:

*11. Act not to apply to certain bodies etc.*

*(1) This Act does not apply to—*

...

*(e) the judicial functions of—*

*(i) a court; or*

*(ii) the holder of a judicial office or other office connected with a court; or...*

*(2) In subsection (1), a reference to documents in relation to a particular function or activity is a reference to documents received or brought into existence in performing the function or carrying on the activity.*

14. Section 11(1) of the FOI Act lists bodies to which the FOI Act does not apply, either generally, or in respect of documents received or brought into existence by those bodies in performing specified functions. The inclusion of a body in s.11(1) means, in effect, that the body is not subject to the obligations imposed on agencies by the FOI Act (i.e., under Part 2, to publish certain documents and information; under Part 3, to deal with applications for access to documents made in accordance with s.25; and under Part 4, to deal with applications for amendment of personal affairs information) either generally, or in respect of documents concerning specified functions.

15. In *Re Christie and Queensland Industry Development Corporation* (1993) 1 QAR 1 at p.8 (paragraphs 19-22), Commissioner Albietz explained that there is a drafting error in s.11(2) of the FOI Act, but that the legislature's clear intention can be given effect by reading s.11(2) as if it were in these terms:

*(2) In subsection (1), a reference to a particular function or activity means that this Act does not apply to documents received or brought into existence in performing the function or carrying on the activity.*

16. In his May 1999 submission to the Legal, Constitutional and Administrative Review Committee (LCARC) of the Queensland Parliament regarding LCARC's review of the FOI Act, Commissioner Albietz recommended that s.11(2) be amended accordingly.
17. Commissioner Albietz also submitted that s.11(1)(e) should be amended to harmonise with the structure of s.11(1)(f) and other paragraphs of s.11(1), and to give effect more precisely to Parliament's apparent intention. He recommended that s.11(1)(e) should read:

*This Act does not apply to –*

...

*(e) a court, or the holder of a judicial office or other office connected with a court, in respect of documents in relation to their judicial functions; or*

...

18. LCARC accepted Commissioner Albietz's recommendations, and recommended to the Attorney-General and Minister for Justice (see recommendations 208 and 209 at pp.246-247 of LCARC's report no. 32 dated December 2001) that the suggested amendments be made to s.11(1)(e) and s.11(2). In his formal response to the LCARC report (at pp.58-59), the Attorney-General and Minister for Justice accepted those two recommendations by LCARC. However, the relevant amendments to those provisions have not yet been made.
19. The FOI Act operates by imposing obligations on an agency (as defined in s.8) in respect of documents of an agency (as defined in s.7). Therefore, it does not make sense to provide in s.11(1)(e) that the FOI Act does not apply to the judicial functions of a court. As explained at paragraph 14 above, other paragraphs of s.11(1) operate by prescribing that the FOI Act does not apply to a named body, or holder of a named office. The exclusion is either total (as in s.11(1)(a), (b), (c), (d), (g), (h), (i) and (pa)), or partial: in respect of documents in relation to specified functions of a particular agency (as in s.11(1)(f), (m), (n), (o) and (p)). Likewise, s.11(1)(e) should first have identified the body and/or officeholder(s) to be excluded from the application of the FOI Act, either totally or partially. If the latter, it should have gone on to specify the particular functions for which 'related' documents would be excluded from the application of the FOI Act (as recommended by Commissioner Albietz: see paragraph 17 above).
20. In my view, it cannot have been Parliament's intention to exclude from the application of the FOI Act, as a class, any documents relating to the judicial functions of a court. That would produce absurd consequences. It would exclude citizens from seeking access, under the FOI Act, to any documents held by government agencies that related to current or concluded legal proceedings: not only legal proceedings to which a government entity was a party, but also, for example, documents relating to evidence given by employees of government agencies (in that capacity) as witnesses or expert witnesses in cases not involving a government entity as a party.
21. In my view, it must have been Parliament's intention in enacting s.11(1)(e) to give courts and judicial officers a partial exclusion from the obligations imposed by the FOI Act. Under the practice adopted in s.11(1), a partial exclusion is given by reference to documents in relation to a particular function or activity of a named body or officeholder. In s.11(1)(e), the particular function is the judicial functions of a court or holder of a judicial office, *et cetera*.

22. However, s.11(2) of the FOI Act (as it must be interpreted for the reasons explained by Commissioner Albietz in *Re Christie* at p.8, paragraphs 19-22) has the effect of confining the scope of the s.11(1)(e) exclusion more narrowly than to any documents held by a court or judge relating to the judicial functions of the court or judge. Rather, the scope of the exclusion is for any documents received or brought into existence by a court, or the holder of a judicial office *et cetera*, in performing the judicial functions of the court, or holder of a judicial office *et cetera*.

### **Summary**

23. In my view, it is clear enough, despite unfortunate drafting, that Parliament's intention in enacting s.11(1)(e) and s.11(2) of the FOI Act was that a court, or the holder of a judicial office or other office connected with a court, should not be subject to the obligations imposed on agencies by the FOI Act in respect of documents received or brought into existence in performing the judicial functions of the court, or of the holder of a judicial office or other office connected with the court. I note that this approach to the interpretation of s.11(1)(e) and s.11(2) was endorsed in paragraph 16 of Crown Law's submissions on behalf of the respondent, dated 18 August 2003.

### **Submissions made on behalf of the Magistrates Court**

24. In its submissions dated 18 August 2003 and 14 May 2004, Crown Law relevantly argued, on behalf of the Magistrates Court, that:
- (a) When Magistrate Taylor presided at the mention on 25 January 2001 of the court proceedings involving the applicant and Ms Cannon, the Magistrates Court as constituted by Magistrate Taylor was "a court" performing "judicial functions" within the meaning of s.11(1)(e)(i) of the FOI Act, or alternatively, Mr Taylor was "the holder of a judicial office" performing "judicial functions" within the meaning of s.11(1)(e)(ii) of the FOI Act. It was those proceedings that directly gave rise to the letters in issue.
  - (b) The letters were received or brought into existence in performing the judicial functions of either the Magistrates Court, or Mr Taylor as the holder of a judicial office.
  - (c) Both letters in issue clearly relate to the judicial functions of the Magistrates Court because both arose out of specific proceedings: neither letter is concerned with routine "court administration matters" such as filing dates, sitting dates, *et cetera*.
  - (d) The letter from Chief Magistrate Fingleton to Ms Cannon represented a quasi-judicial determination of Ms Cannon's complaint.
  - (e) The characterisation of the letters as relating to the judicial (or quasi-judicial) functions of the Magistrates Court is supported by the decision of the Victorian Supreme Court in *Glenister v Dillon (No.2)* [1977] VR 151, and by the decision of Commissioner Albietz in *Re Devine and Department of Justice* (S 54/99, Information Commissioner Qld, 31 March 1999, unreported):
    - In *Glenister v Dillon*, a complaint was made to the Victorian Ombudsman regarding the failure of the Public Solicitor to inform the stepfather of a man for whom the Public Solicitor acted, of the date for the man's sentencing. The Victorian Supreme Court held that the representation by the Public Solicitor of accused persons was clearly ancillary to the discharge of the judicial function of government, and hence, the Ombudsman had no power to investigate the complaint.
    - In *Re Devine*, a number of emails were sent and received by a police officer in the course of investigating the death of the applicant's daughter. Those emails were provided to the Coroner at a pre-inquest hearing. Commissioner Albietz held that the emails were received by the Coroner in performing his judicial functions and were therefore excluded from the FOI Act.



- The two letters in issue are analogous to the emails in issue in *Re Devine* and their connection with the judicial functions of the courts is more immediate and direct than the actions of the Public Solicitor in *Glenister v Dillon*. They concern the way in which a specific magistrate conducted a specific hearing in a specific case.
- (f) The letters are not of an administrative nature because they are not primarily concerned with the management of an office or organisation (applying the definition of "administrative" discussed by the Commonwealth Administrative Appeals Tribunal in *Re Altman and The Family Court of Australia* (1992) 15 AAR 236).

#### **Submissions of the applicant**

25. In his submissions dated 8 September 2003, the applicant relevantly argued that:
- (a) the dealing by the Chief Magistrate with the letters in issue formed no part of the exercise of any judicial activity;
  - (b) the Crown has failed to support its case by saying what remedies are available in such an exercise of judicial activity, and to whom those remedies are available;
  - (c) the Crown has not paid sufficient regard to the clear delineation that exists as to how an administrative activity can be discharged under the *Magistrates Act 1991* Qld;
  - (d) the Crown is wrong in suggesting that there is a lack of judicial determination concerning the distinction between the character of judicial and non-judicial activity; and;
  - (e) the jurisdiction conferred on Magistrate Taylor was more likely to be the exercise of an administrative power by a person who may also be the holder of a judicial appointment.

#### **Application of s.11(1)(e) and s.11(2) to the documents in issue**

26. I accept that Magistrate Taylor was performing judicial functions in presiding at the preliminary hearing on 25 January 2001 of the matter involving Ms Cannon and the applicant. I also accept that Ms Cannon's letter of complaint concerned the manner in which Magistrate Taylor performed his judicial functions at that preliminary hearing on 25 January 2001. However, I do not consider that characterisation to be directly relevant for the purposes of applying s.11(1)(e) and s.11(2) of the FOI Act to the documents in issue.
27. The relevant question in applying s.11(1)(e) and s.11(2) of the FOI Act is whether the letters in issue were received or brought into existence by the court, or by the Chief Magistrate, in performing the judicial functions of the court, or of the Chief Magistrate. In other words, what function was the Chief Magistrate performing in receiving Ms Cannon's letter of complaint about Magistrate Taylor, and responding to it? Was she performing a judicial function, or an administrative function? If she was performing a judicial function, the letters are excluded from the application of the FOI Act by s.11(1)(e). If she was not, the letters are not excluded from the application of the FOI Act.
28. Only the supplementary submissions dated 14 May 2004 by Crown Law touch on this issue, and then only briefly (at paragraph 11(b) of those submissions). Crown Law argued that, in responding to Ms Cannon's letter of complaint, the Chief Magistrate was performing a quasi-judicial function or power, "involving an explanation and application by the then Chief Magistrate of the principles of judicial independence". Crown Law offered no detailed analysis of the meaning of "quasi-judicial" functions, nor any explanation as to why a complaint-handling function should properly be characterised as the exercise of a quasi-judicial function.

29. The term "quasi-judicial" functions is ordinarily used to describe functions performed by tribunals (or government officials conferred by statute with authority to make decisions affecting a person's rights or interests) which have some characteristics in common with, but which are not, judicial functions of a court. The term "quasi-judicial" denotes that the function is exercised in a manner similar to the way in which judges hear and decide court proceedings, in particular by giving the affected person(s) an opportunity to present a case as to how the relevant decision-making power should be exercised, and by deciding material issues by reference to relevant and probative evidence or other material.
30. I note that the words of s.11(1)(e) of the FOI Act clearly provide that the FOI Act does not apply to the judicial functions of a court, *et cetera*. There is no reference in s.11(1)(e) to quasi-judicial functions. Accordingly, I do not consider that the scope of the exclusion effected by s.11(1)(e) extends to quasi-judicial functions performed by the holder of a judicial office.
31. I note in that regard that when a judge of a court is appointed as a member of a statutory tribunal, the judge would usually be exercising quasi-judicial functions, rather than judicial functions, when dealing with cases before the statutory tribunal. There is no indication in the FOI Act of an intention to exclude from the Act's application documents received or brought into existence by tribunals performing quasi-judicial functions. It would be anomalous if documents relating to the performance of quasi-judicial functions by a judge sitting as a member of a statutory tribunal were excluded from the application of the FOI Act, but documents relating to the performance of quasi-judicial functions by other members of the tribunal were not.
32. In any event, for the reasons which I will explain below, I consider that, in receiving and responding to Ms Cannon's letter of complaint, the Chief Magistrate was performing an administrative function, not a judicial function.
33. I note that Crown Law's submissions on behalf of the respondent sought support from the decision of Commissioner Albietz in *Re Devine and Department of Justice* (S 54/99, 31 March 2000), a decision which is published only on the Information Commissioner's website. The definition of "court" in s.7 of the FOI Act includes a Coroner. At paragraph 16 of his decision, Commissioner Albietz cited several judgments by superior courts which have held that a Coroner, either undertaking inquiries or holding an inquest, is exercising judicial power. Commissioner Albietz held that certain emails relating to police investigations, that were provided by police to the Coroner at a conference prior to an inquest, were received by the Coroner in performing his judicial functions, and hence were excluded from the application of the FOI Act by s.11(1)(e). The circumstances of that case were not analogous with the present, and in my view the decision in *Re Devine* affords no support for the respondent's case.

#### **Powers and functions of the Chief Magistrate**

34. The powers and functions of the Chief Magistrate are contained in the *Magistrates Act 1991*. The *Magistrates Act* was amended in 2003. However, for the purposes of this external review, it is relevant to consider the provisions of the *Magistrates Act* that were in force at the time the documents in issue were received or brought into existence, i.e., as at February 2001. Accordingly, the discussion below concerns the provisions contained in Reprint No.3 of the *Magistrates Act*.

35. Part 3 of the *Magistrates Act* relates to the powers and functions of the Chief Magistrate. Section 10, as in force at February 2001, provided:

***Functions of Chief Magistrate***

*10.(1) The Chief Magistrate is responsible for ensuring the orderly and expeditious exercise of the jurisdiction and powers of Magistrates Courts.*

*(2) Subject to this Act and to such consultation with Magistrates as the Chief Magistrate considers appropriate and practicable, the Chief Magistrate has power to do all things necessary or convenient to be done for ensuring the orderly and expeditious exercise of the jurisdiction and powers of Magistrates Courts, including, for example—*

- (a) determining the Magistrates who are to constitute Magistrates Courts at particular places appointed under section 22B(1)(c) of the Justices Act 1886 or who are to perform particular functions; and*
- (b) issuing directions with respect to the practices and procedures of Magistrates Courts; and*
- (c) allocating the functions to be exercised by particular Magistrates; and*
- (d) nominating a Magistrate to be a supervising Magistrate or a coordinating Magistrate for the purpose of the allocation of work of the Magistrates Court.*

...

*(8) The Chief Magistrate may discipline by way of reprimand a magistrate who, to the Chief Magistrate's satisfaction—*

- (a) is seriously incompetent or inefficient in the discharge of the administrative duties of office; or*
- (b) is seriously negligent, careless or indolent in the discharge of the administrative duties of office; or*
- (c) is guilty of misconduct; or*
- (d) is absent from duty without leave or reasonable excuse; or*
- (e) wilfully fails to comply with a reasonable direction given by the Chief Magistrate or a magistrate authorised to give the direction; or*
- (f) is guilty of conduct unbecoming a magistrate.*

...

*(10) If the Chief Magistrate reprimands a Magistrate, the Chief Magistrate must immediately submit a written report on the matter to the Minister.*

...

36. I note that ss.10(8) - (11) were removed from the *Magistrates Act* by amendments passed in 2003. The *Explanatory Notes* to the *Magistrates Amendment Bill 2003* Qld stated (at p.4):

*The Chief Magistrate's powers to discipline by way of reprimand are being removed in response to criticism that such powers are incompatible with the principle of judicial independence. The Chief Justice and the Chief Judge do not have comparable powers and nor do Chief Magistrates in other jurisdictions.*

37. However, ss.10(8) - (11) were in force in February 2001, and are relevant to the characterisation of the activity in which the Chief Magistrate was engaged when the documents in issue in this review were received or created.
38. I consider that, in receiving and dealing with Ms Cannon's letter, the Chief Magistrate was performing a complaint-handling/investigative function ancillary to the powers given to the Chief Magistrate under s.10(8) of the *Magistrates Act*. While there is no specific provision in the *Magistrates Act* that sets out a procedure for making a complaint about the conduct of a magistrate, or what is to be done when such a complaint is made, I consider that it must be accepted that, implicit in the Chief Magistrate's power to reprimand a magistrate under s.10(8) of the *Magistrates Act*, was the power or duty of the Chief Magistrate to receive, assess, investigate if necessary, and take appropriate action in respect of, complaints about magistrates. That complaint-handling/investigative function could also properly be regarded as being ancillary to the general responsibility of the Chief Magistrate, under s.10(1) of the *Magistrates Act*, to ensure the orderly and expeditious exercise of the jurisdiction and powers of the Magistrates Court.
39. Accordingly, it is necessary to consider whether, in exercising her ancillary complaint-handling/investigative function under s.10 of the *Magistrates Act* regarding Ms Cannon's complaint, the Chief Magistrate was performing a judicial or administrative function.

#### **Judicial functions and administrative functions**

40. In *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, "judicial power" was described (at p.357) as a power:

*...to decide controversies between subjects, or between [the sovereign] and its subjects... . The power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.*

41. In *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, Kitto J said (at p.374):

*A judicial power generally entails a decision settling for the future, as between defined persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons.*

42. In *Hamblin v Duffy* (1981) 34 ALR 333, Lockhart J said (at p.338): "...judicial acts generally entail the determination of questions of law and fact in relation to disputes susceptible of determination by reference to established rules or principles...". His Honour noted (at p.339) that the expression "decision of an administrative character" was incapable of precise definition, but that it included: "...at least the application of a general policy or rule to a particular case; the making of individual decisions...".
43. I consider that the Chief Magistrate's functions under Part 3 of the *Magistrates Act*, as in force at February 2001, were essentially administrative in character. They were not judicial in character, nor were they necessarily connected with any specific judicial process. They were to do whatever was necessary and practicable to ensure the orderly and expeditious exercise of the jurisdiction and powers of the Magistrates Courts. The powers were conferred on the head of the Magistrates Courts as the officer best placed to deal with organisational and operational matters concerning the courts. In *Payne v Deer* [2000] 1 Qd R 535 at p.538, de Jersey CJ

noted that s.10(2) of the *Stipendiary Magistrates Act 1991* Qld (which was materially identical to s.10(1) of the *Magistrates Act* quoted at paragraph 35 above) committed to the Chief Magistrate "administrative responsibility" for "ensuring the orderly and expeditious exercise of the jurisdiction and powers of magistrates courts". The decision in respect of which judicial review was sought in that case (allocation of a Magistrate to sit at a particular venue) was clearly administrative in character.

44. In two subsequent cases, judicial review was sought of decisions or conduct of the Chief Magistrate when exercising powers under (or ancillary to) s.10(8) of the *Magistrates Act* in respect of complaints against a magistrate, or concerns over the conduct of a magistrate: circumstances more closely analogous to those in the present case. In *Gribbin v Fingleton* [2003] 1 Qd R 698, the Supreme Court dealt with (and ultimately granted) an application for a statutory order of review under Part 3 of the *Judicial Review Act 1991* Qld. The nature of the application is made clear at p.699, paragraph 1, and p.709, paragraph 43, of the court's judgment. A statutory order of review is a remedy which is available only in respect of decisions of an administrative character made under an enactment, or conduct related to the making of decisions of that character: see s.4, s.20 and s.21 of the *Judicial Review Act*. This means that the Supreme Court must be taken to have accepted that the decisions or conduct of the Chief Magistrate that were quashed on judicial review were administrative in character, rather than judicial.
45. In *Cornack v Fingleton* [2003] 1 Qd R 667, the applicant was a magistrate who had had complaints made about her conduct as a magistrate by litigants and/or legal practitioners who had appeared before her. The Chief Magistrate had directed the applicant to attend at a meeting to discuss the complaints. Following that meeting, the Chief Magistrate purported to give the applicant a further direction to prepare a written response to some of the issues discussed at the meeting, and to attend a further meeting. If the applicant failed to comply with that direction, she was advised that she would be subject to reprimand, under s.10(8) of the *Magistrates Act*, for failing to comply with a reasonable direction given by the Chief Magistrate.
46. The applicant brought an application under the *Judicial Review Act* for declarations that the Chief Magistrate had no power to make the various decisions she had made in connection with the applicant, or alternatively, that the decisions involved an improper use of the Chief Magistrate's powers.
47. In her evidence, Chief Magistrate Fingleton deposed to the fact that she occasionally received complaints from litigants and legal representatives about both the outcomes of cases, and the manner in which cases had been conducted by magistrates. She stated that she regarded it as her duty and right to deal with complaints about the conduct of magistrates in court, unlike complaints about the outcome of a case (where she generally sent a standard letter, appropriate to the case, advising the complainant of the right to appeal, or the absence of one). She stated that she operated on the premise that, as litigants are entitled to have their case presented and received fairly, complaints which question whether or not that has occurred should be properly considered by her as Chief Magistrate.
48. In discussing the specific actions taken by Chief Magistrate Fingleton in relation to the applicant, McKenzie J noted that the existence of a power to require a judicial officer to attend under compulsion to discuss issues concerning the way in which the judicial officer conducts hearings in court, is inconsistent with the principle that judges are independent of one another. However, His Honour did not take issue with the general proposition that the Chief Magistrate had the power and/or duty to receive, and to deal with, complaints about magistrates, and that s.10(8) of the *Magistrates Act* gave the Chief Magistrate power to discipline a magistrate by way of reprimand for misconduct, or conduct unbecoming a magistrate.

49. In *Mann v O'Neill* (1997) 191 CLR 204, the respondent was a magistrate sitting in the Small Claims Court of the Australian Capital Territory (ACT). The appellant appeared in a matter before the respondent. Shortly after judgment was entered against the appellant in the matter, the appellant wrote to the Attorney-General of the Commonwealth questioning the respondent's mental capacity to discharge his duties of office (the appellant also sent a copy of his letter to the Chief Magistrate of the ACT). In his letter, the appellant complained about the respondent's conduct and demeanour in court. The respondent brought defamation proceedings against the appellant. The issue before the High Court was whether absolute privilege or absolute immunity attached to the statements made by the appellant in his letter to the Attorney-General.
50. The appellant argued that his statements were made in the course of judicial or quasi-judicial proceedings and therefore qualified for absolute privilege. He argued either that his letter of complaint was analogous to a notice of appeal and should therefore be regarded as a step in the proceedings, or that the letter was the necessary first step for the institution of proceedings to remove the respondent from office.
51. The High Court rejected the appellant's arguments. At p.214, the majority (Brennan CJ, Dawson, Toohey and Gaudron JJ) said:

*Neither in substance nor in form does the letter to the Attorney-General display the features of a notice of appeal. In particular, it is not addressed to a court, much less a court exercising appellate jurisdiction with respect to the decisions of the Small Claims Court. And it does not seek to initiate an appeal. Moreover, it is impossible to treat it as in any way analogous to a notice of appeal for the simple reason that the Attorney-General has no power to order a rehearing of a matter which has been judicially determined. Further, the course invited by Dr Mann is wholly outside and foreign to the judicial process.*

52. With respect to the appellant's second argument, the majority acknowledged those cases which support the view that the proceedings of some disciplinary tribunals are quasi-judicial, and agreed that, where a complaint is part of an established procedure which must be set in motion if it is to result in disciplinary proceedings, the complaint is properly to be regarded as the first step in those proceedings. But the majority held that that was not the case in respect of the appellant's complaint (at pp.215-216):

*The Ordinance [by which the respondent was appointed as a Special Magistrate] made no provision for any procedure to be followed by the Attorney-General for the removal from office of a special magistrate. It may be taken that the Attorney-General was obliged to act on the advice of the Executive Council and to ensure procedural fairness. However, that does not alter the fact that no procedures were specified by the Ordinance. More precisely, the Ordinance made no provision for anything which is properly identified as a proceeding, much less a proceeding of a quasi-judicial tribunal. And there is nothing to suggest that, as a matter of practice, there is any established procedure for dealing with complaints of the kind made by Dr Mann. Certainly, there is nothing to suggest that there is a procedure involving quasi-judicial proceedings. ...*

*...There is nothing to suggest that he [the Attorney-General] was exercising anything other than an administrative role in receiving Dr Mann's letter. And the function which Dr Mann's letter invoked was essentially an investigative function.*

53. I consider that the Chief Magistrate was likewise performing an administrative role in receiving and responding to Ms Cannon's complaint.
54. As in *Mann v O'Neill*, there does not appear to have been any established procedure in the Magistrates Court for dealing with complaints of the kind made by Ms Cannon. Section 10 of the *Magistrates Act* made no provision for any particular procedure to be followed upon the receipt of a complaint. There is certainly nothing to suggest that there was a procedure that was followed and that it involved the exercise of a judicial function. In *Cornack v Fingleton*, Chief Magistrate Fingleton deposed to the fact that she simply regarded it as her "duty and right" to deal with complaints about the conduct of magistrates in court.
55. While I accept that the letter of complaint arose directly out of the performance by Magistrate Taylor of judicial functions, the relevant issue for the purposes of applying s.11(1)(e) and s.11(2) of the FOI Act is the proper characterisation of the functions performed by the Chief Magistrate in receiving the letter of complaint and responding to it.
56. In this case, the Chief Magistrate was not, for example, attempting to adjudicate, or to give a final or conclusive decision about, a dispute between parties as to existing rights or obligations by reference to established rules or principles, that being the hallmark of a judicial function or decision. She was receiving, investigating and responding to a complaint from a litigant about the conduct of another sitting magistrate. While it is not possible for me to discuss in detail in these reasons for decision, the contents of the two letters in issue (having regard to my obligation under s.87(2) of the FOI Act not to disclose matter claimed to be exempt), I am able to say that the Chief Magistrate's response to Ms Cannon's letter of complaint contained no comment about the actions of Magistrate Taylor or about the proceedings between Ms Cannon and the applicant. The Chief Magistrate did not attempt to make a decision in response to Ms Cannon's complaint, or otherwise to adjudicate on the matter. She simply referred in her response to general, procedural matters concerning the allocation of magistrates to particular courts.

### **Findings**

57. For the foregoing reasons, I find that the documents in issue were not received or brought into existence in performing judicial functions of the Magistrates Court or of the Chief Magistrate. Accordingly, they are not excluded from the application of the FOI Act by s.11(1)(e) of the FOI Act.

### **Conclusion**

58. I decide that the documents in issue (identified at paragraph 6 above) are not excluded from the application of the FOI Act by s.11(1)(e) of the FOI Act.
59. It follows that I have jurisdiction to deal with the applicant's application for review, under Part 5 of the FOI Act, of the respondent's refusal of access to the documents in issue. The respondent has foreshadowed claims for exemption in respect of those documents. I will write to the participants separately in the near future, giving directions for the next step in the conduct of this review.

.....  
 D J BEVAN  
**INFORMATION COMMISSIONER**