SUBMISSION BY THE INFORMATION COMMISSIONER (QLD)

TO THE LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

ON THE REVIEW OF THE

FREEDOM OF INFORMATION ACT 1992 QLD

14 May 1999

TABLE OF CONTENTS

Term of Reference A: **Whether the basic purposes and principles of the freedom of information legislation in Queensland as set out above have been satisfied, and whether they now require modification.**

Introduction

A1. The basic purposes and principles of freedom of information legislation remain relevant and important in a system of government based on representative democracy. The past two decades have increasingly seen the judicial branch of government move to recognise and apply (in ways that affect rights and liabilities under Australian law) the logical implications to be drawn from a system of government based on representative democracy. I have previously drawn attention to these important legal developments in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 645, and in my 3rd (1994/95), 4th (1995/96) and 5th (1996/97) Annual Reports. Two examples will suffice for present purposes. In *Australian Capital Television Pty Ltd v The Commonwealth of Australia [No. 2]* (1992) 66 ALJR 695, Mason CJ of the High Court of Australia said (at p.703):

> *The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives. ... The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.*
>
> *Freedom of Communication as an Indispensable Element in Representative Government*
>
> *Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticise government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives. By these means the elected representatives are equipped to discharge their role so that they may take account of and respond to the will of the people. Communication in the exercise of this freedom is by no means a one-way traffic, for the elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to inform the people so that they may make informed judgements on relevant matters. Absent such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative.*

A2. This passage emphasises not only the importance of accountability of elected representatives (including Ministers, for the exercise of the powers of the executive branch of government) to the electors, but also the principle that citizens in a representative democracy have the right to seek to participate in, and influence, the processes of government decision-making and policy formulation on any issue of concern to them (whether or not they choose to exercise the right). The importance of FOI legislation is that it provides the means for a person to have access to the knowledge/information that will assist a more meaningful and effective exercise of that right. (See also p.85, paragraphs 68-69, of *Re Eccleston* which refer to the work of an English legal academic, David Feldman, who defined a category of higher order democratic rights which, in a democracy, should not be subject to political interference, and which included "the right to receive information which is relevant to public political decisions which one is entitled to make or influence ...".)

A3. The second example comes from *Attorney-General (UK) v Heinemann Publishers Pty Ltd* (the Spycatcher case) (1987) 10 NSWLR 86, where McHugh JA (then of the New South Wales Court of Appeal, now of the High Court of Australia) gave explicit recognition to a principle that lies at the heart of our democratic system - that government exists for the benefit of the community it serves and that government officials, both elected and appointed, do not hold office for their own benefit but for the benefit of the public they serve (at p.191):

> *But governments act, or at all events are constitutionally required to act, in the public interest. Information is held, received and imparted by governments, their departments and agencies to further the public interest.*

The information which public officials, both elected and appointed, acquire or generate in office is not acquired or generated for their own benefit, but for purposes related to the legitimate discharge of their duties of office, and ultimately for the service of the public for whose benefit the institutions of government exist, and who (through one kind of impost or another) fund the institutions of government and the salaries of officials.

A4. This principle has informed the work of His Honour Mr Justice Finn of the Federal Court of Australia, who, in a series of essays, has undertaken the task of exploring the incidents and consequences of what he describes as "the most fundamental fiduciary relationship in our society ... that which exists between the community (the people) and the state, its agencies and officials". Relevant extracts are cited and reproduced at paragraph 3.10, pp.22-27, of my 4th Annual Report (1995-96), but the following segments are worth noting here:

- *If "the powers of government belong to and are derived from the people", can the donees of those powers under our constitutional arrangements properly be characterised in terms other than that they are the trustees, the fiduciaries, of those powers for the people? ... I would formulate it this way:*

  > The institutions of government, the officers and agencies of government exist for the people, to serve the interests of the people and, as such, are accountable to the people.

- *... government is a trust: all who exercise the devolved power of the public do so as servants of the public. This, the "public servant" principle, provides the*

proper basis for characterising the fundamental role and responsibility of our officials of all stations. ...

It is surprising how resistant many of our officials are to the idea that in exercising, or in participating in the exercise of, public power, that in managing, or in utilising, publicly owned property, they are acting in the matter (whatever their particular role in the scheme of government) for and on behalf of the public.

- ... [the open government] *principle, in a fundamental sense, provides the key to the power of governments and to the power of the public over its system of government. … The practice of open government can properly be described as "a democratic imperative". ... Openness is not an absolute value; neither is secrecy an instrument of government convenience. Of the two, in a polity based on popular sovereignty and practising representative democracy, openness must be accepted as the predominant constitutional value with secrecy now only justifiable by clear and demonstrable need*.

- [the accountability principle] *expresses what should be an inescapable consequence of sovereignty and trusteeship; accountability to the people is required of all who hold office of employment in, or who exercise public power in, our governmental system.*

A5. Considerations of this kind appear to have been reflected in the Attorney-General's second reading speech to the Queensland Legislative Assembly on the introduction of the *Freedom of Information Bill 1991* (Parliamentary Debates [Hansard], 5 December 1991, at p.3850):

> *In conclusion, this Bill will effect a major philosophical and cultural shift in the institutions of Government in this State. The assumption that information held by Government is secret unless there are reasons to the contrary is to be replaced by the assumption that information held by Government is available unless there are reasons to the contrary. The perception that Government is something remote from the citizen and entitled to keep its processes secret will be replaced by the perception that Government is merely the agent of its citizens, keeping no secrets other than those necessary to perform its functions as an agent. Information, which in a modern society is power, is being democratised. I commend the Bill to the House.*

A6. In *Re Eccleston* at pp.81-82 (paragraphs 58-59), I commented:

> *58. The democratic rationale for the enactment of freedom of information legislation, the cornerstone of which is the conferral of a legally enforceable right to access government-held information, is encapsulated in the notions of accountability and public participation. With the object of assisting to secure a more healthy functioning of the democratic aspects of our system of government, and in particular a government responsive to the public it serves, the FOI Act is intended to:*
>
> *(a) enable interested members of the public to discover what the government has done and why something was done, so that the*

public can make more informed judgments of the performance of the government, and if need be bring the government to account through the democratic process; and

(b) enable interested members of the public to discover what the government proposes to do, and obtain relevant information which will assist the more effective exercise of the democratic right of any citizen to seek to participate in and influence the decision-making or policy forming processes of government.

59. The public participation rationale for freedom of information legislation is inherently democratic in that it affords a systemic check and balance to any tendency of the small elite group which ultimately manages and controls the processes of high level government policy formulation and decision-making, to seek participation and input only from selected individuals or groups, who can thereby be accorded a privileged position of influence in government processes.

A7. This democratic imperative for open government will remain relevant for so long as our system of government is organised according to the principles of popular sovereignty and representative democracy. Its correlative is that any interested member of the public should be entitled to information about any aspect of the performance or operations of any agency through which the executive branch of government conducts its operations, except to the extent that disclosure of information would prejudice the broader public interest (including public interest considerations that are common to all members of the public, although they might apply in particular instances for the benefit of particular individuals - such as the public interest in protection of individual privacy, or the protection of sensitive commercial information of business enterprises that is collected and held by government).

A8. It is unlikely that any government would be prepared to wear the odium of abolishing freedom of information legislation outright, but it has been common in Australia for governments (having, with some fanfare, introduced quite liberal FOI legislation - and none better than Queensland's as originally enacted in 1992) to seek to wind back its sphere of operation, chiefly by three techniques -

- excessive broadening of exemption provisions;
- excluding more and more government agencies or classes of information from the application of the legislation; and
- raising fees and charges for access to government information to levels that will inhibit use of the legislation by all but the most dogged and well-resourced of applicants.

The first two have already been employed in Queensland, and the third (employed in New South Wales since the inception of that state's FOI legislation) is bound to become a major focus of the present review.

A9. In my view, the success of the FOI Act is logically to be gauged by its wide and ready use by members of the community (in furtherance of the objects which Parliament intended the legislation to achieve) rather than by reference to how effectively public demand for use of the legislation is moderated (in the interests of resource savings) by the imposition of financial

hurdles on its use. (The Queensland FOI Act presently has the most liberal charging regime of any Australian jurisdiction, and one of the highest rates of usage of FOI legislation of any Australian jurisdiction, gauged on a *per capita* basis. Even so, rates of usage, hovering in the vicinity of 8,000 applications per year, do not seem excessive, in absolute terms, for a State with a population of approximately 3 million people.) Information that is sought under the FOI Act rarely has intrinsic value to the applicant for access, so that financial hurdles do not have to be set particularly high to substantially inhibit use of the FOI. It will require delicate judgment of the appropriate balance to be struck with fees and charges, so as not to impede unduly the achievement of the objects of FOI legislation.

A10. It seems that Ministers of the Crown (from both sides of politics), and senior government officials, in Queensland have in the past considered that they need a substantial zone in which to operate free of public scrutiny. Hence the amendments to s.36 and s.37 of the FOI Act made in November 1993 and March 1995, which continue in force. Given the longstanding practice in Queensland of vesting so many decision-making powers in the Governor in Council, of routing so much government decision-making (not only major decisions, but minor and routine decisions) through Cabinet and/or Executive Council, and the common practice of putting submissions to Cabinet "for information purposes only" concerning any significant proposal for new policy development within a Ministerial portfolio, the breadth of the s.36 and s.37 exemptions has been directly inimical to the achievement of the major objects of the FOI Act (as summarised in paragraph A16 below). The appropriate breadth of any zone in which the executive branch of government should be permitted to operate free of public scrutiny, will be a significant issue for the future effectiveness of the FOI Act.

A11. There are senior officials in government who believe that the FOI Act constitutes an expensive and inefficient distraction from the performance of the main tasks of governments, especially at a time when government is being exhorted to find increased efficiencies in service delivery, being placed under fiscal pressure to 'do more with less', and to adopt private sector methods focussing on customer service. Private sector service delivery does not have to contend with any equivalent of freedom of information legislation, though it frequently does have to contend with government regulatory regimes established to further the general public interest, and with accountability for performance to the owners of the business. Ultimately, the 'owners' of the 'business of government' are the electors, and consistently with the analysis I have set out above, they have entitlements greater than that of a mere customer.

A12. Cost and efficiency considerations, with respect to the impact of FOI legislation on government administration, offer the easiest means of attack for opponents of open government. Important as it is, however, accountability in terms of efficiency and economy should not be the first and last word when considering accountability of government administration.

A13. There is no doubt that the administration of FOI legislation comes at a cost, and that it is capable of making sporadic intrusions on the time of public officials (generally engaged on other duties) who hold documents which are the subject of applications made under the FOI Act. However, within reasonable limits (and the FOI Act makes provision in this regard - see, for example, s.28(2) of the FOI Act), democratic governments should be capable of tolerating a degree of alleged "inefficiency" (as FOI Act requirements sporadically affect officers engaged in the administration of government programs), and should be prepared to accept the costs of administering a system for enhancing the accountability of the executive branch of government,

as the price of honouring some of the democratic imperatives of a system of representative democracy.

A14. Moreover, it is doubtful whether the cost of administering FOI legislation is any greater than the amounts of public money spent by governments of all political persuasions on government media officers, information units, public relations campaigns and the like. There seems a certain elementary fairness and balance in having public funds subsidise the costs of the government responding to members of the public who seek to enforce the right conferred by the FOI Act to obtain government-held information which is of interest or concern to them.

A15. In his essay, "Secrecy and Open Government" (published in P.D. Finn (ed), Essays on Law and Government, Law Book Co., 1995, at pp.182-227), Mr Justice Thomas of the High Court of New Zealand suggests an interesting perspective on this issue (at p.225):

> *... democracy and open government go hand in glove. This nexus derives from the sovereignty of the people. Government is delegated with the authority and power to act on the people's behalf, and the official information it gathers and holds pursuant to the devolution of power is gathered and held on the people's behalf. For representative government to be responsible and accountable, it must make the information available to the people. They do have a "right to know". ... Other essential features of a democracy are implemented irrespective of the cost or burden they might impose. No-one suggests, for example, that free and regular elections should be dispensed with simply because they are enormously expensive. Nor is it contemplated that parliament as an institution should be curtailed in the interests of more efficient and inexpensive government. If greater openness in government is regarded as a democratic imperative, should not the same approach be applicable?*

Summary of the basic purposes and principles of the FOI Act

A16. The basic purposes and principles of FOI legislation (often summarised as openness, accountability, public participation) have traditionally been described as:

- to make government more accountable by making it more open to public scrutiny;
- to improve the quality of political democracy by giving the opportunity to all members of the community to access information that will permit more meaningful participation on the processes of government, including the formulation of policy;
- to enable persons to be kept informed of the functioning of the decision-making process as it affects them and to know the criteria that will be applied by government agencies in making those decisions; and
- to enable individuals to have access to information about them held on government files, so that they may know the basis on which decisions that can fundamentally affect their lives are made and may have the opportunity of correcting information that is inaccurate, incomplete, out-of-date or misleading.

A17. However, with information taking an increasingly central place in society and the ability of people to participate in society increasingly linked to their ability to have ready access to relevant information, a further principle is beginning to receive acknowledgment as a significant

supporting rationale for the existence of FOI legislation, namely, that government information is a valuable resource, collected or created at the taxpayers' expense, which should be accessible by the people, because it belongs to the people (subject, of course, to the justifiable exemptions provided for in the FOI Act). To the extent that government information can assist research or innovation, or foster commercial enterprise, without prejudicing essential public or private interests, it should be permitted to do so. This is a legitimate extension, in the information technology age, of the traditional governmental activity of investing in infrastructure support for, and fostering/promoting, wealth-producing activity in our society.

A18. It must be remembered that the FOI Act is by no means the only mechanism by which the broad objectives referred to above can be achieved. It cannot be regarded as entirely responsible for their fulfilment or otherwise. There are numerous circumstances in which government information is accessible to members of the public. The Parliamentary system, including the expanding parliamentary committee system, promotes the transfer of information from the government to Parliament, and then to the people. Annual reporting requirements, consultation, publication practices and administrative law requirements increase the flow of information from the government. The ways in which the government provides this information are also becoming more sophisticated, particularly with improved technology which has led to an increase in the electronic availability of government information.

A19. The FOI Act operates in this climate of considerable availability of government information. Its importance lies in the fact that it provides an enforceable right of access to government-held information. It enables members of the public to obtain access under the law to documents that may otherwise be available only at the discretion of the government. It is with this in mind that the success, or otherwise, of the FOI Act must be assessed.

Whether the basic purposes and principles of the FOI Act as set out above have been satisfied, and whether they now require modification?

A20. It is difficult to use statistics as a measure of whether the FOI Act is working in terms of meeting its objectives. Many of the benefits of the FOI Act are intangible and/or unquantifiable, and many applicants will no doubt have had vastly different experiences of the Act, both positive and negative, depending on a variety of circumstances. I am able to base my views on whether the FOI Act is working (in terms of satisfying or fulfilling its objectives) only on my experience of the cases which come before me for external review (representing approximately 3% of total applications made under the FOI Act), and on the decisions made by agencies in those cases, the submissions lodged by the participants, and consultations which take place with various parties during the course of the review process, as well as on my knowledge of the FOI legislation of other jurisdictions and the decisions which are published by the equivalent, independent external review authorities in those jurisdictions.

A21. Of the access applications received by state government agencies in 1996-97 (the last year for which a Department of Justice Annual Report under s.108 of the FOI Act is available), over half (approximately 56.4%) were classified as applications for personal affairs information, as compared to 14% for local government agencies. Applications for the amendment of personal affairs information accounted for only 27 of the 7810 applications (or 0.3%) processed during the reporting period. The high proportion of applications for access to personal information received by state government agencies is largely attributable to the volume of applications received by

Queensland Health and District Health Services (which collectively received the most FOI access applications during the reporting period). Of the access applications received by Queensland Health during the reporting period, 67.6% were for information of a personal nature.

A22. The relative predominance of requests for personal affairs information suggest that requests relating to policy development and general government decision-making represent a minority of FOI access applications. Yet it could be said that requests for the latter type of information provide the real test of whether the FOI Act is serving its purpose of keeping the government accountable and facilitating participation in government. Certainly it has been my experience that, at external review level, requests for personal affairs information or for information which is of personal interest or concern to the access applicant, significantly outweigh requests for information of a policy/decision-making nature, the disclosure of which could be considered to be in the wider public interest.

A23. The reasons for the small proportion of requests for information of a policy/decision-making character at external review level are not clear. Certainly, some agencies do appear to adopt a generous approach to disclosure of such information at primary decision-making levels (although others appear to be far less generous - see paragraph A25 below). Moreover, it must be accepted, I think, that human nature is such that people are rarely moved to take action (in this instance, in the form of lodging an FOI access application) about a particular issue unless that issue directly concerns them or is of importance to them personally. Hence the public relies, to a large extent, on interest groups such as, for example, welfare groups, or conservation or environmental groups, as well as media organisations and politicians *et cetera*, to seek access to information which could be considered to be of general interest or concern to the community as a whole. It has been my experience that applications for external review by applicants of that kind are in the minority.

A24. It may be that for some potential applicants, the $30 application fee (although moderate by the standards of other Australian jurisdictions) is a deterrent. It may be that there is not a great demand for information of a policy/decision-making character over and above what is already generally available. It may be that there has been an increase in public involvement in agency policy formulation due to the adoption of consultation procedures independent of FOI. The impact of those sorts of changes would be difficult to separate from the effects of FOI; i.e., has the very existence of FOI legislation meant that a great deal more information is now being routinely provided outside the FOI Act?.

A25. Alternatively, lack of public awareness of the legislation, or that the FOI Act is not generally seen as a viable mechanism for obtaining policy or decision-making information, may account for the low number of applications. Again, in my experience (based on the sample of cases I see at external review level), some agencies appear reluctant to disclose information of a policy/decision-making character. They frequently claim exemption from disclosure in respect of such information, even though much of it seems to me to be innocuous or uncontroversial. I find that the s.36, s.37 and s.41(1) exemptions are widely overused by agencies to protect even the most routine and seemingly innocuous information. It appears from my unsuccessful attempts to persuade agencies to exercise the discretion permitted to them by s.28(1) of the FOI Act in favour of disclosing much harmless or innocuous information that happens to qualify for exemption under the broad reach of s.36(1) of the FOI Act, that agencies may be (or may have

been) under some kind of central instruction to maintain a claim of exemption under s.36(1) of the FOI Act whenever it is available.

A26. So it may have been the experience of access applicants that applications for information of a policy/decision-making character are so rarely successful in the first instance, that there is little incentive to continue to seek access, given the delays and frustration which may be associated with the process. I am aware of some journalists who became increasingly disenchanted with the prospect of using the FOI Act after their attempts (post March 1995) made it clear that Ministers and government agencies were prepared to use s.36(1) of the FOI Act to ensure that any information they did not want to disclose could not be obtained under the FOI Act. (For the perspective of journalists and editors on difficulties with the use of FOI legislation, see Nigel Waters, *Print Media Use of Freedom of Information Laws in Australia,* Australian Centre for Independent Journalism, January 1999.)

Impact on the openness of government - government administration and the goal of cultural change

A27. An objective of the FOI Act is to increase the openness of government and to reduce governmental secrecy. Whether or not that objective has been achieved in Queensland can best be answered, I think, by saying that more information is available now about what goes on in government than was the case before FOI. However, some government agencies have not willingly embraced the notion that they should be more open. In my experience, some government agencies have done little more than acknowledge the existence and impact of FOI at its most basic level and to accept that more will be known about government as a consequence.

A28. The culture of an agency and the understanding and acceptance of the philosophy of FOI by individual officers can play a significant part in determining whether the FOI Act achieves its objectives. A negative attitude, particularly on the part of senior officers, can influence an agency's approach to FOI and seriously hinder the success of FOI so far as that agency is concerned. It is imperative that officials who hold information and power within the executive branch of government recognise that they do so on behalf of the people of Queensland, and tailor their management practices with respect to government information accordingly.

A29. I think it is important to remember that the FOI Act does not purport to prevent or discourage disclosure of government information outside the framework of the FOI Act (see s.14 of the FOI Act) - a fact often forgotten by agencies. Section 14 is a clear exhortation to agencies to be as open as possible and not to regard the requirements of the FOI Act as expressing the full extent of their responsibilities with respect to open government. Perhaps there would be less emphasis on the FOI Act itself, if agencies were to reassess their approach to disclosure of information to members of the public, with a view to establishing agency policies which will positively encourage disclosure, except in cases where it is essential that disclosure be restricted. Ideally, the FOI Act should be a last resort mechanism to gain information from a government agency. Wherever possible, agencies should release information quickly and informally. I consider that agencies could deal with many requests for information much less formally than they do currently, and in a way that, in the long run, would be less administratively burdensome for them. I acknowledge that many agencies have established administrative access schemes. However, the wider use of those schemes should be actively encouraged within agencies. Many agencies have established internet websites. By studying patterns evident in prior requests for access to

agency information (under the FOI Act or otherwise), agencies could anticipate the kinds of information which could be routinely made available for public access via an agency website (with possible attendant resource savings).

A30. In my view, the FOI Act has, on the whole, had a significant impact on the way agencies make decisions and the way in which they record information and store records. The FOI Act (together with other administrative law requirements) has focussed on the need to justify agency decisions and to give substantive reasons in support of those decisions. Agencies and individual officers are aware that their decisions, processes and procedures may be open to public scrutiny (not only via the FOI Act) and that serves to impose a certain discipline on agencies and officers, deterring impropriety and encouraging better and more careful performance of functions and duties. There is, however, a significant caveat in that regard, in that the benefit of this prophylactic effect is lost or diminished in the case of officials working on material that will, or can readily be, insulated from public scrutiny under s.36 or s.37 of the FOI Act.

A31. It has been my experience that, for the most part, the cadre of specialist FOI administrators (particularly those in the larger agencies which predominantly provide client services to members of the public) understand the objects of FOI legislation. However, to locate requested documents, and obtain initial views on whether their disclosure may be prejudicial, specialist FOI administrators are substantially dependent on the co-operation of the individual officers, work groups and line-managers who hold documents which are the subject of access requests, many of whom, it seems, regard FOI access applications as, at best, an unwelcome intrusion on, and distraction from, their 'real work'. Occasionally, examples are seen of clear hostility towards the FOI Act and its requirements, sometimes from quite senior officials. In many cases, there remains a strong belief in departmental or agency 'ownership' of documents. In some cases, that descends to a belief in personal or group 'ownership'. There is also a perceptible hesitation on the part of some FOI decision-makers to make decisions which could lead to embarrassment of the agency, or a Minister or other official. There is often a fear of the unknown: a tendency to conjecture and speculation about all evils which might conceivably flow from disclosure. Such attitudes do nothing to further the objects of the FOI Act.

A32. The goal of cultural change is only likely to be achieved with strong leadership. In the Commonwealth sphere, Cabinet issued directions in June 1985 that agencies should not refuse access to non-contentious material only because there were technical grounds of exemption available under the Commonwealth FOI Act. Proper compliance with the spirit of the Commonwealth FOI Act (it was said), required an agency to determine first whether release of a document would have harmful consequences before considering whether a claim for exemption might be made out.

A33. It would be welcome to see a similar approach adopted in Queensland, and to see official manuals and guidelines issued to FOI decision-makers that acknowledge the constitutional importance, and promote the acceptance, of open government principles. It seems that any central policy directions that have been given in Queensland are to the opposite effect. I am aware of a direction to Queensland government departments that the legal professional privilege exemption (s.43(1) of the FOI Act) is to be claimed wherever it is available, unless consent to the waiver of privilege is obtained from the Attorney-General. And, as noted above, there appears (at least up until the time of the last general election) to have been some kind of central direction to the effect that the s.36(1) exemption is to be claimed and maintained whenever it is available.

A34. In January 1996, the report by the Australian Law Reform Commission and the Administrative Review Council on their joint review of the Commonwealth FOI Act, *Open government: a review of the federal Freedom of Information Act 1982* (the ALRC/ARC Report) was published. The product of careful research and wide consultation, it contains many worthwhile recommendations for the improvement of the Commonwealth FOI Act (on which the Queensland FOI Act was largely modelled) and for the improved administration of the Commonwealth FOI Act. I recommend it as a report worthy of attention in assessing and monitoring whether the Queensland FOI Act, and its administration, are as effective as they could be for attaining the objects which the Parliament intended to achieve through the enactment of the Queensland FOI Act. Apposite to the discussion in the preceding paragraph is one (among many) worthwhile recommendations from the ALRC/ARC Report (at paragraph 4.16) which should, in my view, be considered for implementation in Queensland:

> *The Review considers that the cultural changes that will result from improved appreciation of the philosophy and purpose of the FOI Act would be more likely to occur if senior officers were given tangible incentives to pay greater attention to, and to improve, an agency's FOI practices and performance. Linking good public information, communication and FOI practices to performance appraisal would be likely to influence the attitude towards information access of the officers whose attitudes often influence those of the entire staff of an agency - the senior officers. The Review recommends that performance agreements of all senior officers should be required to impose a responsibility to ensure the efficient and effective handling of access to government-held information, including FOI requests, in the agency. Commitment to good information management and FOI practices should also be expressed in an agency's corporate plan. ...*

A35. As a further measure to promote the achievement of cultural change, I have recommended later in this submission that consideration should be given to amending s.4 and s.5 of the FOI Act to provide a more explicit objects clause.

Conclusion

A36. In my view, the short answer to the question posed at the outset of this discussion - whether the purposes of FOI legislation in Queensland have been satisfied and whether they now require modification - is that the purposes have been only partly satisfied, but they remain relevant and important, and do not need modification.

A37. It can fairly be said that much has been achieved since the introduction of the FOI Act in Queensland in 1992. There is no doubt that the existence of the FOI Act has had a positive effect on the ability of the community to obtain access to information held by the government. Certainly, citizens wanting to gain access to personal information about themselves contained in records held by government agencies have made wide and successful use of the FOI Act. In broad terms, therefore, the FOI Act has fulfilled some of its purposes. I think that most commentators would also agree that FOI has brought about associated benefits in public administration. The benefits include improvements in record keeping, report writing, and general decision-making.

A38. However, there must be concern that the FOI Act is not providing an effective regime for access to documents containing other forms of information; particularly documents associated with the decision/policy making processes of government. A promising start was made, but the chances of the FOI Act growing into a truly effective accountability mechanism have been drastically reduced by successive amendments which have excluded more and more information from potential disclosure, thus limiting the Act's effectiveness. Those amendments, which I have discussed above, derogate significantly from the accountability and public participation objects of the FOI Act. I consider that the amendments to s.36 and s.37, and to ss.11, 11A, and 11B, of the FOI Act which I have recommended later in this submission, are necessary to restore the credibility and effectiveness of the FOI Act.

A39. In an article titled *Freedom of Information: Torchlight not Searchlight"* (in McKenna, HF, McMillan, JS, and Nethercote, JR (eds), *Fair and open decision-making*, 66 Canberra Bulletin of Public Administration 162), Associate Professor Spencer Zifcak summed up the then-current state of play regarding the Commonwealth FOI Act as follows:

> *... it has developed into part of the accepted, albeit modified, fabric of administrative life. Welcomed into the community as the principal instrument with which to shed light on the caverns and crannies of bureaucratic organisation, it has laid bare important aspects of government deliberation but left the whole largely intact. In its ten years of life, the Freedom of Information Act has neither confirmed the worst fears of critics nor has it brought to fruition the idealistic vision of its supporters. Rather, the Act has become part of the institutional furniture providing distinct but limited benefits and creating ascertainable but limited discomforts.*

A40. I think that the above comments are true in respect of the Queensland FOI Act at this point in time. It has been effective, but not as effective as it could be. In my view, if FOI is allowed to languish, we run the risk of losing the important contribution that FOI can make to achieving a truly accountable and open government in Queensland. The benefits of an effective FOI Act should not be underestimated, but there is still much to do. I therefore welcome a comprehensive review of the FOI Act, and the opportunity for debate about the Act's merits and problems. In my view, FOI still has a great untapped potential to perform the role of catalyst in bringing public administration to a stage where it places a high value on the public availability of information. For that potential to be realised, the obstacles identified in the preceding discussion need to be overcome.

Term of Reference B(i) **Whether the FOI Act should be amended, and in particular:**

...

(i) whether the objects clause should be amended;

B1. In my view, the present s.4 of the FOI Act is rather too brief as an objects clause. It also omits any mention of the important rights conferred by Part 4 of the FOI Act, i.e., to amend information concerning an individual's personal affairs. It is preferable that the content of s.5 (stating Parliament's reasons for enactment) should not be separated from the provision that is expressly labelled as an objects clause (as s.4 now is). It is preferable to avoid any suggestion or misunderstanding (on the part of FOI administrators), in an era in which purposive interpretation of statutes is required (see s.14A of the *Acts Interpretation Act 1954* Qld), that the purpose of the FOI Act is confined to that which appears in the specifically labelled objects clause: s.4.

B2. The existing s.5 could also be improved. It fails to make explicit mention of the public participation object of FOI legislation (see paragraphs A2 and A6 above), even though that object was clearly recognised in the Attorney-General's Second Reading Speech on the introduction of the *Freedom of Information Bill 1991*:

> *... The Bill enables people to have access to documents used by decision-makers and will, in practical terms, produce a higher level of accountability and provide a greater opportunity for the public to participate in policy making and government itself.*

B3. It would also benefit by a clear statement that the object of "enhancing accountability of government" extends to enhancing the accountability of individual government officials for the performance of their duties of office. An objects clause would also benefit by a more explicit recognition of the principles discussed in paragraphs A1-A7 of this submission.

B4. **Recommendation:**

Sections 4 and 5 of the FOI Act should be amended to read:

> ***4.(1)*** *The purpose of this Act is to confer rights on persons, and impose obligations on agencies and Ministers, with the object of furthering the principles that, in a free and democratic society, with a system of government based on representative democracy and sovereign power residing in the people—*
>
> *(a) the public interest is served by—*
>
> *(i) opening the activities of government to scrutiny, discussion, comment and review;*
>
> *(ii) promoting informed public participation in the processes of government;*

(iii) enhancing the accountability of government and government officials; and

(b) the community should be kept informed of government's operations, including, in particular, the rules and practices followed by government in its dealings with members of the community; and

(c) members of the community should have access to information held by government in relation to their personal affairs and should be given the ways to ensure that information of that kind is accurate, complete, up-to-date and not misleading.

(2) *Parliament also recognises that there are competing interests in that the disclosure of particular information could be contrary to the public interest because its disclosure in some instances would have a prejudicial effect on—*

(a) essential public interests; or

(b) the private or business affairs of members of the community in respect of whom information is collected and held by government.

(3) *This Act is intended to strike a balance between those competing interests by giving members of the community a right of access to information held by government to the greatest extent possible with limited exceptions for the purpose of preventing a prejudicial effect to the public interest of a kind mentioned in subsection (2).*

5.(1) *The objects of this Act are to be achieved by—*

(a) creating a general right of access to documents of an agency and official documents of a Minister;

(b) providing means to ensure that information held by government which relates to the personal affairs of members of the community is accurate, complete, up-to-date and not misleading; and

(c) requiring that certain information and documents concerning the operations of government be made available to the public.

(2) *It is the intention of the Parliament that the provisions of this Act be interpreted so as to further the objects set out in s.4, and that any discretions conferred by this Act be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.*

(3) *Agencies and Ministers are to give effect to this Act in a way that assists the public to—*

(a) obtain access to the particular documents they seek, promptly and at the lowest reasonable cost; and

(b) ensure that information relating to an individual's personal affairs is accurate, complete, up-to-date, and not misleading.

Term of Reference B(ii): Whether the FOI Act should be amended, and in particular:

...

(ii) whether, and to what extent, the exemption provisions in Part 3, Division 2 should be amended;

Sections 36 and 37

B5. Following amendments to s.36 and s.37 in November 1993 and March 1995, their reach is so wide that they can no longer be said to represent an appropriate balance between competing public interests favouring disclosure and non-disclosure of government information. They exceed the bounds of what is necessary to protect traditional concepts of collective Ministerial responsibility (and its corresponding need for Cabinet secrecy) to such an extent that they are antithetical to the achievement of the professed objects of the FOI Act in promoting openness, accountability, and informed public participation, in the processes of government. The centrepiece of the FOI Act, the conferral by s.21 of a legally enforceable right of access to documents of agencies and official documents of Ministers (subject only to limited exceptions designed to protect the private and business affairs of members of the community, and *essential* public interests: see s.5(2) of the FOI Act), has been reduced, in practical terms, to a right of access subject to Ministerial veto.

B6. I do not believe I can argue the case for amendment of s.36 and s.37 any better than I have done in Chapter 3 of my 3rd Annual Report (1994/95), although I have added pertinent additional comments on the issues in my 4th, 5th and 6th Annual Reports. I have extracted the relevant paragraphs from each of those Annual Reports for ease of reference by the Committee. They constitute Attachment B(ii)1 to this segment of my submission.

B7. In those attachments, I recommended that s.36 be amended to restore it to the form in which it was first enacted in 1992. I now consider that two variations should be made to the form of s.36 as first enacted in 1992, to take account of the problem I identified in paragraph 3.18 of my 5th Annual Report (1996/97): see Attachment B(ii)1 to this submission.

B8. **Recommendation:**

(a) Section 36 of the FOI Act should be amended to restore it to the form in which it was originally enacted in 1992, subject to two variations:

(i) in s.36(1)(e), omit "decision of Cabinet" where it last appears and substitute "government";
(ii) in s.36(2)(b), omit "decision of Cabinet" and substitute "government".

(b) Section 37 of the FOI Act should be repealed (for the reasons explained in paragraphs 3.45-3.49 of my 3rd Annual Report, 1994/95, and 3.28 of my 4th Annual Report, 1995/96);

(c) However, if recommendation (b) is not acceptable, then s.37 of the FOI Act should be amended to restore it to the form in which it was originally enacted in 1992, subject to two variations:

(i) in s.37(1)(e), omit "decision of the Governor in Council" and substitute "government";

(ii) in s.37(2)(b), omit "decision of the Governor in Council" and substitute "government".

(d) If recommendations (a), (b) and (c) are not implemented, s.36(2) and s.37(2) of the FOI Act, as now in force, should be amended so that each is in the following terms:

(2) Subsection (1) does not apply to matter officially published by government.

Sections 36(3), 37(3) and 42(3)

B9. Amendments to s.36(3), s.37(3) and s.42(3) made in March 1995 seem to suggest that a Ministerial certificate can only be issued under those provisions in circumstances where a 'neither confirm nor deny' response is invoked. This would seem to unduly limit the possible use of a Ministerial certificate. There may well be cases where the existence of a document is known, so that invoking a 'neither confirm nor deny' response would be futile (see, for example, my decision in *Re Fagan and Minister for Justice and Attorney-General and Minister for the Arts* (1995) 2 QAR 583). Consideration should be given to whether amendment of these provisions is necessary to allow for the possibility of the issue of a certificate in such situations.

B10. Turning to another matter, ss.36(3) and 37(3) refer to a certificate stating that "specified matter" would be exempt, whereas s.42(3) refers to "a specified matter". There would appear to be no reason for the distinction between these provisions, and it appears likely that the different wording of s.42(3) is merely a drafting error. The former wording appears to be appropriate in the circumstances, and I would suggest that s.42(3) be amended to bring it into line with the other provisions.

B11. **Recommendation:**

(a) Consideration should be given to whether amendment to s.36(3), s.37(3) and s.42(3) is necessary to allow for the issue of a Ministerial certificate in cases involving documents where the invocation of a 'neither confirm nor deny' response would not be appropriate.

(b) The words "a specified matter" in s.42(3) should be replaced by the words "specified matter".

Section 39

B12. There is a drafting error in s.39 in that it contains a subsection 39(2) but not a numbered subsection 39(1). While that error can be overcome by the application of the *Acts Interpretation Act 1954*, it would be appropriate to amend the provision to number a subsection 39(1).

B13. **Recommendation:**

The numeral "(1)" should be inserted after the number "39" in s.39 of the FOI Act.

Public interest balancing test in s.39(2) and s.48

B14. Amendments to s.39 and s.48 of the FOI Act, as enacted by the *Freedom of Information (Review of Secrecy Provision Exemption) Amendment Act 1994*, incorporated into those two exemption provisions a differently worded formulation of a public interest balancing test (i.e. *"unless disclosure is required by a compelling reason in the public interest"*) than that found in any of the other exemption provisions which incorporate a public interest balancing test (for a discussion of which, see my decision in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60)).

B15. In his second reading speech in support of the amending legislation (Parliamentary Debates [Hansard], 5 August 1994, pp.8410-8411) the Attorney-General expressed the justification for the different formulation of the public interest balancing test in s.39(2) and s.48 as follows:

> *In addition, I wish to advert to the fact that the test in relation to the new section 48 inserted by this Bill is higher than that required in relation to the public interest aspect of most other grounds for exemption in the Act. This Bill will provide that for such disclosure there is required to be a compelling reason in the public interest. The reason for this is that it has been determined that the courts be given a clear standard in this regard, because Parliament has already expressed its views in relation to these particular secrecy clauses contained in other statutes. The same principle will apply also to the test contained in section 39 of the Act relating to the confidentiality provision in the* Financial Administration and Audit Act.
>
> *It has always been recognised that confidentiality of certain Government information is justifiable and necessary. However, at the same time, our Government is committed to upholding the most open and accessible freedom of information regime that exists in any Government in Australia. Moreover, it provides the relevant information to the public at a cost which is significantly cheaper than most, if not all other jurisdictions in Australia. The competing interest of, on the one hand, justifiable and supportable confidentiality in certain Government affairs and, on the other, the community's right of access to information, have been balanced in this particular exercise. This balance is comprehensively described in section 5 of the present Act which sets out the principles applicable in determining the appropriate extent of access under the* Freedom of Information Act.

B16. In its report on the review of the secrecy provision exemption in the FOI Act (Report No. 46, March 1994), the Queensland Law Reform Commission also addressed the issue of the appropriate formulation of a public interest balancing test for s.48 of the FOI Act:

> *Under section 48 as it is currently drafted, a secrecy provision is only exempt if "its disclosure would, on balance, be contrary to the public interest."*
>
> *In most of the other provisions of the* Freedom of Information Act 1992 (Qld) *which provide an exemption, the relevant information is exempt "unless its disclosure would, on balance, be in the public interest."*

The Commission is unaware of any reason why an amended section 48 should not be drafted in a style consistent with other exempting provisions, and the Draft Bill has been drafted accordingly.

B17. I concur with the Law Reform Commission's assessment that, with respect to s.48 of the FOI Act, there is no valid reason why the public interest balancing test in the amended provision should not be worded consistently with the public interest balancing tests in other exemption provisions. I consider that the same logic applies to s.39(2) as well, and that the introduction of a different, and arguably narrower, formulation of public interest balancing test for s.39(2) and s.48 of the FOI Act than is found in other exemption provisions in Part 3 of the Act, is not warranted.

B18. **Recommendation:**

The words "is required by a compelling reason in the public interest" should be deleted from s.39(2) and s.48(1) of the FOI Act, and replaced by the words "would, on balance, be in the public interest".

Section 42(1)(c)

B19. Section 42(1)(c) provides that matter is exempt matter if its disclosure could reasonably be expected to endanger a person's life or physical safety. The correct approach to the interpretation and application of s.42(1)(c) is explained and illustrated in *Re Murphy and Queensland Treasury* (1995) 2 QAR 744 at pp.760-778 (paragraphs 43-92). The standard required for exemption under s.42(1)(c) is to demonstrate a reasonable basis for expecting disclosure of the particular matter in issue to endanger a person's physical safety. There have been occasions where the material before me suggested that an applicant for access to information may seek some form of retribution against another person, but nothing so serious as to amount to endangerment of physical safety. The concern that prompts me to raise this issue is similar to the concern that prompted the enactment of 'stalking' laws. I consider that the scope of protection afforded by s.42(1)(c) should extend to reasonably apprehended acts of harassment or intimidation directed at a person, that fall short of endangering a person's physical safety.

B20. **Recommendation:**

Section 42(1)(c) be amended to read:

Matter is exempt matter if its disclosure could reasonably be expected to—

...

(c) endanger a person's life or physical safety, or subject a person to acts of serious harassment.

Section 42(1)(e)

B21. It is my experience that s.42(1)(e) currently is both overused, and incorrectly used, by agencies. I discussed the operation of s.42(1)(e) in my decision in *Re "T" and Queensland Health* (1994)

1 QAR 386. As it is currently drafted, s.42(1)(e) does not provide that the matter in issue must disclose lawful methods or procedures for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law. It provides simply that disclosure of the matter in issue must reasonably be expected to prejudice the effectiveness of a lawful method or procedure, etc. I find that in most cases that come before me for review which involve a claim for exemption under s.42(1)(e), the claim has been made by the particular agency as a 'back-up' to a claim of confidentiality under s.46(1), and is made in respect of methods or procedures of such an ordinary and fundamental kind (such as, for example, interviewing witnesses, taking statements or even reviewing reports) that it could not possibly be reasonably expected that disclosure would prejudice the effectiveness of those methods or procedures. Where, for example, a witness statement is in issue, agencies often rely on s.42(1)(e) to argue that disclosure of that statement would prejudice the effectiveness of the method or procedure of taking statements from witnesses, because persons would no longer be prepared to co-operate in giving statements if they knew those statements could be disclosed under the FOI Act. Hence, it is used to back up a claim under s.46(1) that the statement was provided in confidence. I do not consider that to have been the intended sphere of operation of s.42(1)(e).

B22. The equivalent provision in the Commonwealth FOI Act (s.37(2)(b)) provides:

> ***37(2)*** *A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to—*
> …
>
> *(b) disclose lawful methods or procedures for preventing, detecting, investigating or dealing with matters arising out of,* [contraventions or possible contraventions of the law] *the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or …*

B23. The test for exemption under s.37(2)(b) of the Commonwealth FOI Act necessitates a two stage inquiry -

- first, whether disclosure of the document in issue would, or could reasonably be expected to, disclose lawful methods or procedures *et cetera*; and
- second, whether that disclosure of the lawful methods or procedures would, or could reasonably be expected to, prejudice their effectiveness.

B24. I recommend that s.42(1)(e) of the Queensland FOI Act be amended so as to accord with s.37(2)(b) of the Commonwealth FOI Act. This would overcome some of the problems that are being experienced regarding the interpretation and use by agencies of s.42(1)(e).

B25. **Recommendation:**

> **Section 42(1)(e) should be amended to read:**
>
> *42.(1) Matter is exempt matter if its disclosure could reasonably be expected to—*
>
> ...

(e) disclose a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law), the disclosure of which could reasonably be expected to prejudice the effectiveness of that lawful method or procedure; ...

Section 44(1) and the public interest test

B26. The Committee's Report No. 9, Privacy in Queensland (9 April 1998), considered the issue of what changes might be necessary to s.44(1) of the FOI Act to ensure harmony with the language adopted in a proposed privacy statute for Queensland (as recommended by the Committee). The Committee recommended that I and my senior staff be consulted in the drafting of any new privacy legislation, and any consequential amendments to the FOI Act, and that we be given opportunities for consultation and comment upon any draft Bills that are produced. No approach has been made to me in that regard, so I assume that draft privacy legislation is still some way off. The following discussion is directed to an amendment of s.44(1) that I consider is desirable, irrespective of any other changes that might be necessary to harmonise with proposed privacy legislation.

B27. As I stated at paragraph 15 of my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, the test for exemption under s.44(1) is whether the information in issue is properly to be characterised as information concerning the personal affairs of a person. If it is, then it is *prima facie* exempt subject to the application of the public interest balancing test incorporated in s.44(1). The appropriate limits of protecting personal privacy under s.44 of the Queensland FOI Act are primarily set by the interpretation given to the phrase "personal affairs". As I noted at paragraph 13 of *Re Stewart*, the Commonwealth, New South Wales and Victorian exemption provisions which correspond to s.44 of the Qld FOI Act all contain a material difference from s.44 of the Queensland FOI Act. Section 33(1) of the Victorian Act is in the following terms:

> *33(1) A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person)* [my emphasis].

Section 41(1) of the Commonwealth FOI Act, until its amendment in 1991 to adopt the phrase "personal information" rather than information concerning personal affairs, was identical to the Victorian provision; and clause 6(1) of Schedule 1 to the New South Wales FOI Act contains only minor and immaterial differences.

B28. The unreasonable disclosure test allows for greater flexibility in applying the exemption than does s.44(1) of the Queensland FOI Act, under which some personal affairs information may be found to be exempt in circumstances where its disclosure would not be unreasonable, but where it would be difficult to say that its disclosure would positively be in the public interest. By way of illustration, in *DPP v Smith* [1991] 1 VR 63 at p.69, a Full Court of the Supreme Court of Victoria held that because the persons whose personal affairs information was in issue had themselves chosen to bring the information into the public domain, the granting of public access to the documents under the Victorian FOI Act would not involve unreasonable disclosure. A similar decision was reached in *Re Perton and Attorney-General's Department* (1992) 5 VAR 302, in which the Victorian Administrative Appeals Tribunal held that the fact that a person had chosen to reveal details of a

dispute to the press justified the Tribunal in concluding that disclosure of the documents in issue would not constitute an unreasonable disclosure of that person's personal affairs.

B29. In *Re Lawless and Secretary to Law Department* (1985) 1 VAR 42 at 49, in the context of a convicted person seeking access to documents for the purpose of assisting him to overturn the conviction, it was held by Rowlands J that the factors relevant in weighing concepts of reasonableness and the public interest included:

- the desirability of just administration of the criminal law;
- the desirability that the just administration of the criminal law be manifest; and
- the desirability of finality in legal proceedings.

Rowlands J held that disclosure of certain personal affairs information of a third party would not be unreasonable because the third party had not sought privacy and her actions had assured her notoriety.

B30. In its Revised FOI Memorandum No. 23, the Commonwealth Attorney-General's Department stated that the question of whether disclosure would be unreasonable under s.41 of the Commonwealth FOI Act must be determined by the decision-maker on the facts of the particular case, but that the following matters are indicative of those to be taken into account:

(a) the extent to which the public interest in disclosure of a particular document may outweigh the invasion of privacy that could result from disclosure;

(b) the degree of personal sensitivity of the information;

(c) the extent to which the information concerned is already a matter of public knowledge;

(d) the extent to which the subject of the information is a public figure and the relationship between the information concerned and the capacity in which he is a public figure;

(e) the nature of the document;

(f) the age of the document;

(g) the existence of a significant relationship (e.g., a family relationship) between the applicant and the subject of the information.

(The list was compiled from observations made in decisions of the Commonwealth AAT.)

B31. As can be seen from the above, the 'unreasonable disclosure' test incorporates a public interest test equivalent to the countervailing public interest test which presently qualifies s.44(1) of the Queensland FOI Act, but also affords greater flexibility by allowing a range of other factors going to the reasonableness of disclosure to be taken into account. My decision in *Re Uksi and Redcliffe City Council* (1995) 2 QAR 629 illustrates a situation in which it was necessary, in the face of a 'reverse-FOI' application, to expound reasons why disclosure of information concerning the personal affairs of the applicant for review would, on balance, be in the public interest, even though the substance of the information had already become a matter of public record.

B32. **Recommendation:**

Section 44(1) of the FOI Act should be amended to read:

Matter is exempt matter if its disclosure would involve the unreasonable disclosure of information concerning the personal affairs of a person, whether living or dead.

Sections 44(3) and (4)

B33. I have given two formal decisions in which I was required to review an agency's exercise of the discretion conferred by s.44(3) of the FOI Act: *Re "S" and The Medical Board of Queensland* (1994) 2 QAR 249 and *Re "NKS" and Queensland Corrective Services Commission* (1995) 2 QAR 662. In those decisions, I have not had to confront the issues which I am about to address, and indeed it may never be necessary (in a review under Part 5 of the FOI Act) for me to confront these issues under s.44(3) in its present terms. However, I am aware of a number of difficulties that agencies have experienced in dealing with s.44(3), which it is appropriate for this review to address.

B34. Section 44(3) and s.44(4) provide:

> ***(3)*** *If—*
>
> *(a) an application is made to an agency or Minister for access to a document of the agency or an official document of the Minister that contains information of a medical or psychiatric nature concerning the person making the application; and*
>
> *(b) it appears to the principal officer of the agency or the Minister that the disclosure of the information to the person might be prejudicial to the physical or mental health or wellbeing of the person;*
>
> *the principal officer or Minister may direct that access to the document is not to be given to the person but is to be given instead to a qualified medical practitioner nominated by the person and approved by the principal officer or Minister.*
>
> ***(4)*** *An agency or Minister may appoint a qualified medical practitioner to make a decision under subsection (3) on behalf of the agency or Minister.*

B35. Firstly, it is not clear whether s.44(3) permits the medical practitioner to whom access is given, to then provide the relevant document(s) to the access applicant, with whatever additional counselling or explanation the medical practitioner considers necessary, or whether the operative words of s.44(3), i.e., "direct that access to the document is not to be given to the person" mean that the nominated medical practitioner must comply with the direction given by the authorised decision-maker under s.44(3), and the applicant for access must not receive the document(s) in issue. There are respectable arguments for either position, and I have no strong preference. Arguably, a medical practitioner should not be prevented from assessing the information concerned, and then exercising his/her professional discretion in releasing the matter to the applicant. Certainly, I am aware that there are medical practitioners who, after assessing the information concerned, have handed the information over to access applicants. If the Parliament has a strong preference for one position

over the other, it is preferable that its choice be made explicit on the face of the FOI Act, by an appropriate amendment. If not, inconsistent approaches by different agencies (and different medical practitioners) are likely to continue.

B36. Secondly, there are four decisions to be made in applying s.44(3):

(a) whether the information concerned is information of a medical or psychiatric nature concerning the person making the application;

(b) whether disclosure of the information might be prejudicial to the physical or mental health or well being of the person;

(c) the exercise of the discretion whether the information is not to be given to the applicant but instead to a qualified medical practitioner (connoted by the word "may" in s.44(3)); and

(d) approval of the medical practitioner nominated by the applicant.

B37. Section 44(4) provides that an agency or Minister may appoint a qualified medical practitioner to make "a decision" under subsection (3), and the question is whether the term "a decision" applies to all of the four separate decisions. Similarly, there is ambiguity between the language in s.44(3) ("principal officer") and s.44(4) ("an agency"). These matters should be clarified by an amendment to s.44(4), perhaps by providing that "*A principal officer or Minister may appoint a qualified medical practitioner to make <u>any</u> decision under subsection (3) on behalf of the agency or Minister*".

B38. In applying s.44(3), some difficulty could be encountered by agencies in determining what is information "of a medical or psychiatric nature". For example, would a report by a psychologist be information of this kind? The Commonwealth counterpart to s.44(3), which is ss.41(3)-(8) of the Commonwealth FOI Act, covers a more extensive range of information, defining the matter within the scope of s.41(3) to be "information that was provided by a qualified person acting in his or her capacity as a qualified person". Section 41(8) of the Commonwealth FOI Act now defines a "qualified person", for the purposes of that section, quite expansively so as to include occupations that involve provision or care for the physical or mental health of people, or for their well being, and gives specific illustrative examples including psychologists, marriage guidance counsellors and social workers. Section 41(3) of the Commonwealth FOI Act was originally identical to s.44(3) of the Queensland FOI Act. However, the problems associated with the provision in those terms were discussed in the 1987 Senate Standing Committee Report on the FOI Act at pp.196-198. Subsequently, s.41 was amended in 1991. However, the ALRC/ARC Report (at paragraph 10.21) expressed some concerns about the operation of the current Commonwealth provisions.

B39. I do not think that any amendments to s.44(3) of the Queensland FOI Act need go as far as those contained in ss.41(3)-(8) of the Commonwealth FOI Act. However, I consider it worthwhile to extend the coverage of s.44(3) to permit a psychologist's report on an access applicant to be disclosed to a nominated, approved psychologist, if direct disclosure to the access applicant might be prejudicial to his/her physical or mental health or wellbeing.

B40. **Recommendation:**

Consideration should be given to amending s.44(3) and s.44(4) in order to make clear provision in respect of the matters discussed above.

Section 45(3)

B41. This provision exempts matter which would disclose the purpose or results of research, in certain circumstances. It was not an exemption proposed by EARC or PCEAR, and it did not form part of the FOI Bill originally laid before Parliament. It was introduced by the Attorney-General at the Committee stage of debate on 5 August 1992. There was no discussion of the provision at that time. In my view, a reconsideration of the justification for, and appropriate limits of, this exemption is called for. On reading the provision (which appears to have been based on its NSW counterpart - see Sch.1, cl.8 of the NSW FOI Act) one is immediately struck by a problem of interpretation. Section 45(3)(b) requires that there be an adverse effect on the agency or other person "by or on whose behalf the research is being or is intended to be, carried out". The use of the words which I have underlined tends to suggest that the provision does not apply to research which has been completed. This approach would be in line with the corresponding provisions of Commonwealth and Victorian legislation (s.43A of the Commonwealth FOI Act and s.34(4)(b) of the Victorian FOI Act), which apply only to proposed research or research in progress. On the other hand, it does not sit comfortably with the wording of s.45(3)(a). Amendments clarifying the intended scope of the provision, in particular whether it is intended to extend to completed research, are necessary.

B42. I also have other concerns about s.45(3). At present, satisfaction of this exemption is considerably simpler than others contained in the Act. First, one need only establish an "adverse effect" rather than a "substantial adverse effect" (*cf.* s.40(c) and s.40(d)), or destruction or diminution of commercial value (*cf.* s.45(1)(b)). Secondly, there is no public interest test. Section 45(1) proceeds on the basis that disclosure of business information will be subject to a public interest test except in the relatively restricted circumstances where the information would reveal trade secrets or commercially valuable information. Even then, in the case of commercially valuable information other than trade secrets, a reasonable expectation of destruction or diminution of the value of the information must be established.

B43. I can see no reason why all documents which might disclose the purpose or results of research should be singled out for such cautious treatment. No doubt some documents of this type will contain highly sensitive material (which would probably qualify for exemption under either s.45(1)(a), s.45(1)(b) or s.45(1)(c), in any event) but there will also be many other documents where the adverse effect of disclosure will vary in degrees down to a minor effect. As the provision is currently worded, even the smallest adverse effect on an agency or other person will mean that the matter is exempt, notwithstanding that there may be overwhelming public interest factors in favour of disclosure. An agency could refuse disclosure of information created by it on the basis of some minor adverse effect on its operations, even if disclosure would bring to light information that it is manifestly in the public interest to disclose. I consider that this provision should be amended to include a public interest balancing test, operating in the same fashion as the one which qualifies s.45(1)(c). I would further suggest that the requirement be for a "substantial adverse effect" rather than merely an "adverse effect".

B44. **Recommendation:**

(a) Section 45(3) should be amended to clarify whether it extends to research which has been completed.

(b) Section 45(3) should be amended to include a public interest balancing test in the same terms as that which qualifies s.45(1)(c) of the FOI Act.

(c) The words "adverse effect" in s.45(3) should be amended to "substantial adverse effect".

Section 46(2)

B45. I explained the effect of s.46(2) in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at p.292 (paragraphs 35-36):

> *35. FOI administrators who approach the application of s.46 should direct their attention at the outset to s.46(2) which has the effect of excluding a substantial amount of information generated within government from the potential sphere of operation of the s.46(1)(a) and s.46(1)(b) exemptions. Subsection 46(2) provides in effect that the grounds of exemption in s.46(1)(a) and s.46(1)(b) are not available in respect of matter of a kind mentioned in s.41(1)(a) (which deals with matter relating to the deliberative processes of government) unless the disclosure of matter of a kind mentioned in s.41(1)(a) would found an action for breach of confidence owed to a person or body outside of the State of Queensland, an agency (as defined for the purposes of the FOI Act), or any official thereof, in his or her capacity as such an official. Section 46(2) refers not to matter of a kind that would be exempt under s.41(1), but to matter of a kind mentioned in s.41(1)(a). The material that could fall within the terms of s.41(1)(a) is quite extensive (see* Re Eccleston *at paragraphs 27-31) and can include for instance, material of a kind that is mentioned in s.41(2) (a provision which prescribes that certain kinds of matter likely to fall within s.41(1)(a) are not eligible for exemption under s.41(1) itself).*
>
> *36. The terms of s.46(2) actually render s.46(1)(b) redundant, for practical purposes, in respect of matter of a kind mentioned in s.41(1)(a). Even where matter of that kind was provided by a person or body outside the categories referred to in s.46(2)(a) and (b), s.46(2) stipulates that disclosure of the matter must found an action for breach of confidence owed to such a person or body. If that requirement can be satisfied, then s.46(1)(a) will apply, and the issue of whether s.46(1)(b) also applies is of academic interest only.*

B46. In general terms, the purpose of s.46(2) is to make deliberative process matter ineligible for exemption under s.46(1), unless the information has been provided by a source external to an agency (or at least a source not acting in the capacity of an officer of an agency in supplying the information). However, it is questionable whether the words "owed to a person or body other than

... a person in the capacity of ... an officer of an agency" achieve that aim in clear terms. I suggest that the slightly amended provision set out below would more clearly state the aim of s.46(2):

> ***(2)*** *Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless its disclosure would disclose* ***information communicated by*** *a person or body, other than* ***information communicated****—*
>
> *(a)* ***in the person's*** *capacity as—*
>
> *(i) a Minister; or*
>
> *(ii) a member of the staff of, or a consultant to, a Minister; or*
>
> *(iii) an officer of an agency; or*
>
> *(b)* ***by*** *the State or an agency.*

B47. I do not consider that removal of the reference to an action for breach of confidence from s.46(2) detracts from the essential purpose of the provision. The real question for determination in almost all cases involving s.46(2) will be whether the information was supplied by the source in his or her capacity as an officer of an agency. If the provision reflects this point it will be easier for users to comprehend.

B48. Re-wording of the provision in this manner would also dispose of what may be regarded as an anomaly in the present structure of s.46. The present wording of s.46(2) makes s.46(1)(b) redundant, for practical purposes, in cases where the matter in issue can be categorised as falling within s.41(1)(a). If matter is of that type, then the only way that either s.46(1)(a) or s.46(1)(b) can come into play, given the current wording of s.46(2), is if an action for breach of confidence would be successful. However, that is the very test for exemption under s.46(1)(a), so either s.46(1)(a) will be satisfied and there will be no need to look at s.46(1)(b), or s.46(1)(a) will not be satisfied and so s.46(1)(b) will be ruled out by the very terms of s.46(2). In either event, s.46(1)(b) has no useful role to play. This may (with good reason) sound confusing, but in essence it means that s.46(1)(b) is rendered redundant when the information in issue is matter of a kind mentioned in s.41(1)(a) of the FOI Act. It is not clear that this was an intended result of the wording of s.46(2). The above amendment would remove this restriction.

B49. **Recommendation:**

Section 46(2) should be amended in the manner set out above.

Section 47(2)

B50. A recent review involving claims for exemption made by Queensland Treasury under s.47 has led me to the view that s.47(2) has been incorrectly drafted and requires amendment.

B51. On a literal interpretation of s.47(2) in its present form, matter the disclosure of which would reveal the consideration of a contemplated movement in government taxes, fees or charges, or the imposition of credit controls, falls automatically within the terms of s.47(1)(a), and hence is

prima facie exempt subject to the application of the public interest balancing test incorporated in s.47(1); i.e., the requirement under the terms of s.47(1)(a) itself to demonstrate that disclosure of the matter in issue would have a substantial adverse effect on the ability of the government to manage the economy of the State, is bypassed in the case of matter that answers the description in s.47(2). I do not consider that that could have been the intention of the provision. For instance, a contemplated movement in government taxes, fees or charges may already have been officially announced (e.g., proposals for abolition of state taxes and charges if a GST is introduced by the Commonwealth Parliament), but information analysing the nature of those changes, would still answer the description in s.47(2)(a), even though its disclosure may have no adverse effect on the ability of the government to manage the economy of the State. No doubt it was intended that matter of the kind described in s.47(2) may fall within s.47(1)(a), but it should still be necessary to demonstrate that its disclosure could reasonably be expected to have the required substantial adverse effect.

B52. **Recommendation:**

Section 47(2) should be amended in terms that accord with the corresponding provision in the Commonwealth FOI Act (s.44(2)), so that it reads:

47.(2) The type of matter to which subsection (1)(a) may apply includes, but is not limited to, matter the disclosure of which would reveal —

(a) the consideration of a contemplated movement in government taxes, fees or charges; or

(b) the imposition of credit controls.

Section 50(b)

B53. Section 50(b) provides that matter is exempt matter if its disclosure would be contrary to an order made or direction given by a royal commission or commission of inquiry, or a person or body having power to take evidence on oath.

B54. I consider that s.50(b) is too widely drafted at present. The term "commission of inquiry" in s.50(b)(i) may cover a wide range of boards, tribunals and investigative committees established to investigate and deliver findings about a variety of matters, if, when performing certain functions, those bodies are deemed (under a provision in their constituting statute) to be commissions of inquiry within the meaning of the Commissions of Inquiry Acts 1950 (see my decision in *Re Bayliss and Medical Board of Queensland* (1997) 3 QAR 489 at paragraphs 31-34). The deeming is a drafting device which has been used in Queensland legislation as a shorthand device for conferring powers and immunities on a body which is given a function of conducting investigations, inquiries or hearings. For example, s.13 of the *Medical Act 1939* provides that, for the purpose of hearing any application or making any investigation or holding any inquiry into any matter under the Medical Act, the Medical Board shall be deemed to be a commission of inquiry within the meaning of the *Commissions of Inquiry Acts*. For examples of similar provisions, see s.159 of the *Corrective Services Act 1988*, s.44(1) of the *Education (Teacher Registration Act) 1988*, s.29 of the *Veterinary Surgeons Act 1936*, and s.29(1) of the *Tow Truck Act 1973*.

B55. Usually such bodies also have power to take evidence on oath and hence also fall within the terms of s.50(b)(ii). For example, s.12(1) of the *Medical Act* provides that the Medical Board may, for the purposes of the Act, examine any person on oath. Section 6(2G) of the *Law Society Act 1952* provides that a statutory committee (which is established for the hearing of charges of malpractice, professional misconduct or unprofessional conduct against a solicitor) has the power to take evidence on oath.

B56. Section 16 of the *Commissions of Inquiry Acts* gives a general power to make non-publication orders in respect of certain material which is placed before the commission of inquiry. I have had no occasion to consider a non-publication order made by a commission of inquiry issued by the Governor in Council. However, in several cases involving lesser bodies whose non-publication orders are covered s.50(b), I have found that their non-publication orders have been made in terms that are too broad (e.g. simply prohibiting disclosure), and do not admit of logical exceptions, such as disclosure to those parties who are directly involved in the relevant hearing. For example, investigative committees established under the *Medical Act* to investigate complaints by members of the public against medical practitioners (and which are deemed to be commissions of inquiry for that purpose), ordinarily make blanket non-publication orders regarding the evidence and material considered by the commission during the hearing. According to their literal terms, those orders prevent disclosure of that material even to the person whose complaint initiated the investigation, and such persons have subsequently been refused access to information of that kind under s.50(b) of the FOI Act. Moreover, no attention is given to the appropriate duration of a non-publication order. No occasion may arise for the body to later revisit that issue, and consider whether the non-publication order should now be rescinded. Unless rescinded or varied, the order will continue to have legal effect, and render information exempt under s.50(b) *ad infinitum*, no matter that any sensitivity, or reason for making the initial non-publication order, has long since vanished with the passage of time.

B57. At present my powers on a review of an agency decision that matter is exempt under s.50(b) of the FOI Act are confined to determining whether the matter in issue is covered by the terms of a legally valid order or direction made by a body answering the descriptions in s.50(b)(i) or (ii) of the FOI Act. If so, the matter in issue is exempt. In my view, this can lead, and has led, to patently unjust results.

B58. I recommend that s.50 be amended to permit review of the order or direction (other than those made by a royal commission or a commission of inquiry issued by the Governor in Council) on which a claim for exemption under s.50(b) is based, if the Information Commissioner considers that no sufficient ground exists for the continuation of an order or direction prohibiting disclosure of the matter in issue to the applicant for access.

B59. One way of doing this would be to add a new subsection to s.50 to provide that if, on a review under Part 5 of the FOI Act of a decision that matter is exempt under s.50(b) of the FOI Act, and after consulting the person or body (or the successor of that person or body) of the kind referred to in s.50(b)(ii), which made the relevant order or direction of the kind referred to in s.50(b), the Information Commissioner forms the view that the order or direction should be rescinded or amended so as to permit disclosure to the applicant for access of the matter in issue, in whole or in part, the Information Commissioner may make a recommendation to that effect to the relevant person or body (or successor thereof), accompanied by the Information Commissioner's reasons for making that recommendation. The relevant person or body (or successor thereof) should then

be required to make a decision, within 28 days, as to whether or not it is prepared to rescind or amend the relevant order or direction in accordance with the Information Commissioner's recommendation, and in the event that it declines to accept the Information Commissioner's recommendation in full or in part, should be required to publish its reasons for doing so.

B60. Where the person or body (other than a royal commission, or commission of inquiry issued by the Governor in Council) which made the relevant order or direction under s.50(b) has ceased to exist, and there is no successor body, the Information Commissioner could be given the legislative authority, after consulting with any affected person, to decide to rescind or amend the relevant order or direction, having regard to whether any valid reasons warrant the continuation of the relevant order or direction.

B61. This approach would require that the scope of s.50(b)(i) be limited so that it applies only to royal commissions, or to properly constituted commissions of inquiry issued by the Governor in Council (*cf.* s.11(1)(i) of the FOI Act). That would prevent investigative bodies which are simply deemed to have some of the powers of a commission of inquiry under the Commissions of Inquiry Acts, from falling within the terms of s.50(b)(i), and, as bodies covered by s.50(b)(ii), they would be subject to the proposed new provision outlined above.

B62. As indicated above, I am not proposing that the suggested new provisions apply in respect of non-publication orders made by a Royal Commission or a commission of inquiry issued by the Governor in Council. However, if it was considered appropriate to do so, that could be effected by applying the proposed new provision to both limbs s.50(b), and by defining the successor of such a body to be the Minister for Justice, for the purposes of the operation of the proposal outlined above.

B63. **Recommendation**:

(a) Section 50 of the FOI Act should be amended in the manner outlined above, in order to deal with problems in the scope and operation of s.50(b) in its current form.

(b) The Committee should recommend that the Office of Parliamentary Counsel consult with the Information Commissioner (as well as the instructing Department) concerning the form of the proposed amendments.

Term of Reference B(iii): Whether the FOI Act should be amended, and in particular:

...

(iii) whether the ambit of the application of the Act, both generally and by operation of s.11 and s.11A, should be narrowed or extended:

Introduction

B64. The ambit of the application of the FOI Act requires extension, not narrowing, and furthermore the basis on which exclusion from the application of the FOI Act is conferred and effected requires thorough scrutiny, and, in my view, remedial measures.

B65. The obligations imposed by the FOI Act apply to agencies, as defined by s.8 and s.9 of the FOI Act. Many bodies which answer the relevant statutory description have been conferred with exclusion from the application of the FOI Act, either generally or in respect of documents relating to specified activities. Exclusions and partial exclusions appear to have been granted on an ad hoc basis, reflecting no (or at least no discernible) consistent policy approach.

B66. Exclusions have been effected under s.11(1), s.11A, s.11B, and regulations made under s.11(1)(q), of the FOI Act, and in some instances by legislative provision other than the FOI Act or the FOI Regulation (see paragraph 3.15 of my 5th Annual Report 1996/97) which has the vice that a citizen may not be able to rely merely on the terms of the FOI Act and the FOI Regulation to ascertain accurately the full extent of the rights (and limitations thereon) that they confer.

B67. I confidently predict that the Committee will receive a rash of submissions from bodies seeking exclusion from the application of the FOI Act (such that my prediction in paragraph 3.63 of my 3rd Annual Report (1994/95) that the FOI Act is in danger of dying the death of a thousand cuts, when taken together with the additional exclusions from the FOI Act made since that time, will be shown to have involved only moderate exaggeration).

B68. Any claim for exclusion should be carefully vetted, in light of the principles adverted to in paragraphs A1-A8 and A11 of this submission. Importantly, if exclusion is found to be warranted, it should be effected in a proper, balanced and fair manner, and not by use of the unjustifiable method that has been employed in s.11A and s.11B of the FOI Act. The rationale for corporatisation of the bodies engaged in the performance of certain functions undertaken by State and local government in Queensland has been permitted to miscarry in the provisions made by s.11A and s.11B of the FOI Act. I consider that I have argued my case in respect of that issue as well as I am able to in the relevant paragraphs from my 3rd, 4th and 5th Annual Reports, which I have extracted and attached for ease of reference by the Committee as Attachment B (iii)1 to this submission.

B69. GOCs are government bodies which, pursuant to the *Government Owned Corporations Act 1993* Qld, have undergone a structural reform process whereby they are intended to operate as a corporate body on a commercial basis in a competitive environment. Section 16 of the Government Owned Corporations Act provides:

> ***16. "Corporatisation"*** *is a structural reform process for nominated government entities that—*

> *(a) changes the conditions and (where required) the structure under which the entities operate so that they operate, as far as practicable, on a commercial basis and in a competitive environment; ...*

The corporatisation of government functions accords with the national competition policy which aims to ensure that private and public bodies are able to compete for business on a 'level playing field'.

B70. The ALRC/ARC Report examined the arguments for and against applying the obligations of the Commonwealth FOI Act to Government Business Enterprises (GBEs), the Commonwealth equivalent of GOCs. I summarised those arguments at paragraph 3.66 of my 3rd Annual Report (1994/95). In essence, the proponents of corporatisation would argue that in order for GOCs to operate on a 'level playing field' with their private sector competitors they should be free from the additional administrative and financial burdens occasioned by compliance with obligations imposed by FOI legislation. (Query, then, why a body covered by s.11A or s.11B of the FOI Act should require any special treatment if it has no direct competitors.)

B71. I believe there are much stronger arguments for ensuring that administrative law mechanisms, including FOI obligations, continue to apply to GOCs (see paragraph 3.67 of my 3rd Annual Report). The objectives of FOI legislation (see paragraphs A1-A7 above) do not become irrelevant as a consequence of the creation of a GOC, rather there is a question of the degree and type of accountability required in the particular circumstances.

B72. Moreover, where GOCs perform services in the nature of community service obligations (CSOs), which many GOCs have a statutory obligation to perform (and are generally provided with an extra budgetary allocation to do so), it is important that avenues of accountability like FOI legislation should apply to enable scrutiny of whether those services are carried out adequately to meet public and individual needs.

B73. Corporatisation essentially represents a choice by the executive government that a function it has previously carried on, with publicly-owned assets for the benefit of the public, would be more efficiently and effectively performed by a publicly-owned entity operating (as nearly as practicable) according to the principles on which private sector business enterprises operate. In my view, this makes the principles discussed at paragraphs A1-A7 of this submission no less applicable to such a body. The High Court of Australia held no doubts in that regard when, in its unanimous judgment in *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, it said (at p.107):

> *... Similarly, those provisions which prescribe the system of responsible government necessarily imply a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal parliament. Moreover, the conduct of the executive branch is not confined to ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a minister who is responsible to the legislature.*

B74. There is no logical reason why a body of the kind described in the preceding paragraph should be any less accountable to its ultimate owners, the electors and taxpayers of Queensland (or the electors and ratepayers of a particular local government authority, in the case of a body covered by s.11B of the FOI Act), for the efficient and effective performance of its functions, through the elected representatives of the people who are furnished with information on that performance in their capacity as the nominal shareholders or owners of the corporatised, but publicly-owned entity. Yet it has been agued in a case before me (that was settled without the need for a formal decision) that information on the performance of the commercial activities of a body covered by s.11A of the FOI Act, even when held in the possession of a Minister (official documents of a Minister are, of course, ordinarily subject to the application of the FOI Act), was excluded from the application of the FOI Act under the terms of s.11A of the FOI Act and related provisions. (If that argument is correct, it would apply also to information on the performance of a body covered by s.11B of the FOI Act that was in the possession of a local government authority.)

B75. There is no logical reason why information as to compliance by a publicly-owned entity with a government regulatory scheme, that applies alike to the entity and its privately-owned competitors, should not be available (subject to the application of the general exemption provisions in Part 3, Division 2 of the FOI Act) to any interested member of the public; and yet, if the arguments put to me in the case referred to in the preceding paragraph are correct, such information would be excluded from the application of the FOI Act if it was received or brought into existence in carrying out a GOC's commercial activities.

B76. There is no logical reason why documents relating to the compulsory acquisition of land (which, from the viewpoint of the affected citizen, is one of the most intrusive powers that the executive government is entitled to employ), by a GOC for the furtherance of its commercial activities, should not be available to the affected landowner under the FOI Act (whereas it is clear that information relating to the compulsory acquisition of land by Education Queensland for the purpose of building a school, or by the Department of Transport for the purpose of widening a major road, would be available under the FOI Act to the affected landowners: see, respectively, *Re Little and Department of Natural Resources* (1996) 3 QAR 170 and *Re Hopkins and Department of Transport* (1995) 3 QAR 59); yet arguments have been put to me (again in a case that was settled and did not require a formal decision) that such information is excluded from the application of the FOI Act by the terms of s.11A and related provisions.

B77. Bodies covered by s.11A and s.11B of the FOI Act receive more favourable treatment vis-à-vis the application of the FOI Act than would be received by a former public authority which has been completely privatised, i.e., sold off into private ownership (*cf.* paragraph 3.61 of my 3rd Annual Report 1994/95).

B78. If it is desired, as a matter of policy, to equate the position of bodies now covered by s.11A and s.11B of the FOI Act with that of private sector corporations, then s.11A, s.11B, and Schedule 2 of the FOI Act should be repealed (and any necessary consequential amendments made to complementary legislation) and those bodies should be named in separate paragraphs of s.11(1). If exclusion of all of the activities of such a body is not considered necessary, then those bodies which operate in a competitive commercial market should be named in separate paragraphs of s.11(1) according to the following verbal formula: "(name of body) in respect of documents in relation to its competitive commercial activities." (It might also be thought desirable to clarify some of the grey areas which would still remain, e.g., whether employees of a body with an

exclusion for documents related to its competitive commercial activities are intended to have the right to seek access under the FOI Act to documents relating to their employment affairs.)

Outsourcing

B79. I briefly adverted to this issue on p.21 of my 6th Annual Report (1997/98): see attachment B(iii)2. A new development in recent years has been the propensity of governments to outsource, or contract out, the performance of government services. The ARC's Report No. 42, *The Contracting out of Government Services - Access to Information*, made some recommendations concerning whether it was possible to obtain information held by private contractors when particular government functions are contracted out.

B80. The ARC Report presented five options for ensuring that information relating to service delivery was not rendered inaccessible by virtue of it being held by private contractors rather than government agencies. The ARC favoured the option that the Commonwealth FOI Act be amended to deem documents in the possession of the contractor, that relate directly to the performance of their contractual obligations, to be in the possession of the government agency. Information of that type would then be accessible, subject to relevant exemption provisions. This would ensure access to documents, scrutiny of which would serve to enhance accountability of the government agency and the contractor for the quality of the service provided but protect documents not directly related to the performance of the contract (such as records of suppliers and similar commercially sensitive material) from disclosure. This latter proposal was favoured also by the Senate Finance and Public Administration References Committee's Second Report, presented on 14 May 1998.

B81. I note that the proposed UK FOI Bill is intended to cover contracts for government services with private contractors. It is not yet clear whether information relating to those contracts will also be included as no specific provision has been made in the Bill to cover this situation. The New Zealand approach is similar to one of the options put forward by the ARC Report. The *Official Information Act NZ* provides that any information held by an independent contractor engaged in performing services for government shall be deemed to be held by the government organisation. Similar legislative provision is made for local authorities.

B82. In my 6th Annual Report (p.21), I noted that the success of the suggested approach to the Commonwealth FOI Act would be dependent on all contracts imposing obligations on the contractor to create appropriate records and to provide them to the government agency, with periodic auditing of the contractor's adherence to its record-keeping obligations. I commented that early attention was needed to develop appropriate solutions in the ability of the Queensland FOI Act to apply to information held by private contractors with government agencies. I note that the WA Information Commissioner has also expressed concern about this matter.

B83. Section 7 of the Queensland FOI Act defines "document of an agency" quite broadly so as to include "a document to which the agency is entitled to access". However, entitlement to access a document must derive from some statutory or contractual right. In many cases, a determination of whether a document is one that the agency is entitled to access may well depend upon interpretation of contractual terms and, sometimes, the operation of difficult principles of

common law. I would prefer an express provision to be included in the FOI Act to address this particular situation.

Term of reference B(iv): **Whether the FOI Act should be amended, and in particular:**

…

(iv) whether the FOI Act allows appropriate access to information in electronic and non-paper formats.

Introduction

B84. Since the enactment of the FOI Act in 1992, there have been rapid advances in information technology, which have significantly altered the manner in which government agencies collect, create, manage and disseminate information. Increasingly, agencies are utilising computer networks and databases, and communication tools such as electronic mail (e-mail) and voice-mail in the performance of their functions. The question is whether the FOI Act, as presently framed, adequately takes into account the particular considerations which arise in the context of information which is held by government in electronic, magnetic or other non-paper formats:

> *As electronic databases become more sophisticated, they resemble information 'pools' rather than discrete documents. Drawing analogies … between paper documents and electronic information is often troublesome. When a 'paper statute' is applied in an era of electronic information, its original ideals can become difficult to carry out. Ironically, the powerful new systems designed to store, process and retrieve vast amounts of data may thwart public access to government information.* [*Grodsky*, "The Freedom of Information Act in the Electronic Age: the Statute is Not User Friendly", (1990) 31 *Jurimetrics Journal* 17 at 19.]

B85. The only Australasian FOI statute that appears to have adverted to the prospect that non-paper records may pose special difficulties and require special treatment is the Western Australian FOI Act, which in s.112 relevantly provides:

> ***112.(1)*** *The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for achieving the objects and giving effect to the purposes of this Act.*
>
> …
>
> ***(4)*** *Without limiting subsection (1), regulations may be made —*
>
> *(a) as to the way in which access applications and applications for amendment relating to electronically stored information may be dealt with and as to the way in which access to such information may be provided and the way in which such information may be amended;*
>
> …

However, to the best of my knowledge, no such regulations have been promulgated.

Rights of access under the FOI Act

B86. Section 4 of the FOI Act sets out the object of the Act:

> ***4.*** *The object of this Act is to extend as far as possible the right of the community to have access to information held by Queensland government.*

B87. However, despite the use of the term "information" in s.4 of the FOI Act (and in the title of the Act), other provisions of the Act, most notably, section 21 and section 25(1), make it clear that the right of access conferred by the FOI Act is not a right of access to information *per se*, but a right of access to information contained in the form of documents which exist in the possession or control of a particular agency or Minister, at the time that a valid access application is lodged with that agency or Minister.

The definition of "document"

B88. Section 7 of the FOI Act contains the following relevant definition:

> ***7.*** *In this Act—*
>
> …
>
> ***"document"*** *includes—*
>
> *(a) a copy of a document; and*
> *(b) a part of, or extract from, a document; and*
> *(c) a copy of a part of, or extract from, a document.*

B89. A broader definition is contained in s.36 of the *Acts Interpretation Act 1954* Qld:

> ***36.*** *In an Act—*
>
> ***"document"*** *includes—*
>
> *(a) any paper or other material on which there is writing; and*
>
> *(b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and*
>
> *(c) any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device).*

B90. Although neither of the definitions of the word "document", quoted above, is exhaustive, it is clear that the word "document" is intended to refer to something whose purpose is to record or convey information, sounds, images et cetera. As defined, it would appear that the term "document" encompasses a wide variety of electronic or non-paper formats (e.g. audio and video

tapes, cine-film, microfilm and microfiche, x-rays, and data disks (hard disks, floppy disks and CD-ROMs.)

B91. Information stored in a computer, either as discrete documents or as disparate segments of data, and any information derived from such discrete documents or segments of data, would fall within the extended definition of "document" contained in s.36 of the *Acts Interpretation Act.* However, for the sake of certainty, and ease of reference by those involved in processing FOI access applications, and members of the community seeking to utilise the Act, it would be preferable to include the extended definition of "document" in the FOI Act itself.

B92. **Recommendation:**

The definition of "document" in section 7 of the FOI Act should be amended to read:

*"**document**" includes—*

(a) any paper or other material on which there is writing; and

(b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and

(c) any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device); and

(d) a copy of a document; and

(e) a part of, or extract from, a document; and

(f) a copy of a part of, or extract from, a document.

Identifying and locating documents

B93. The first difficulty faced by an agency or Minister in responding to an FOI access application is to identify and locate all records falling within the scope of the application. Section s.25(2) of the Act relevantly provides :

***(2)** The application must—*

…

(b) provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency or the Minister to identify the document.

B94. It is implicit in the wording of s.25(2)(b) of the FOI Act that, in dealing with an FOI access application, an agency or Minister must make reasonable efforts to identify all relevant documents containing matter which falls within the scope of the FOI access application. This may prove to be particularly difficult, in the case of documents held in electronic and other non-traditional, non-paper formats, where the matter sought may exist in various formats, not only in paper files, but also on hard disks, floppy disks, servers and backup tapes. The officer undertaking a search must be sufficiently familiar with the agency's electronic data storage systems, in particular the mechanisms for the saving, archiving, deletion and backup of data, to understand where relevant matter might reasonably be found, and how such matter can be retrieved. Similarly, an applicant who is unfamiliar with the particular manner in which an agency organises its non-paper records will likely not be in a position to determine whether the agency's search efforts for relevant matter have been reasonable in all the circumstances.

B95. The degree of effort which constitutes a reasonable search will vary from case to case, and depend in large part on the manner in which agency records are organised and indexed, and the document management resources which are available to the agency concerned to facilitate search efforts. An applicant should not be disadvantaged because of apparent deficiencies in an agency's record management systems, which lead to relevant information not being identified and dealt with in response to an FOI access application. Agencies should be encouraged to utilise database software and other indexing tools to improve the efficiency and thoroughness of searches for information stored electronically, for the benefit of all concerned.

B96. There has been exponential growth in the use of e-mail systems in the past few years. While e-mail undoubtedly has benefits in terms of speed of communication, it also provides particular problems in the context of FOI:

> *Electronic mail is significant for FOI in that it allows data to be created, transmitted, processed, analysed, archived, and disposed of electronically, without paper printouts.* [From "FOI access to electronic records", Campbell, M (1995) 59 *Freedom of Information Review* 70, at 74]

B97. Another relatively new, but rapidly proliferating, office technology to which the same considerations apply is voice-mail. The intangible nature of communications carried out by e-mail or voice-mail may lead agency staff (intentionally or otherwise) to exclude them from consideration in identifying "documents" which are responsive to an FOI access application. E-mail and voice-mail messages can easily be deleted by the recipient, thereby potentially thwarting an access applicant's right of access to the information they contain.

B98. Further, both e-mail and voice-mail are often used for routine communications, of which it is considered no lasting record need be kept. At least so far as e-mail is concerned, it must be recognised that its storage ties up valuable computer resources, and that if a lasting record is required, a printed copy can be generated for placement on the relevant file. These considerations may influence the decisions taken by officers of agencies regarding the storage and archiving of such records of communication.

B99. I consider it essential that agencies implement protocols regarding document naming, storage and archiving, and educate their staff about the applicable statutory provisions in the *Libraries and Archives Act 1988* Qld (and relevant agency record retention and disposal schedules made thereunder), in order to maximise the efficiency with which documents falling within the scope of an FOI access application can be identified and located.

Retrieval

B100. Even after all relevant documents have been identified and located, an agency may still encounter significant difficulties in retrieving those documents in order to make a determination regarding access to them. This is particularly so in the case of information held in electronic form, for instance in situations in which an agency has upgraded its computer resources, and can no longer access the relevant information, or where information has been password-protected or encrypted by an individual who is no longer employed by the agency.

B101. Particular practical difficulties also arise regarding backup tapes, in light of the purpose for which such tapes are created, and the manner in which the information they contain is recorded. The Information and Privacy Commissioner of British Columbia, Canada has considered on at least four occasions the question of whether an agency was required to conduct a search of backup tapes containing deleted e-mail messages (i.e., after the messages in question had been deleted by the sender or recipient). In the Commissioner's view:

> [T]*he purpose of systems backup for any digital records is the recovery of a system from a major crash, the electronic equivalent of trying to get an office operating again after an earthquake or a fire. It recreates the system to the point in time when the disaster occurred. Such backup for disaster recovery … is not like the normal filing drawers of a public body and should not be accessible under the Act in the same way as a filing cabinet, hard-copy, or computer tape records stored in off-site storage.* (Information and Privacy Commissioner (B.C.), Order No. 73-1995, December 21, 1995, unreported).

B102. While such systems backup tapes do come within the extended definition of "document", for the purposes of the FOI Act, for the reasons quoted above, it is questionable whether such tapes ought to be caught by the terms of the FOI Act.

B103. **Recommendation:**

> **Consideration should be given to excluding backup tapes, kept by agencies for 'disaster recovery' purposes, from the scope of the definition of "document" for the purposes of the FOI Act.**

Forms of Access

B104. Having regard to the terms of s.21 and s.25 of the FOI Act, it is clear that (subject to the qualification explained in paragraph B106 below), an agency or Minister is not obliged to create a new document in order to provide information requested by an access applicant - an agency or Minister is only obliged to locate existing documents in its possession or control, which fall within the terms of a valid access application under s.25 of the FOI Act (and to make the

decisions, in respect of any documents thus located, that are required under the provisions of the FOI Act).

B105. However, information held in electronic and other non-paper formats may, in many cases, not exist in any discrete or tangible form, but rather as segments of data scattered throughout a computer storage device, or across a computer network. A "document", as such, may not exist without the synthesis of raw data into a comprehensible form, which may require some degree of data programming or manipulation. Absent some special provision, agencies could contend that the programming or manipulation required to generate information in an intelligible written format constituted the creation of a document, and was therefore beyond the scope of the obligations imposed by the FOI Act.

B106. Thus, the forms of access provided for in s.30(1) of the FOI Act include an exception to the general statement of principle set out in paragraph B104 above; i.e., s.30(1)(e), which describes particular circumstances in which an agency will be required to create a new written document in response to an FOI access application:

> ***30.(1)*** *Access to a document may be given to a person in one or more of the following forms—*
>
> *...*
>
> *(e) if—*
>
> *(i) the application relates to information that is not contained in a written document held by the agency; and*
>
> *(ii) the agency could create a written document containing the information using equipment that is usually available to it for retrieving or collating stored information;*
>
> *providing a written document so created.*

B107. It is important to note that section 30(1)(e) only applies when the access application relates to information that is not contained in a written document held by the agency. The most obvious example of this is the storage of information in a computer file or database. Secondly, s.30(1)(e)(ii) requires an examination of a factual issue as to whether, in the particular circumstances of a given case, the relevant agency could create a written document, containing the information requested in the FOI access application, using equipment that is usually available to it for retrieving or collating stored information.

B108. Several specific issues arise in connection with the wording of s.30(1)(e).

(a) Applicability to a Minister

B109. In contrast to other provisions of the FOI Act (e.g. s.26, s.29), and, indeed, other portions of s.30 (e.g. s.30(3)(a)), which make it clear that they apply both to agencies and to Ministers, s.30(1)(e) speaks only of an "agency". Arguably, therefore, Ministers are not subject to the obligation to

create a document in the circumstances set out in s.30(1)(e), but are only amenable to the other forms of access specified in s.30(1) of the FOI Act. Was this really a result that Parliament intended, and, if so, what is the rationale for the differential treatment of agencies and Ministers in this respect?

B110. **Recommendation:**

Section 30 should be amended by inserting a new subsection (1):

30(1) In this section—

"agency" includes a Minister.

(b) Interpretation of phrase "equipment that is usually available"

B111. The term "usually available" imposes a significant qualification on the entitlement of an FOI access applicant to seek specific information from a computer database or other repository of stored information. It means, in effect, that it must be possible to retrieve or collate the information requested by an FOI access applicant using equipment (including computer programs or software) already in place, or otherwise usually available, to undertake the performance of the agency's functions. In other words, s.30(1)(e) imposes no requirement on an agency to obtain additional equipment or to re-program existing equipment, or (for example) write a specific program to enable a database to be interrogated, in order to respond to an FOI access application.

B112. However, it is possible that an agency which upgrades its computer hardware or software resources, and in the course of so doing, divests itself of the particular equipment which was previously utilised in the creation or manipulation of data, could argue that the necessary equipment is no longer "usually available" to the agency, thus relieving the agency of the obligation to produce the requested written document. In addition to routine upgrading of the type discussed above, it is also possible (though hopefully, it would not occur) that an agency which had reason to believe that data recorded in electronic form might become the subject of an FOI access application, and did not wish to provide access to that data, could intentionally divest itself of the particular type of equipment which was utilised previously to create, or retrieve, data of the kind sought. If the agency no longer had the relevant equipment at the time it came to determine the FOI access application, it could contend that the necessary equipment was not "usually available" to the agency, and thus circumvent its disclosure obligations under the FOI Act.

B113. Further, given its ordinary meaning, the term "equipment" would seem to extend only to the physical resources of the agency (i.e., computer hardware and software), and not to the agency's personnel. Does this mean that an agency which had the necessary equipment, but no personnel with the necessary expertise to create the required written document by using that equipment, must incur the cost of engaging the services of an individual with the required expertise to undertake the necessary work using the agency’s equipment, in order to produce the required written document?

B114. **Recommendation:**

The present s.30(1)(e)(ii) should be amended by replacing the word "equipment" with the words "equipment and technical expertise".

B115. If the information requested did not concern the personal affairs of the access applicant, then (provided an appropriate regulation is made: see paragraph B137 below) the agency would be entitled to charge the access applicant for the reasonable costs incurred in providing a written document under s.30(1)(e) of the FOI Act: see s.29(3)(c)(iv) of the FOI Act and s.7(1) of the *Freedom of Information Regulation 1992* Qld (the FOI Regulation). However, if the information requested did concern the personal affairs of the access applicant, the agency would not be entitled to charge for what could be considerable costs involved in retrieving stored information: see s.7(2) of the FOI Regulation.

(c) Interpretation of the phrase "written document"

B116. Under the terms of s.30(1)(e)(ii) of the FOI Act, an agency is obliged to create a "written document" from stored information that is not contained in a written document already held by the agency. The question then is what constitutes a "written document" for the purposes of section 30(1)(e)? Section 36 of the *Acts Interpretation Act* contains the following relevant definition:

> *"**writing**" includes any mode of representing or reproducing words in a visible form.*

B117. However, it is unclear whether the terms of s.30(1)(e) would extend to the creation of a document in any formats other than handwriting, typewriting, or a computer printout (as opposed to, for instance, supplying the requested information on a computer disk or CD-ROM, which may be preferable for large amounts of information).

(d) Specifying a particular format?

B118. Section 30(1)(e) merely requires that an agency provide a written document "containing the information"; it says nothing about the particular format in which that document is to be created. It therefore leaves open the question of whether an applicant can request that the written document be generated in a particular format, or alternatively, whether it is left to the discretion of the agency concerned (either of which situations could potentially lead to abuse). As an extreme example, could an agency intentionally create the written document required under s.30(1)(e)((ii) in a particular format which would be unintelligible to the applicant (e.g. a written version of raw binary code, or written in a foreign language)?

B119. Such difficulties could be addressed by redrafting s.30(1)(e) in terms similar to those set out in s.27(1)(g) of the *Freedom of Information Act 1992* WA.

B120. **Recommendation:**

The present s.30(1)(e) should be amended by adding, after the words "providing a written document so created", the words "in the form in which it is commonly available in the agency, or if there is no such common form, then in a form no less comprehensible than could be made available to the agency.

Other practical problems with forms of access

B121. Many agencies are increasingly moving toward the 'paperless office' concept, in which records are created, managed, stored and disseminated without any paper ('hard-copy') version being created. Such records create practical difficulties for the processing of FOI access applications, as the records must be retrieved by the officer having responsibility for making a decision on the applicant's right of access to the information in those records.

B122. Because the FOI decision-maker may not have security privileges to access the relevant electronic record collections, it may be necessary for that person to request that a paper copy of the electronic records be generated, by the person having carriage of the matter on behalf of the agency, for review by the FOI decision-maker. Since electronic records are arguably more susceptible to alteration than paper records, it would be possible for an employee who wished to thwart an applicant's right of access to particular information to delete or alter that information prior to the production of a hard-copy of the relevant records for review by the FOI decision-maker. (See my comments below about the possibility of including in the Act an offence provision to address this situation.)

B123. Further, once a decision has been made in respect of an FOI access application for information held in electronic form, there may be practical difficulties for the agency in identifying which records have been the subject of an FOI access application, and which portions of those records were released, and which were claimed to be exempt from access.

B124. While on-line access to records may be advantageous for an agency in terms of reduced resource implications (i.e., removing the obligation to generate a hard-copy of information held electronically), the countervailing consideration is the practical problem of deleting exempt matter, or matter which does not fall within the terms of an FOI access application, from the material made available for on-line inspection.

B125. A further relevant consideration, in my view, is the recognition that information stored in electronic form is potentially subject to manipulation and analysis not normally possible with paper records. Thus, information which would not be invasive of personal privacy or otherwise sensitive if made available on an individual basis could arguably be highly sensitive if made available in bulk (whether in electronic or paper form). A computer database could be generated from information provided in electronic form, which would allow information recorded in discrete data fields to be readily searched, sorted and manipulated in ways not otherwise possible, for a variety of purposes which may be entirely inconsistent with the original purpose for which the information was collected or created by government. Through the use of scanning technology, the same sort of data analysis and manipulation would be possible in the case of information released in bulk hard-copy format.

B126. Difficulties of the type adverted to above were addressed by the Information and Privacy Commissioner of the Province of Ontario, in a case involving a request for access to particulars concerning every licensed physician in Ontario, from information compiled by the body having statutory authority for regulating the medical profession, and contained in a database held by the Ministry of Health. The specific details sought by the access applicant included: the name, address, year medical degree obtained, specialty, telephone number, facsimile transmission number, and status (not limited to, but including whether "student-post-graduate, active in practise, terminated, terms and conditions". In opposing release of the information sought, the Ministry of Health submitted that:

> *[Anyone who obtains access to the requested information] could compile a list of all [College] members in active practice with a specialty in obstetrics and gynecology along with their addresses. It is a simple matter to discover which address represents the locations of abortion clinics. It is also a simple matter to match the residential addresses of these individuals. One could then create a website for posting on the Internet of the names, residential and business addresses of [College] members performing abortions.*
> (Information and Privacy Commissioner Ontario, Order P-1635, 30 December 1998, T Mitchinson, Assistant Commissioner).

B127. A similar process of 'data matching' could easily be undertaken in Queensland, with registration information held by the Medical Board of Queensland. Information concerning an individual medical practitioner may well be made available to an access applicant, with a view to assisting in the making of informed decisions regarding medical treatment. However, access to the same type of information in bulk form could well lead to manipulation and analysis of the information in the manner described above, with possible consequences for the privacy rights or safety of the individuals concerned.

B128. Such concerns may provide a valid basis, in certain circumstances, to permit an agency to provide access in the form of its choice. However, such a situation would not fall within the scope of any of the specific circumstances in which an agency can refuse to grant access in the form requested by an access applicant (as provided for in s.30(3) of the FOI Act).

B129. While the 'forms of access' issues which I have addressed above have not, to my knowledge, caused major difficulties to date, they may become more significant in light of the increasing utilisation of a wide variety of information technologies in the delivery of government services. At present, disputes over the form of access to documents under the FOI Act do not fall within my review jurisdiction under Part 5 of the FOI Act. Under s.71(1)(b) of the FOI Act, I have jurisdiction to review decisions "refusing to grant access to documents in accordance with applications under section 25". However, the categories of reviewable decisions set out in s.71 of the FOI Act do not include decisions to grant access to particular information or documents (other than at the instigation of a person who was, or should have been, consulted under s.51 of the FOI Act, and who wishes to pursue a 'reverse-FOI' application: see s.71(1)(f)(i) and (ii) of the FOI Act), or decisions ancillary to an agency decision to grant access to particular information or documents, such as decisions relating to the form in which access is to be given. If such decisions are liable to increasingly become a source of dispute between access applicants and agencies, consideration should be given to extending the categories of reviewable decisions under s.71 of the FOI Act to cover decisions of that kind.

B130. **Recommendation:**

> **Section 71(1) should be amended by adding a new category of decision subject to investigation and review by the Information Commissioner:**
>
> *decisions granting access to documents in a form other than that requested by the access applicant;*

Amendment Issues

B131. By virtue of the extended definition of the word "document" in s. 36 of the Acts Interpretation Act 1954 Qld, a person is entitled to seek amendment of information of the type referred to in s.53 of the FOI Act, whether the information in question is held by the agency in a hard-copy document, or held in electronic form, provided that the applicant has had access to the document containing the information in question.

B132. Several practical difficulties can arise in dealing with applications for amendment of information held in electronic form. As already discussed, difficulties in identifying, locating and collating information held in electronic form may raise particular practical difficulties, in view of ongoing technological developments.

B133. Part 4 of the FOI Act does not contain any provision analogous to s.28(2), and thus it does not appear that an agency would be entitled to refuse to process an application for amendment of information, in circumstances in which the work involved in identifying, locating or collating the relevant information (wherever stored) would have either of the deleterious consequences identified in s.28(2)(b)(i) and (ii). Further, while s.30(1)(e)(ii) of the FOI Act provides a mechanism whereby an agency may refuse to create a written document containing information held in electronic form, if to do so would require the use of equipment not "*usually available to it for retrieving or collating stored information*", arguably no analogous mechanism is available to an agency as a basis on which to refuse an amendment of information held in electronic form, in similar circumstances.

B134. The Act does not specify a nexus between the time at which the person seeks amendment of information, and the time at which that person had access to a document containing that information. Arguably, a person who had access to a document many decades ago could apply now for amendment of information contained in that document. The document containing the information in question may no longer exist in any tangible form, but only on 'read-only' storage media (microfiche, microfilm, optically scanned or CD-ROM records). Even if a document could be readily identified and located within an agency's records, it is difficult to see how agencies would be able to amend the information in question in the manner required by s.55 or s.59 of the FOI Act in such circumstances.

Fees and charges

B135. Section 29(3) of the FOI Act relevantly provides:

> ***(3)*** *Any charge that is, by regulation, required to be paid by an applicant before access to a document is given is to be calculated in accordance with the following principles—*
>
> *…*
>
> *(c) a charge may be made for the reasonable costs incurred by an agency in—*
>
> *(i) supplying copies of documents; or*
> *(ii) making arrangements for hearing or viewing documents of a kind mentioned in section 30(1)(c); or*
> *(iii) providing a written transcript of the words recorded or contained in documents; or*
> *(iv) providing a written document under section 30(1)(e);*

B136. The relevant charges are specified in sections 8 to 10 of the *Freedom of Information Regulation 1992:*

> *8. The charge for giving access to a document by providing a photocopy of the document in A4 size is the amount calculated at the rate of 50c for each page of the copy.*
>
> ***Charges for copies of documents (other than A4 size photocopies)***
>
> *9.(1) The charge for giving access to a document by providing a copy of the document (other than a copy mentioned in section 8) is the amount that the agency considers to be reasonable.*
>
> *(2) The amount must not be more than the amount that reasonably reflects the cost of providing the copy.*
>
> ***Charges to hear or view documents***
>
> *10.(1) If a document is an article or material from which sounds or visual images are capable of being reproduced, the charge for giving access to the document by making arrangements to hear or view the document is the amount that the agency considers to be reasonable.*
>
> *(2) The amount must not be more than the amount that reasonably reflects the cost of making the arrangements.*

B137. It is questionable whether the creation of a written document under s.30(1)(e) comes within the terms of any of the specific charging provisions set out above. Section 10 of the FOI Regulation does not apply to a print-out of electronically stored information. Presumably, s.9 of the FOI Regulation was intended to do so, but the applicability of that provision to a written document created under s.30(1)(e) of the FOI Act depends, in my view, on the proper interpretation of the term "copy" as used in the charging provision. For the term "copy" to apply to a written document created under s.30(1)(e) of the FOI Act, it must be interpreted to mean more than an exact physical duplicate of the original, but to also include the representation of information in a different form from that in which the information is held by the agency.

B138. I also consider that particular difficulties arise, in the case of information held electronically, in respect of the requirements of s.29(10) of the Act:

> ***(10)*** *Subject to this section, the prescribed charges must be uniform for all agencies, and there must be no variation of charges between different applicants in relation to like services.*

B139. In my view, there will be inherent variations in the costs incurred by agencies in providing access to information held electronically, because of differences in the manner in which agencies collect and store electronic data, differences in the size, age and complexity of hardware and software systems utilised, and the expertise and efficiency of staff involved in processing applications. All of these factors militate against uniformity of charges, and it must be asked whether an applicant ought to be penalised (in the form of higher charges) because of the way in which a particular agency organises its electronic data.

Offence provisions

B140. Although s.55(1A) of the *Libraries and* Archives *Act* creates an offence provision in respect of improper disposal of public records, the possibility exists for agency personnel to take other steps, short of disposal, which may act to the detriment of a person seeking access to documents under the FOI Act. Consideration should be given to the inclusion in the FOI Act of an 'obstructing access' offence provision similar to that contained in s.110 of the *Freedom of Information Act 1992* WA.

B141. **Recommendation:**

> **Consideration should be given to inserting, immediately after the present s.106, a new offence provision:**
>
> *Offence of obstructing access*
>
> *A person who conceals, destroys or disposes of a document, or is knowingly involved in such an act for the purpose (sole or otherwise) of preventing an agency being able to give access to that document, whether or not an application for access has been made, commits an offence.*
>
> *Maximum Penalty—20 penalty units.*

Term of Reference B(v): **Whether the FOI Act should be amended, and in particular:**
...

(v) whether the mechanisms set out in the act for internal and external review are effective, and in particular, whether the method of review and decision by the Information Commissioner is excessively legalistic and time-consuming.

External review mechanism

B142. Since January 1993, the Office of the Information Commissioner (OIC) has resolved approximately 1,300 external review applications. About 75% of these have been resolved informally. The procedures adopted by my Office have many advantages over courts, or tribunals which adopt court-like procedures, particularly with regard to individual access to justice and cost savings to participants and the State. Unfortunately, there have been delays in finalisation of some more complex cases, due to the backlog of cases which arose because of the unexpectedly high level of demand for external review in the early years of operation of the FOI Act, and the fact that my office was afforded resources that were totally inadequate to deal with that unforeseen high level of demand for its services. That situation has been addressed by additional funding, with a program aimed at elimination of the accumulated backlog of cases, already under way, and that backlog should effectively be eliminated by 30 June 2000.

B143. In the early years of my office, I considered it necessary to focus my efforts on the publication of a series of 'leading cases', which dealt in detail with the interpretation of key provisions in what was novel legislation in this State. I (and other FOI decision-makers) can now rely on the principles established in those decisions to administer the FOI Act, in as simple a manner as possible, given that the Act imposes a framework of legal rights (conferred on citizens) and legal obligations (imposed on agencies and Ministers) in which I, and other FOI administrators, must operate.

<u>Advantages of the Information Commissioner model</u>

B144. I explained the procedural approach that would ordinarily be adopted by my Office at pages 24-29 of my first Annual Report (1992/93). Working copies of the documents in issue are obtained from the respondent agency or Minister, and an initial assessment of them is undertaken (in light of the stated reasons for the decision under review) with a view to determining the best method of proceeding in a particular case. In most cases:

- Applications are assessed to ascertain whether any third party should be notified of the review, e.g., a member of the public referred to in a document sought by the access applicant.
- An assessment is made of the prospects of an informal negotiated, or mediated, resolution. Many avenues for informal resolution are explored. They are not restricted to matters concerning the legal interpretation of the FOI Act, or indeed to questions that arise under the FOI Act.
- In cases that cannot be resolved without reference to legal issues, I usually advise participants of the legal principles that I consider relevant to the issues in dispute between them. I may also

express a 'preliminary view' as to the application of the principles to the facts of the case, in order to point out perceived weaknesses in a participant's position. This provides a 'reality check', and may lead the participant (whether agency or individual) to abandon a particular claim or to explore other avenues for informal resolution.

- If attempts at informal resolution do not succeed, the FOI Act requires me to make a decision. Before doing so, I am bound by legal requirements of procedural fairness to give participants a chance to make submissions and lodge evidence in support of their respective cases and, so far as is allowed by the FOI Act (i.e., references to the matter in issue cannot be disclosed to the party seeking access to it), to make each participant aware of the material lodged by other participants. I ordinarily do this by exchange of written submissions and evidence, rather than by more expensive and intimidating oral hearings.
- When that process has been completed, I prepare a written decision, and reasons for decision, for the participants. More significant decisions are published.

B145. From my experience, the Information Commissioner model has the following advantages over a court, or tribunals which adopt court-like procedures:

- greater access to justice for individuals, in the form of a less confrontational and less intimidating forum for dispute resolution, not surrounded by the trappings of a court-like process (the great majority of both agency and individual participants have not considered it necessary to obtain legal representation);
- significant scope for informal resolution of disputes (reflected in approximately 75% of disputes being resolved informally);
- reduced costs to participants as compared with the traditional court or tribunal model (Much of the initial burden of researching and defining relevant issues, in cases that are resolved informally, and some of it in cases that proceed to formal decision, is assumed by my staff, rather than by the agency or individual participants as would occur with a court or a tribunal which follows court-like procedures. Moreover, there is less perceived need for participants to engage legal representatives than in the more threatening oral hearing situation of the court model. Even where legal representatives are engaged, costs incurred in preparing written submissions and evidence are usually far less than for preparation and attendance at an oral hearing.);
- more equitable treatment of participants in regional areas (conducting negotiations and mediation by telephone or correspondence, and allowing them to make submissions and provide evidence in writing, rather than requiring them to travel long distances to attend conferences or oral hearings);
- timely resolution of most disputes (which will improve as the backlog of cases reduces further);
- reduced costs to the State in terms of administration of my Office, compared with a tribunal or court model; and
- specialist knowledge of resolution techniques and the FOI Act, that can be utilised in both informal resolution and in decision-making.

B146. The Information Commissioner model also has an advantage over any model internal to an agency, in that mediation and negotiation can, in most cases, be carried on with an added degree of trust. From my experience, a significant number of applicants have an inherent distrust of agencies. When the independent position of my Office is explained to them, most feel much more comfortable in explaining their goals, accepting assurances, and negotiating informal outcomes, than they have in their previous dealings with agencies. In addition, where decision-making

proves necessary, the independence of the Information Commissioner gives added credence to decisions.

B147. I note that the advantages of the Information Commissioner model have been accepted in a number of other jurisdictions. Tasmania, Western Australia and South Australia have adopted a similar model (although in the latter instance the role given to the South Australian Ombudsman of making decisions in FOI disputes is one of two avenues of external merits review, the other being appeal to the District Court).

B148. One factor has severely limited the ability of my Office to extend the full advantages of the Information Commissioner model to all FOI users. That is having to deal with the large backlog of cases caused by unexpectedly high demand for external review in the initial stages of operation of the FOI Act. I have made reference to the backlog on numerous occasions in previous Annual Reports. I am pleased to say that, with additional permanent and temporary funding granted by the government, my Office is reducing the backlog. Indeed, in the period from 30 June 1997 to date, the number of external review applications on hand has reduced by approximately 30%. Nevertheless, delays caused by the backlog have been a source of considerable frustration both to a significant number of users of the FOI Act, and to me and my staff.

B149. I urge the Committee to distinguish the advantages of the Information Commissioner model from the unfortunate short-term consequences of initial under-resourcing of the OIC.

B150. I now turn to address the two specific issues raised in the term of reference.

Excessively legalistic

B151. I first consider it necessary to stress that I am obliged to work within a legal framework. While I make every effort to resolve disputes informally, my powers derive from an Act of Parliament. I am bound by the provisions of the FOI Act, and the common law requirements of procedural fairness, in the exercise of my powers. If informal resolution is not possible, I must give written reasons for decision that explain the legal basis for my decisions. The interpretation of the FOI Act is replete with the kinds of difficulties in construction and application that attend most pieces of legislation, and, moreover, it incorporates by reference some complex areas of the general law (see paragraph B167 below). The Information Commissioner is the third level of decision-making under the FOI Act. The cases that come before me usually involve the more complex issues that arise in the administration of the FOI Act, and certainly those that could not be resolved to the satisfaction of at least one participant at the two earlier levels.

B152. There are two stages at which I may discuss legal issues in depth. The first is when I express a preliminary view as to the legal principles governing the dispute and their application to the facts of the case. The second is when written reasons for decision are prepared.

B153. As to the first stage, the procedure I adopt differs significantly from the traditional court-based approach of simply allowing each participant to research the law, marshall the evidence necessary to support their case, and present their evidence and/or submissions for adjudication, with little or no guidance or direction from the ultimate decision-maker. In reviews under Part 5 of the FOI Act, many applicants and third parties are unrepresented and unfamiliar with the FOI Act. In most cases, FOI decision-makers have not had legal training. In order to encourage participation

without the need to resort to legal representatives, I explain the principles I think are relevant to the matter in issue.

B154. In some cases, principles can be explained relatively simply because they are expressed in simple terms in the FOI Act. However, many terms and provisions within the FOI Act have specialised or complex meanings or incorporate complex legal issues. For example, s.46(1)(a) requires consideration of the contractual, fiduciary and equitable principles concerning breach of confidence, and s.43(1) requires consideration of the common law concerning legal professional privilege. Those principles are subject to frequent refinement by the courts in decided cases. Their application in particular cases often necessitates detailed legal analysis.

B155. I accept that explanations of complex issues may be daunting to some participants. While every effort is made to simplify the explanation of such concepts, they often remain complex concepts that challenge both lawyers and individual participants. There is a point at which efforts to further simplify such statements of principle would end in simply misleading the participant. I do not consider it appropriate to gloss over complex issues by making a superficial assessment of the issues for consideration, in order to give a misleading air of simplicity.

B156. The approach I adopt invites participants to take up the challenge to be more involved in the process, if they wish, while leaving open the option of obtaining legal advice if they consider any issues are too complex. In either case, they or their legal representatives have the benefit of my preliminary views, based on the experience I have gained from dealing with FOI cases on a daily basis for more than 6 years. I consider the provision of preliminary views to participants a distinct advantage of the Information Commissioner model, even if, in some cases, a participant may be faced with the choice of whether to work at understanding the complex legal principles incorporated in the FOI Act.

B157. If a formal decision is required, I must make my decision according to the FOI Act, and the common law and equitable concepts that it incorporates. I must ensure that my decision adequately explains the legal principles that I have applied, and the way in which I have applied them. In this regard, there are clear legal obligations upon me. Australian law imposes fairly onerous obligations as to the extent, and substantive content, of the reasons which must be furnished by a tribunal which (like the Information Commissioner pursuant to s.89(2) of the FOI Act) is required to give reasons for decision: see H Katzen "Inadequacy of Reasons as a Ground of Appeal", (1993) Australian Journal of Administrative Law, p.33. In judicial review proceedings, the failure by a tribunal to give adequate reasons for decision may constitute an error of law sufficient to warrant the court setting aside the tribunal decision and remitting the matter to be decided again according to law. This ground of review has been raised (although, not successfully) in judicial review proceedings brought in respect of one of my decisions made under s.89 of the FOI Act: see *Mentink v Albietz and Queensland Corrective Services Commission* (Sup Ct of Qld, No. 630 of 1998, Muir J, 28 January 1999, unreported), at pp.8-9 (paragraph 18).

B158. The following comments briefly highlight the main obligations imposed on a tribunal in stating its reason for decision in a particular case. The findings on all material questions of fact taken into account in making a decision must be stated in a tribunal's reasons for decision. If a matter is considered, then the findings of fact in relation to it must be set out (see *Sullivan v Department of Transport* (1978) 20 ALR 323 at p.353). A finding of fact must be supported by adequate evidence, i.e., by sufficient evidence that is logically probative of the finding reached. The

supporting evidence must be referred to in the tribunal's reasons for decision, and findings which resolve conflicting evidence should be clearly explained (see, for example, *Australian Postal Commission v Lucas* (1991) 33 FCR 101). There should be a clear and unambiguous statement of the proposition for which any applicable case authority is cited (see *Secretary, Department of Social Security v Ridley* (1992) 17 AAR 37 at p.49). The reasoning process leading to the ultimate conclusion on each issue in dispute must be adequately disclosed, and logically explained, in the tribunal's reasons for decision (see, for example, *O'Brien v Repatriation Commission* (1984) 1 FCR 472). Moreover, a tribunal is required to deal, in its reasons for decision, with any submission on a question of law or fact that is "worthy of serious consideration" or is seriously advanced by a participant: see *Dennis Wilcox Pty Ltd v Federal Commissioner of Taxation* (1988) 79 ALR 267, per Jenkinson J at p.276. (In several of my earlier decisions, the length and complexity of my reasons for decision was directly attributable to this legal requirement to deal with contentions put in lengthy submissions by the participants: see *Re Pope and Queensland Health* (1994) 1 QAR 616, *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663, *Re Pemberton and The University of Queensland* (1994) 2 QAR 293, *Re Woodyatt and Minister for Corrective Services* (1995) 2 QAR 383, *Re Murphy and Queensland Treasury & Ors* (1995) 2 QAR 744, *Re Morris and Queensland Treasury* (1995) 3 QAR 1.)

B159. These legal obligations apply to the expression of reasons for decision in cases in which it is common for a single page in issue to have a number of different segments of information in issue, each of which is claimed to be exempt under several different exemption provisions. (This practice by respondent agencies, and/or 'reverse-FOI' applicants, of making multiple exemption claims for the same segment of information in issue, frequently adds to the length and complexity of my decisions. If I conclude that the matter in issue qualifies for exemption I need only deal with one exemption provision; however, if I conclude that the matter in issue does not qualify for exemption, I must make relevant findings, and record sufficient explanation as to why the matter in issue does not qualify for exemption, under each of the exemption provisions relied upon by the respondent agency or 'reverse-FOI' applicant.) This process may be repeated over dozens, or hundreds, of pages in issue in a particular case. In some cases, up to 20 third party participants have had to be consulted (and in 2 cases, more than 50 third party participants), and given the opportunity to make submissions on matter in issue the disclosure of which might affect them.

B160. While the vast majority of FOI access applications should be capable of being processed at primary decision-making levels without adopting an unduly technical or legalistic approach to the application of the FOI Act, the cases that proceed to external review (approximately 3% of total applications) ordinarily involve more difficult issues, and the approximately 25% of those cases that cannot be resolved by negotiation, and must proceed to a formal decision under s.89 of the FOI Act, ordinarily involve some of the more contentious and complex issues that are capable of arising in the administration of what is a fairly complex piece of legislation. The task of an independent external review authority is to take a more careful look at those complex and contentious issues, while affording the opportunity (which, due to statutory time constraints, is not ordinarily available at primary, and internal review, decision-making levels) for participants in a review to provide detailed inputs to the decision-making process.

B161. Moreover, Parliament has seen fit to confer a "legally enforceable right" to be given access to documents of an agency, or official documents of a Minister, subject to the exceptions provided for in the FOI Act, chief of which is the discretion conferred on agencies and Ministers by s.28(1)

to refuse access to an exempt document or to exempt matter in a document. Legal rights are things which lawyers and tribunal members (if not all public servants) are trained to respect and take seriously. In most cases which come before me, the applicant is asserting a legal right to be given access to the matter in issue, and the respondent agency carries a legal onus (see s.81 of the FOI Act) of proving that the matter in issue falls within the terms, properly construed, of one of the exemption provisions in Part 3, Division 2 of the FOI Act. The participants in a review under Part 5 of the FOI Act are entitled to have such a dispute resolved according to proper legal standards and principles.

B162. My decisions are, of course, subject to supervision by the Supreme Court through judicial review proceedings, and it is quite proper that there be that opportunity for correction of legal error. However, I am also conscious of the importance of not subjecting participants to the inconvenience and expense (which, when costs have to be borne by agencies, can involve substantial sums of public money) of involvement in Supreme Court proceedings occasioned by a slapdash approach to the task of preparing reasons for decision in a review under Part 5 of the FOI Act. I note that I have resolved more than 300 cases by decision, my decisions have been challenged in judicial review proceedings on six occasions, and none of my decisions has yet been overturned for legal error.

B163. The FOI Act introduced a new scheme of rights into Queensland. Many aspects of the Act were similar to legislation in other jurisdictions, but the Act was also different in some significant respects. The FOI Act affects the interests not only of access applicants and agencies, but also of third parties about whom the government holds information. Given the potential effect on numerous members of the community, I considered it necessary from the outset to establish clear principles for application of its provisions, based on the intention of Parliament expressed in the Act, and previous case law. I did this in a number of detailed reasons for decision.

B164. In truth, this was the best strategic approach I could adopt to the circumstances in which my office found itself, in its first 3½ years of operation. New applications for review were streaming in at an average rate in excess of five per week, and I had available only two professional staff for the first six months, four for the next 12 months thereafter, and six for the next two years after that. Case officers were carrying in excess of 60 cases each, and there were inevitably unfortunate delays in some cases receiving detailed attention. Many cases involved hundreds of documents, and some involved thousands of documents. Many cases necessitated consultation with multiple third parties. Many agencies were adopting an over-cautious approach to information disclosure, or making fundamental errors in the application of legal principles incorporated from the general law (e.g., there was widespread misunderstanding and/or incorrect application of the common law test for legal professional privilege, and hence exemption under s.43(1) of the FOI Act). Some were making ambit claims - trying to test the water to see what they could get away with in terms of claiming exemptions for whole categories of documents (e.g., by employing arguments that had been tried by Commonwealth agencies, but discredited, in cases before the Commonwealth Administrative Appeals Tribunal), and trying to push the boundaries of exemption provisions as far as possible.

B165. My staff could barely keep up with the process of requesting, and undertaking initial assessments of, the documents in issue in the flood of cases coming through. My response was to select suitable candidates for 'leading cases' on the statutory provisions which were most significant for the administration of the FOI Act, especially those that were being most frequently applied (or

misapplied) in the cases proceeding to external review. The 'leading cases' were intended to fully expound my views on the correct approach to the interpretation and application of those provisions (with a full exposition of my reasons for forming those views, which would be available to a court exercising judicial review in the event that my approach was challenged, and the Supreme Court could then give authoritative guidance one way or another). I thereby hoped to clearly establish principles for FOI administrators to follow in the future at primary decision-making levels, thereby doing the greatest good, as quickly as practicable, for future users of the FOI Act. I explained the strategic approach that I had adopted at paragraphs 2.12-2.16 of my 2nd Annual Report (1993/94).

B166. It is unfortunate if some FOI administrators have found those decisions difficult to follow. In my view, this approach should have made the principles easier to ascertain than having to extract them from a large volume of different cases dealing with different aspects of the same exemption provision. Moreover, briefer statements of the key principles appeared in my 'second round' of formal decisions, which applied principles expounded in the 'leading cases'. I note that in his recent paper on the new Administrative Decisions Tribunal of New South Wales, delivered to the Australian Institute of Administrative Law Annual Forum in Canberra on 29-30 April 1999, Judge Kevin O'Connor, President of the Administrative Decisions Tribunal, had occasion to make the following remarks:

> *In the Australian instances that I have mentioned (the Queensland Information Commissioner and the Western Australian Information Commissioner), both offices have produced a steady stream of highly instructive FOI decisions with a high level of consistency and policy coherence. In the Commonwealth arena the Attorney-General's Department has over many years published a commentary on Commonwealth and Federal Court FOI decisions. In the Commonwealth arena very many judges and tribunal members have been involved in making FOI decisions. That commentary has often been critical of decisions on the ground of lack of consistency. The Information Commissioner model should avoid this problem.*

B167. I believe that the Committee should consider carefully whether some who level charges of excessive legalism, are merely hankering after a level of simplicity in the administration of the FOI Act that is simply not attainable in a piece of legislation of such complexity, that seeks to balance many competing interests, is framed in broad and open-textured language that frequently calls for the making of difficult value judgments, or difficult exercises in predictive opinion (in the case of each exemption provision that turns on the phrase "disclosure could reasonably be expected to"), and incorporates by reference some complex areas of the general law, such as breach of confidence (s.46; s.38), trade secrets (s.45(1)(a)), legal professional privilege (s.43), contempt of court and contempt of parliament (s.50).

B168. There is not a great deal of scope for making the legislation less complex, without shifting the balance between disclosure and non-disclosure too far in one direction or the other. The legislation could say that any document of any agency is to be made available on request, unless the agency can satisfy the Information Commissioner that disclosure of the document or part thereof would be contrary to the public interest, and leave each case to be dealt with according to its own circumstances. However, in my view, that would be productive of too much uncertainty, and Parliament has quite properly seen fit to provide more detailed guidance as to the grounds of

public interest which it considers are, or may be (in the case of those exemption provisions which are subject to a public interest balancing test), sufficient to justify withholding information from an access applicant.

B169. My 'leading cases' (which some have criticised for their length) have provided precedents for those seeking to understand the FOI Act. I now summarise and refer to those decisions when expressing preliminary views, and in decisions. While new and complex issues still arise for my consideration, many cases can now be dealt with more expeditiously against the background of the careful analysis recorded in earlier decisions. (While I would not recommend using the length of decisions as a guide to complexity, I note that the average length of my decisions given in 1997 and 1998 was 11 pages, compared to 21 pages in 1993 and 1994.) If there is a perception of excessive complexity in relation to my decisions, it may be unfairly skewed by those early decisions, and by the fact that, since December 1995, only decisions relating to more complex or novel issues, that have wider educational or precedent value, have been published. By far the greater number of my decisions are now provided in letter form to participants, and are not otherwise published. Thus, in 1997/98, 91 (out of 270 finalised cases) were resolved by decision, with only 19 decisions considered to warrant publication in the Information Commissioner's formal decision series.

Excessively time-consuming

B170. I consider that the Information Commissioner model is considerably less time-consuming, and resource-intensive, than would be a court, or a tribunal which follows court-like procedures. The relatively small amount of time and resources spent by participants in the course of an external review application, is one of its distinct advantages. This is different from the question of whether all external review applications have been resolved quickly.

B171. In that regard, I acknowledge that there are some participants in external reviews who are unhappy with the time taken to resolve particular external review applications. However, I have indicated above that the major reason for the delay has been the backlog of cases. I believe that the staffing now afforded to my office is at a level where, if the demand for its services remains relatively stable, the backlog will soon be eliminated and it will be able to provide appropriate standards of timeliness for all applications.

B172. To give some impression of the current position, I note that at the date of writing some 85% of external review applications made in the 1997/98 financial year, and 64% of applications made in the current financial year to 31 March 1999, have been finalised.

B173. I should note, however, that there are some factors which mean that the process which I have adopted takes longer than would be the case if my procedures simply involved, for instance, directing the participants to prepare their cases for formal presentation at a hearing on a fixed date. One factor is that I prefer wherever possible to negotiate a resolution rather than jumping into procedures preparatory to the preparation of a formal decision. In my view, it is far better to have an agreed outcome than to have one that results in one or more of the participants going away unhappy with an imposed decision. Often negotiation of a solution may have little to do with exemption provisions in issue, but it is preferable to have participants walking away on agreed terms. The negotiation process can take time. Participants are often at odds. Time is needed to

have participants accommodate themselves to concessions they may eventually be prepared to make. Several strategies may be adopted to attempt resolution.

B174. Another factor is the approach I have adopted of obtaining submissions and evidence in writing wherever possible, rather than proceeding to an oral hearing. If an informal resolution cannot be achieved, it is necessary for me to accord procedural fairness to allow participants to prepare and lodge (and to respond to each other's) submissions and evidence. I consider that conducting such a process "on the papers" provides a less threatening procedure for participants who are unrepresented. Oral hearings provide a forum in which legal representatives may be able to overbear unrepresented participants by the use of well-practised advocacy skills. Conducting hearings on the papers is also less demanding on the resources of participants and my office. Oral hearings are very resource-intensive for all concerned. However, the interchange of written submissions and evidence is less immediate than an oral hearing. Usually, I allow several weeks at each stage for participants to consider and prepare written material in support of their case, and to reply to the material of other participants.

B175. Both the above procedures may, in some cases, extend the time between lodging an application and resolution of the review. However, I consider that both are justified in terms of the advantages they bring to participants in the external review process. Chief among those advantages is that of keeping down the costs of participation in the external review process, not only for applicants but also for agencies (and hence for the public purse). Thus, if on examination of the matter in issue in conjunction with an agency's reasons for decision, it appears to me that the agency's decision is correct, I may convey a preliminary view to that effect and invite the applicant to lodge written submissions and/or evidence to persuade me to the contrary. If, after considering the material lodged by the applicant, I remain unpersuaded, I may proceed directly to a decision without requiring the agency to incur any expense for the preparation and presentation of a formal case (which agencies must normally do, as a matter of course, before the administrative appeals tribunals of the Commonwealth, Victoria and NSW). The same process might apply in reverse for the benefit of an access applicant. I consider that my procedural approach has been effective in reducing or eliminating unnecessary expense and formality for participants, at least so far as the duty to accord procedural fairness, and the complexity of the issues for determination in any particular case, will allow.

B176. Summary

In summary, I submit that:

1. ***The Information Commissioner model offers important advantages in terms of access to justice, informality, resource savings and timeliness. The ability of the OIC to deliver fully those advantages in every case has been constrained because of the need to deal with the backlog which built up due to the initial under-resourcing of the OIC when confronted with the unexpectedly high level of demand for external review in its early years of operation.***

2. ***The approach of the OIC is not excessively legalistic. Approximately 75% of cases are resolved by informal means. However, I must operate within a legal framework. Decisions about the effect of novel legislation which incorporates complex common law and equitable principles, and which affects the rights not only of applicants and agencies but also members of the public about whom agencies hold information, necessarily require a level of***

legal analysis. I am required to give written reasons for decision that adequately address the legal and factual issues raised. I have developed a number of 'leading cases' that explain the correct approach to the interpretation and application of key provisions in the FOI Act. I (and agency decision-makers) can now refer to, and rely on, those principles in future cases, allowing decisions that can be more simply expressed but which are nevertheless based on demonstrable legal reasoning.

3. ***The Information Commissioner process is not time-consuming. In fact, it requires a considerably smaller commitment of time and resources by participants and my Office than would a more traditional court-style approach. It is, however, fair to say that some applicants have experienced considerable delays in the resolution of reviews. As I indicated above, this is due to the large backlog of cases, which is now being addressed. Nevertheless, since its inception, the OIC has resolved approximately 1,300 applications for external review. With the elimination of the backlog, its performance will continue to improve.***

Internal review mechanism

B177. I consider that the internal review mechanism can be a valuable tool in the FOI process. It allows reconsideration by an agency of specific issues raised by an applicant, who ordinarily has little or no opportunity for input in the making of the initial agency decision. It is particularly important in 'sufficiency of search' cases, where it is preferable that the applicant have an opportunity to raise such issues directly with the agency, and proceed to external review only if no satisfaction can be obtained from the agency.

Term of Reference B(vi): **Whether the FOI Act should be amended, and in particular:**

...

(vi) the appropriateness of, and the need for, the existing regime of fees and charges in respect of both access to documents and internal and external review.

Rationale for charging fees

B178. When considering this issue, it is worth referring back to the views of EARC and PCEAR, expressed in their respective reports on freedom of information. EARC dealt with the question of charges for access at Chapter 18 of its report. Emphasising that the charging regime should be viewed as an integral part of the FOI scheme, EARC stated (at paragraphs 18.27-18.31 and 18.35-18.36):

> *The Commission agrees that the importance of the principle of 'freedom of information' cannot be overstated. In the course of this Report, the Commission has repeatedly stated that FOI is a vital tool in opening to public scrutiny and public participation the decision-making and policy-formulation of government. Access to information as to what decisions are made by government, and the content of those decisions are fundamental democratic rights. As such, FOI is not a utility, such as electricity and water, which can be charged according to the amount used by individual citizens. All individuals should be equally entitled to access government-held information and the price of FOI legislation should be borne equally.*
>
> *The Commission reaffirms its acknowledgment in Issues Paper No. 3 that FOI legislation will be introduced at some unquantifiable cost to government. In the view of the Commission, it must be recognised that the experience of other jurisdictions is that FOI also provides unquantifiable benefits in the form of administrative improvements. These administrative benefits have been discussed in Issues Paper No. 3 and elsewhere in this Report.*
>
> *Further, the Commission agrees with the view of Paul Chadwick that:*
>
> > "Any assessment of the costs of supplying information which the public has actually asked for under FOI, should consider the far greater amount spent on disseminating information which the government wants the public to have" (Prasser, Wear & Nethercote, eds. 1990, p.190).
>
> ...
>
> *Considerable sums of public moneys are spent on government information programs. Government must be prepared to expend money on FOI for information requested by members of the public.*
>
> ...

> *Throughout this Report, the Commission has sought to promote the protection of individual information privacy, and has recognised that individuals have a strong and continuing interest in information held by government agencies which concerns their personal affairs. For this reason, it is considered that FOI legislation should not impose a charge of any kind in respect of documents containing information which relates to the personal affairs of the applicant.*
>
> *In relation to non-personal affairs documents, as stated above, the Commission is of the opinion that the price of FOI legislation should be shared equally amongst all citizens. As a corollary to this position, FOI legislation should not require the payment of an application fee. Similarly, the Commission does not consider that it is equitable to require FOI applicants to pay for time spent searching for requested documents, nor should an applicant be charged for decision-making time. It should not be possible for government agencies to penalise an applicant for their own inefficiency, or for government to otherwise inflate charges.*

B179. In its report, the PCEAR stated (at paragraph 3.13.5):

> *The Committee acknowledges that the fee charges proposed by EARC will not make the administration of freedom of information self-funding. It should be frankly conceded that freedom of information costs money and that the competing demands on government resources, for example for schools, hospitals and police, are considerable. The Committee considers, however, that a well-resourced system of freedom of information is essential for enabling citizens to gain access to government information, which is in turn an essential prerequisite for a healthy democracy.*

B180. It is clear that the liberal charging scheme proposed by EARC (which, with the exception of the imposition of an application fee for non-personal documents, was substantially adopted by Parliament) was never intended to place the total cost burden on individual applicants. Fees and charges recover only a fraction of the cost of administering FOI legislation. They are imposed as a crude rationing device to inhibit demand, and hence to reduce the level of publicly funded resources which must be devoted to administration of the FOI Act.

B181. The most basic gauge of demand is the number of FOI applications made in each year. Unfortunately, I have been unable to obtain up-to-date data on applications made from all jurisdictions. Early statistics (which compared applications made in the second year of operation of FOI legislation in each state) suggested that Queenslanders were making FOI applications at a rate that, on a *per capita* basis, exceeded that for other states (see Freedom of Information Annual Report 1993/94, Queensland Minister for Justice and Attorney-General, at p.34 and figure 5.1). However, the statistics that I have been able to obtain raise questions as to whether that is the case.

B182. In 1993/94, 8,225 FOI applications were made under the Queensland FOI Act (the level has remained relatively stable up to 1996/97, varying roughly between 7,500 and 8,500). In 1993/94, Victorians made 10,151 applications. On a per capita basis, Queenslanders made about 12% more applications than Victorians. However, given the variability in annual figures (two years previously the Victorian figure had been 14,357) one must treat that figure with some caution. Both state figures pale by comparison with the Commonwealth government figures for 1993/94, when 36,547 applications were made. Precise figures for New South Wales are unavailable, but estimates by the

New South Wales Ombudsman put applications at between 10,000 and 11,000 for each of the three years up to 1997/98. Given the large population of New South Wales, this would certainly put Queensland applications at a considerably higher per capita rate than New South Wales. On the other hand, comparison between Western Australian and Queensland figures for 1996/97 show that, on a per capita basis, Western Australians made about 5% more FOI applications than Queenslanders.

B183. Even if the rate of FOI applications is shown by more recent figures to continue at a higher level (based on *per capita* comparisons) in Queensland than in some other jurisdictions, that is not necessarily an indication that the system is not functioning at a satisfactory level. From the point of view of promoting public involvement in government and allowing access to as much non-exempt government-held information as is possible, the Queensland charging regime would appear to be at least as effective as any other in Australia. The ultimate question must be, to what extent the government is prepared to ration, through the imposition of financial hurdles, the rights of members of the public to access non-exempt documents, in order to reduce the cost to government of operation of the FOI system. The *Appropriation Act 1998* authorised the expenditure of over $23,000,000,000 of public money by the State government for the financial year. FOI legislation is one of the most significant means by which members of the public can scrutinise the expenditure of that $23,000,000,000, which is ultimately obtained by imposts, of one kind or another, on members of the public. Any move that would further inhibit the ability of members of the public to utilise the legislation should be viewed with caution.

Arguments in favour of increased or additional fees or charges

B184. It is not reasonable to expect that any regime of fees or charges could even approximate real cost recovery, per individual application. I take it that any call for introduction of demand management strategies will be aimed at applications which are considered to be unreasonable given the objects of the FOI Act, not at limiting reasonable use merely for the sake of saving resources. I am aware of three types of use of the FOI Act which have been criticised as being unreasonable:

(1) Repeat applicants. I am aware of concerns that there are a few applicants who have made numerous FOI access applications to either one agency, or across a number of agencies. I do not have statistics in relation to initial or internal review applications. However, it is certainly true that particular individuals have each made large numbers of external review applications. In the period from 1 January 1997 to 31 March 1999, slightly over 500 applications for external review were made. In that period, 8 individuals each made more than 5 external review applications, and 4 of them each made over 10. In fact, one in every 6 applications for external review was made by one of 5 particular individuals, and the 2 individuals who made the most applications for review each made approximately 5% of the total applications. Section 77(1) of the FOI Act currently provides that the Information Commissioner may decide not to review a decision if satisfied that the application is frivolous, vexatious, misconceived, or lacking in substance. However, given that the FOI Act confers a right of access unconditioned by any requirement to demonstrate a particular need, interest or motive for seeking access to particular information, it is no easy matter to come to the conclusion that any particular application is vexatious or frivolous merely on the ground that an applicant has made a substantial number of other external review applications in the past.

(2) Voluminous applications. My office has had to deal with some applications where the number of documents in issue reached many thousands. I am also aware that many agencies have had to deal

with applications for access to thousands of documents. Generally, my staff have been able to negotiate with access applicants to reduce the number of documents sought to a reasonable level. Section 28(2) of the FOI Act currently allows an agency to refuse to deal with an application if dealing with it would substantially and unreasonably divert the resources of the agency having regard to certain specified aspects of dealing with the application. However, the terms of s.28(2) do not appear to cater for a situation where an applicant lodges multiple access applications with an agency, no single one of which would involve a substantial and unreasonable diversion of the agency's resources, as contemplated by s.28(2). Some overseas jurisdictions have developed measures to deal with access applicants whose use of the FOI Act is adjudged to unreasonably place an excessive burden on public resources (see paragraphs B245-B252 below). Measures of the kind that can be targeted at problem individuals are preferable to a tactic of raising the general level of fees and charges, to the detriment of the vast majority of reasonable users of the FOI Act.

(3) Applications as an alternative to the discovery process. I am aware of complaints that lawyers frequently use the FOI Act as an alternative, or adjunct to, the discovery process in legal proceedings. I am aware that this has occurred on a number of occasions. I do not see any reason why a lawyer acting on behalf of a client should be limited because the matter in issue might eventually become available under discovery processes in court. In any event, I do not consider that the imposition of any general fee or charge would be likely to dissuade lawyers from making access applications. Any charge that is likely to dissuade a client who has gone to the expense of engaging a lawyer and initiating legal proceedings to protect their interests, is also likely to dissuade a far greater number of citizens who seek to use the FOI Act for other purposes.

B185. I will discuss below whether any fee or charge is likely to dissuade the first two types of applications, but first I will briefly comment on the present situation, where there is no fee or charge in relation to documents which concern the personal affairs of an applicant.

Personal affairs documents

B186. The present structure of the FOI Act makes a distinction between applications for documents that concern an applicant's personal affairs and applications for documents that do not. In the latter case, there is both an initial access application fee and the possibility of charges for access. If the requested documents concern the applicant's personal affairs, there is no application fee and no charge for access. The proportion of "personal affairs" applications made by members of the public under the Queensland scheme has fallen from about 75% of all FOI access applications in 1993/94 to around 60% in more recent years (source: statistics recorded in Attorney-General's FOI Annual Reports). However, the proportion of external reviews dealing with personal affairs information of the applicant for review has remained relatively stable at approximately 70-75%. Any fee or charge imposed solely on non-personal affairs applications or documents would therefore have a limited effect on overall demand.

B187. Continuing the distinction between personal and non-personal applications in respect of any new fees or charges will involve a continuing administrative burden on agencies and the OIC, in having to examine and characterise requested documents in order to determine whether or not they concern the personal affairs of the access applicant (e.g., for the purpose of assessing whether an applicant for access is required to pay a $30 application fee). This issue has been the subject of many formal decisions of the Information Commissioner, and has been the subject of consideration in many reviews that were resolved informally. This contentious question would

frequently arise, and consume substantial time and resources, if the distinction were maintained in any new system of fees and charges, for example, if it were proposed to introduce a $30 application fee for access to documents concerning the personal affairs of the access applicant, and to increase the existing application fee for all other kinds of access applications from $30 to $60. On the other hand, imposing a uniform application fee of $30 would remove the need for agencies (and my office) to deal with this frequently contentious issue.

B188. There are arguments in favour of maintaining free access to matter concerning the personal affairs of the access applicant, yet there is no obvious reason why that object of the FOI Act should be considered more important than other professed objects of the FOI Act, to the extent of warranting preferential treatment in the regime of fees and charges. In my experience, many repeat and voluminous applicants seek matter that can, at least in part, be characterised as information concerning their personal affairs. Any altered fee structure that does not extend to applications for documents concerning the personal affairs of the access applicant would have only a limited effect as a demand management tool.

How many documents or categories of documents may an access applicant request for payment of one $30 application fee

B189. At present, subject to the application of s.28(2) of the FOI Act, there is no limit on the number of documents that an access applicant may request, free of charge, provided each requested document concerns the personal affairs of the access applicant. As soon as the request extends to one document which does not concern the personal affairs of the access applicant, a $30 application fee is payable.

B190. But just how many documents, or classes of documents, should an access applicant be allowed to request in one FOI access application for the payment of one $30 application fee?

B191. In my experience, the vast majority of access applicants confine the scope of one FOI access application to a request for between one to four separately-described categories of documents. However, in the past 2 years, I have seen some frequent users of the FOI Act frame requests for between 10-20 separately-described categories of documents in the one FOI access application, for which one $30 application fee was paid. I have seen one FOI access application which contained approximately 160 separately-described categories of documents, in respect of which one $30 application fee was paid. I saw another with approximately 60 separately-described categories of documents, and some others with approximately 40 separate categories.

B192. If the $30 application fee is intended as a rationing device to inhibit access applications for the sake of moderating demand on agency resources, the question arises as to whether the circumstances in which a $30 application fee is payable require some refinement to counteract behaviour of the kind described above. I am not aware of any easy way to do this that does not have the potential to unfairly affect the vast majority of reasonable users of the FOI Act, and perhaps that may account for why nothing has been done before now. However, it may be that a provision is needed in the FOI Regulation specifying that no more than 3 clearly-described categories of documents, and no more than (say) 10 clearly-described individual documents, may be included in one FOI access application for which a $30 application fee is payable.

Preferred charging regime

B193. I refer again to paragraphs A1-A15 and B178-B179 above, and in particular to the democratic rationale for the FOI Act and the caution that should be exercised before any charges are imposed that would inhibit the ability of members of the public to utilise the legislation. I do not believe any compelling case can be made for any substantial variation to the existing regime of fees and charges under the FOI Act and FOI Regulation, and my preference is for its retention.

B194. However, if it was desired to make some variations to the existing scheme of fees and charges, with the aim of eliminating or reducing some features of it that might be considered to pose disproportionate administrative burdens, but without unduly inhibiting the vitality of the FOI Act (i.e., its wide and ready use in furtherance of the professed objects of the legislation), the following variations might be considered:

(a) the introduction of a uniform application fee for access to documents, set at a moderate level and certainly no higher than $40 (i.e., the fee should apply irrespective of whether the documents to which access is sought concern the personal affairs of the access applicant);

(b) introduction of a charge for supervised access by way of inspection, after an initial 'free' period of 2 hours, at a rate of $10 per hour or part thereof, irrespective of whether the documents concern the personal affairs of the access applicant (see paragraph B208 below);

(c) introduction of a requirement that an access applicant pay all reasonable charges incurred, beyond the first $200 per agency per year, for the provision of non-standard forms of access to documents which concern the personal affairs of the access applicant (see paragraphs B209-B211 below);

(d) introduction of a requirement that an access applicant pay the presently prescribed charge for access, by way of the provision of photocopies, to documents which concern the personal affairs of the access applicant, beyond a 'free' quota of 400 pages per agency per year.

B195. I do not support a charging regime any more onerous than the existing one. However, I anticipate that the committee will receive many submissions urging a more onerous charging regime, and my following comments address issues that I believe should be taken into account in that regard.

Charges for search and retrieval, consultation and decision-making

B196. I wish to make it clear that I do not support imposition of charges for search and retrieval, consultation and decision-making. Any regime of charges for these activities would raise numerous difficulties both in terms of fairness to applicants and administrative burdens for agencies and for my Office. I will discuss three possible approaches below.

B197. 'Time-spent' option. A 'time-spent' approach to costing would take no account of arguments against full-cost recovery. It would also be open to abuse by agencies, particularly in relation to search and retrieval. One of the professed benefits of freedom of information legislation is that it acts as an incentive to better records management practices in agencies. Since the inception of the FOI Act, I have dealt with numerous 'sufficiency of search' cases, involving claims by applicants that an agency has failed to locate and deal with all documents in its possession which fall within

the terms of the relevant FOI access application. In quite a number of cases, I have been surprised by the poor records management practices of some agencies. Documents (and entire files) which should have been easily locatable, have gone missing for months on end, only to turn up well into the course of an external review application. In some cases, proper procedures had been established but were not adhered to, leading to many hours of searching for misplaced documents. In other cases, documents that an agency acknowledged had been, and should still be, in its possession, could not be located despite extensive searches and inquiries. I do not suggest that any records management system can be perfect but, based on my experience, I consider that a significant amount of the resources expended by some agencies on search and retrieval is attributable to sub-standard practices.

B198. In cases such as this, a charge for search and retrieval time would, in fact, penalise the applicant for the inefficiency of the agency. There would be no incentive for an agency to improve its record-keeping practices. Poorer practices would heighten the cost of access and unfairly inhibit applicants from seeking access to documents.

B199. Similar considerations would apply to a 'time-spent' test for consultation or decision-making. It is possible that such matters could, by explicit reference in the Act, be factored-in to assessment of the reasonableness of a charge on review, but, in my view, the administration of such a test of reasonableness would be very difficult, time consuming and often controversial. Moreover, if challenged on internal or external review, the costs to an agency of staff time expended in justifying its charges, plus the effective costs to my Office in staff time expended in conducting an investigation to decide whether charges were appropriate or excessive, would probably, in most cases, exceed the charges imposed in the first place. (A rash of applications to my Office disputing charges imposed on a 'time spent' basis, would presumably have to be given priority, since access would be held up pending payment of charges. This would, in turn, prejudice applicants seeking timely review of more substantive issues, i.e., refusal of access, or refusal to amend information.)

B200. 'Per page' option. An alternative would be a standard charging regime, based on the number of pages dealt with (a charging system of this kind was recommended, as preferable to the existing 'time-spent' charging system under the Commonwealth FOI Act, in the ALRC/ARC Report at pp.185-187). A fee could be fixed by regulation for ranges of pages dealt with. It could be based on the number of pages actually disclosed to the applicant (as recommended in the ALRC/ARC Report, apparently in the interests of encouraging agencies to favour disclosure, rather than withholding, of information) or the number of pages dealt with at the decision-making stage. The theory would be that the fixed fees were based on the average number of hours that should be expended by a competent FOI administrator in an agency with efficient record management systems, on search and retrieval, consultation and decision-making for different quantities of pages. However, with the rationale for the fee being demand management rather than full cost-recovery, and the sensitivity of demand to price increases being extremely high, the rate need not approximate the full cost of the activities. For example, the fee structure could proceed along the lines -

1 to 20 pages	$30
21 to 50 pages	$45
51 to 80 pages	$60
81 to 120 pages	$75
121 to 160 pages	$90
161 to 200 pages	$105

B201. Under a scheme of this kind, it would be possible to prescribe a steeper proportionate rise in the charging rate for applications involving more than 200 pages if it was desired to provide a financial disincentive aimed at encouraging access applicants to target more precisely the documents they seek. It would also be possible, if desired, to prescribe that the charging rate set out above applied to documents that concern the personal affairs of the access applicant, beyond a 'free' quota of 400 pages per access application (or 400 pages per agency per year).

B202. The 'per page' option would overcome the potential for wide variations in charging, depending on the quality of an agency's record management systems or on whether access has been sought to documents which pose difficult issues in the application of exemption provisions, or require many parties to be consulted, etc. It would also remove the potential for involved disputes as to how much time was spent by an agency in dealing with an application, and whether that was a reasonable amount.

B203. Nevertheless, it would have its drawbacks. The use of 'averaging' would mean that a person with a straight-forward access application may pay more than if a strict 'time-spent' regime applied. Further, some agencies may generate more and lengthier documents than others, or hold on file multiple copies of the same document plus numerous telephone and file notes and the like, which significantly increase the volume of documents, but not the amount of useful information, for which an applicant requesting all documents on a particular topic would be charged.

B204. One means of alleviating the latter concern would be to include a provision requiring the agency to consult the applicant, after location of requested documents but prior to decision-making, in order to clarify the types of documents available, and afford the applicant an opportunity to refine the scope of the access application (e.g., to target particular documents of interest, specify that multiple copies of those documents are not required unless they have additional annotations, and *et cetera*) so as to reduce the number of pages by reference to which the access charges would be levied. That would in turn save on consultation and decision-making time (including at any subsequent internal or external review).

B205. If enough refinements could be introduced into a charging scheme based on the 'per page' option to reduce its drawbacks, I consider it preferable to the 'time spent' option.

B206. Combined option. Some of the concerns expressed above might be reduced by a combination of the two options. Charges could be made on a 'time-spent' basis but with ceilings placed according to the 'per page' option. So, using the figures in the table above, an applicant for 125 documents would pay for time spent on dealing with the application, but only up to a maximum ceiling of $90. Applicants could challenge the reasonableness of the charges but if the maximum charges were set at a low level, it would be relatively easy for the agency to establish that the maximum level had been reached in most cases.

B207. This option would not penalise applicants in cases where large numbers of documents fall within the terms of an application, but they can be located and dealt with easily. In such cases, where the 'time spent' charge did not reach the 'per page' maximum, the applicant would only pay the 'time-spent' charge. This option would require calculation of time spent, and consideration of reasonableness by agencies (on external review by my Office), but the lower the maximum "per page" charge was set, the less often this complication would arise for serious consideration.

Access charges

Supervised access

B208. There is currently no charge payable for allowing an applicant a reasonable opportunity to inspect a document under s.30(1) of the FOI Act. Agencies have informed me that their staff can spend many hours supervising this form of access in relation to individual applications, and of cases where applicants have viewed documents on one occasion and returned on a number of occasions to review the same documents. I accept that, in almost all cases, it is appropriate for an agency to supervise access when one is dealing with the original documents for which an agency is responsible. Granting this form of access clearly has resource implications for agencies, just as does creating copies of documents. There is no obvious reason why a grant of access in this form should be provided free of charge, when other forms of access incur a charge. It may be that there is justification for allowing an initial reasonable period of supervised access (I would recommend 2 hours) to be included in the price of the access application, but for any additional periods of supervised access to be charged at an hourly rate of $10, set by the FOI Regulation.

Charges for non-standard forms of FOI access

B209. From time to time, I have become aware of agencies being requested to incur significant costs in providing what I might describe as non-standard access to matter (as opposed to standard access by providing a copy of a document or allowing inspection). I would include in this category those forms of access listed in paragraphs (d) and (e) of s.30(1) of the FOI Act, e.g. written transcripts of audio tapes. At present the FOI Regulation provides that agencies may require payment of a reasonable charge for providing such access only if the document does not concern the applicant's personal affairs.

B210. I suggest that consideration be given to providing for payment of reasonable charges for non-standard FOI access for personal affairs documents. There are obviously arguments for and against such a step. The cost of such a requirement to agencies can be significant. To take the above example, an agency might have to spend five dollars on providing a copy of a cassette tape to an applicant but hundreds of dollars to have that tape transcribed. On the other hand, it is important that members of the public have access to information concerning their personal affairs without substantial financial impediments to that access.

B211. Perhaps an intermediate solution would be to allow for charges for non-standard access above a certain base level. This could be assessed on a *per* application, or per agency per year, basis. For example, the first $200 chargeable for non-standard access in any year by one applicant to one agency could be written off as a recognition of a valid interest in an applicant obtaining access to personal affairs information. Thereafter, the applicant would be advised that a charge was to be levied, and offered the option of whether to pursue the application for access in that or another form. Such a scheme would have to be clearly spelled out in the FOI Act or the FOI Regulation to avoid arbitrary application.

Application fees for internal review/external review

B212. I do not support the imposition of an application fee for internal or external review. My discussion below concentrates on fees for external review, but similar arguments apply in relation to review within agencies. In my view, any application fee for external review would be inconsistent with the statutory object of providing a cheap and informal method of review of agency decisions under the FOI Act. That is why, as the attached survey of some other specialist tribunals in Queensland discloses (see Attachment B(vi)1), the imposition of a filing fee has been the exception rather than the norm, in respect of Queensland tribunals established to provide merits review of government decisions affecting the legal rights or entitlements of citizens. Similarly, there is no fee for making a complaint to the Parliamentary Commissioner for Administrative Investigations.

B213. Moreover, I consider it neither appropriate nor equitable to impose monetary hurdles at the stage of seeking external review, where the issue is whether a citizen's legal right to have access to government-held information has been correctly determined by an agency or Minister. Having paid to exercise the right of access conferred by the FOI Act, the 'customer' should be entitled to have the provisions of the law correctly applied by the relevant agency or Minister, and to have any error in that regard corrected at no cost to the customer.

B214. If it is considered essential to introduce application fees for external review, then I submit that they should be kept at a low level. An application fee may dissuade repeat applications, but like all crude rationing devices, application fees are just as likely to inhibit legitimate users of the FOI Act as they are to inhibit vexatious or voluminous applications. The truth is that it will be very rare to find an average citizen who is prepared to pay a substantial amount of money to obtain access to government information, when the access is not related to some purpose involving a dispute over money in a far greater amount (or property to a far greater value) than the cost of obtaining access, unless access is required for pursuit of some issue of principle of considerable importance to the applicant.

B215. I consider it likely that the introduction of an application fee of $50 would have a significant impact on the number of new matters proceeding to external review. I also consider that, if it were decided to impose an application fee, the fee should be refundable if the applicant is successful to any extent. A refundable application fee would dissuade unmeritorious applicants for review while giving applicants who are confident of success the hope that they will be reimbursed (assuming, of course, that they can afford the sum in the first place).

Waiver

B216. While an application fee is generally payable for applicants to the Commonwealth Administrative Appeals Tribunal, a number of categories of persons are not required to pay a fee. This includes prisoners, children, and persons who receive legal aid, AUSTUDY and certain health/social security benefits. There is also a provision which allows waiver if payment would cause financial hardship. If waiver provisions along these lines were attached to any new requirement to pay an application fee, it is questionable whether the introduction of the fee would cause a significant reduction in the number of applications coming before the Information Commissioner. A large proportion of applicants for external review fall into one of the above categories or would be in a

position to establish financial hardship. Inclusion of a waiver provision would also be counter-productive in that significant resources would have to be expended on dealing with applications for waiver. Rather than fix a substantial application fee and make provision for waiver in cases of financial hardship, it is preferable that any application fee be fixed at a moderate level, and that there be no provision for waiver on grounds of financial hardship.

Refunds

B217. The Commonwealth Administrative Appeals Tribunal is empowered to refund an application fee where proceedings have terminated "in a manner favourable to the applicant". Refund is based on the certification of the Tribunal. I submit that, for administrative convenience, the Information Commissioner should be the sole and final arbiter of whether the applicant for review has been successful in whole or in part. A refund should be payable at any stage of the proceedings once the Information Commissioner certifies the appropriate hurdle has been cleared, e.g., a refund could be made immediately after an agency has agreed to release to the applicant some information that the agency had previously claimed to be exempt matter under the FOI Act. In addition, the applicant for review should be entitled to a refund if the respondent agency or Minister is successful only on a ground that was not initially relied on in the decision under review. An applicant can only make a decision to pursue external review on the basis of a perceived error in the decision under review, and it is unfair and inequitable for the applicant to be penalised if the agency is only able to successfully defend its decision on grounds that were not raised in the decision under review.

Deemed refusals

B218. There is provision in the FOI Act for an external review application in cases where an agency has not made a decision on an access application within time limits prescribed in the FOI Act. It could be argued that it would be unfair, in those cases where the agency has not complied with the FOI Act, to penalise the applicant by requiring payment of a fee for the making of an external review application. On the other hand, waiver of fees in such cases might lead to increased applications, as applicants who have not received a decision within the prescribed period rush to lodge their external review application at no cost, before a decision from the agency puts a price tag on the next stage of review. On balance, I submit that, if an external review application fee is introduced, the fee should also be payable for an application based on a deemed refusal, but should be refundable if the applicant is successful in whole, or in part.

B219. In conclusion, I do not support the imposition of an application fee for external review, but if an application fee for external review applications were to be imposed:

- the fee should be refundable on certification by the Information Commissioner-

(a) that the applicant has been successful in whole or in part; or
(b) that the respondent has been successful only on a ground not relied upon in the decision under review;

- the fee should extend to applications based on a deemed refusal of access or amendment (provided the fee is refundable if the applicant succeeds in whole or in part);

- there should be no provision for waiver of the fee on grounds of financial hardship, but as a trade-off, the fee should be set at a moderate level, certainly no higher than $50.

I note that any increased charging at primary decision-making levels would inevitably inhibit use of the FOI Act, and would proportionately reduce the number of applications that proceed to internal review or external review, thereby reducing any perceived justification for the imposition of filing fees for internal or external review.

Summary

B220. ***In summary, I submit that:***

1. ***Parliament has recognised that access to government documents is an important element in the maintenance of a free and democratic society (see s.5 of the FOI Act). Imposition of a fee on access amounts to an economic hurdle in the participation by members of the public in the democratic process. Placing a substantial economic hurdle in the way of the exercise of democratic rights is not a course to be entered on lightly. Imposition of substantial fees or charges would further limit equal participation in the democratic ideals of the FOI Act on the basis of the economic standing of the applicant.***
2. ***Any fee or charge imposed which does not extend to personal affairs applications or documents will have only limited utility in terms of demand management.***
3. ***I do not believe any compelling case can be made for any substantial variation to the existing regime of fees and charges under the FOI Act and FOI Regulation.***
4. ***I do not support the introduction of charges for search and retrieval, consultation or decision-making.***
5. ***I do not support the imposition of any application fee for internal or external review. An applicant should be entitled to challenge an agency's decision to ensure its correctness, at no extra charge. If an external review application fee is imposed, it should be uniform (irrespective of whether the documents in issue concern the applicant's personal affairs) and set at a moderate level (certainly no more than $50), and should be refundable if the applicant is successful in any way. I do not support the introduction of a mechanism for waiver of fees, if fees are kept to a reasonable level.***

Term of Reference B(vii): **Whether the FOI Act should be amended, and in particular:**
...

(vii) whether amendments should be made to minimise the resource implications for agencies subject to the FOI Act in order to protect the public interests in proper and efficient government administration, and in particular:

— whether section 28 provides an appropriate balance between the interests of applicants and agencies;

— whether data collection and reporting requirements, which inform the parliamentary and public understanding of how well the FOI Act is operating in Queensland, exceed what is necessary to achieve their legislative purpose;

— whether time limits are appropriate.

Introduction

B221. This term of reference concerns resource implications for agencies of administering the FOI Act. Some submissions will no doubt provide high estimates of the cost of administering FOI by an agency, or agencies in general. However, I would urge a degree of caution in considering such figures. In my view, in some agencies, a significant portion of resources committed to FOI have been committed unnecessarily because of inefficiencies within the agency, or unjustified efforts to avoid disclosure. This may take the form of:

- inefficient records management procedures;
- failure to consult with applicants to clarify precisely what documents are sought;
- raising and persisting in multiple claims to exemption where there is little chance of success;
- considering at length the possible application of exemption provisions to matter which is innocuous, and which could be disclosed by the agency using the discretion permitted to it under s.28(1) - see paragraph B227 below;
- setting the seniority of internal review decision-makers at high levels within the agency.

B222. A number of agencies initially appeared to treat the prospect of FOI disclosure as a direct threat to their 'sovereignty' over the information and processes they 'owned' requiring denial of access in any case where an argument for exemption was capable of being put forward. Unfortunately, some agencies still appear to adopt this approach.

B223. In fact, it is often the least efficient (in terms of approach to the administration of the FOI Act) and most secretive agencies that complain most loudly about resources incurred in the administration of the FOI Act. For example, in a recent review, an agency had failed to locate certain documents in response to an FOI access application, but subsequently tendered those documents in legal proceedings against the access applicant. The review in question took considerable time which the agency complained was a drain on its resources. However, the agency eventually conceded that the failure to locate the documents was due to deficiencies in its records management

systems. Considerable time and effort by all parties would have been averted if suitable procedures had been in place initially.

B224. As another example of inefficiency, in a recent review concerning s.28(2) of the FOI Act, I was informed that an agency could not search its databases using certain keywords (in this instance "complaint") because the databases were set up not to recognise keywords with "negative" connotations. The resulting search had to be reframed in a manner which entailed considerable extra work.

B225. I accept that the FOI process can require a significant commitment of resources, particularly by "high demand" agencies, e.g., the Queensland Police Service, Queensland Health, the Department of Families Youth and Community Care. I am certainly in favour of steps to increase the efficiency of administration of the FOI Act, so long as they do not significantly detract from the rights conferred by the FOI Act. However, information presented to the Committee by agencies as to the amount of resources expended in dealing with FOI applications should be considered bearing my above comments in mind.

Whether section 28 provides an appropriate balance between the interests of applicants and agencies

Section 28(1)

B226. I do not think that this element of term of reference B(vii) could have been directed to s.28(1) of the FOI Act, which contains the chief exception to the right of access conferred by s.21 of the FOI Act, and which is framed in terms that afford agencies and Ministers a degree of flexibility to disregard legal technicalities to some extent in their administration of the FOI Act. (It may be germane to note, in light of term of reference B(v), that that degree of flexibility is denied to me, in a review under Part 5 of the FOI Act, by the terms of s.88(2) of the FOI Act.) Section 28(1) provides:

> ***28.(1)*** *An agency or Minister may refuse access to exempt matter or an exempt document.*

B227. The use of the word "may" in s.28(1) means that the power to refuse access to exempt matter or an exempt document may be exercised, or not exercised, at the discretion of the relevant agency or Minister (see s.32CA of the *Acts Interpretation Act 1954* Qld). The exercise of this discretion in favour of disclosure of technically exempt matter, where it is evident that such disclosure would cause no real harm, is clearly in accordance with the general objects of FOI legislation. In *Re Murphy and Queensland Treasury (No. 2)* (Information Commissioner Qld, Decision No. 98009, 24 July 1998, unreported), I made the following comments in respect of s.28(1) of the FOI Act (at paragraphs 61-62):

> *61. Under s.28(1) of the FOI Act, an agency has a discretionary power to refuse access to exempt matter. An authorised decision-maker at agency level who, in responding to a valid FOI access application, proposes to exercise the power conferred by s.28(1) of the FOI Act, is ordinarily faced with two decisions:*

(a) whether particular matter satisfies the test for exemption under at least one of the exemption provisions in the FOI Act; and

(b) whether he or she should exercise the discretion conferred by s.28(1) of the FOI Act (which is the only source of power to refuse access to exempt matter) so as to refuse access to the matter in question.

62. Strict logic would suggest that decision (a) should always come first. If the matter in issue does not qualify for exemption, the applicant for access has a legally enforceable right to be given access under the FOI Act (see Re Woodyatt and Minister for Corrective Services *(1995) 2 QAR 383 at p.403, paragraph 48) and no occasion arises for the exercise of the discretion conferred by s.28(1). However, in practical terms, it is not strictly necessary that decision (a) should be the first one considered by an authorised decision-maker under the FOI Act. For example, it may well be that a decision-maker need not give detailed consideration to whether the matter in issue technically qualifies for exemption, if he or she decides (assuming the matter in issue to be exempt) that the matter should be disclosed in any event, on the basis that no essential private or public interests would be prejudiced by disclosure. Considerations relevant to the proper exercise of the discretion conferred by s.28(1) may well be more extensive than the material facts and considerations which afford a basis for exemption. In many cases, the gathering of information and consideration of issues involved in both decisions will probably proceed simultaneously (although a decision-maker should always be careful to clearly distinguish between the material facts and relevant considerations which affect each decision).*

(See also *Re Norman and Mulgrave Shire Council* (1994) 1 QAR 574 at pp.577-578, paragraphs 11-17.)

B228. I note that in numerous cases before me, agencies have refused access to matter which relates to third parties, without consulting those third parties, because the matter in issue technically qualified for exemption. When consulted by my Office, however, third parties not infrequently consent to the disclosure of such matter. While a third party's consent to disclosure may not alter the exempt status of a document, it is, as I have pointed out in a number of decisions on external review, a factor to be taken into account by an agency in determining whether to exercise the discretion conferred by s.28(1) in favour of an applicant for access to documents under the FOI Act.

B229. Agencies should be encouraged, by whatever mechanism is most appropriate, to give consideration to the exercise of the discretion conferred by s.28(1) to disclose exempt matter when no identifiable harm could arise from such disclosure, and encouraged, where appropriate, to make greater use of consultation with third parties to ensure that matter is not withheld from applicants on the basis of incorrect assumptions about third parties' views on disclosure.

Section 28(2)

B230. All Australian FOI legislation contains provisions similar to those of s.28(2). However, the majority of jurisdictions take a more generous view of the range of tasks involved in processing an FOI access application, the performance of which an agency is entitled to take into account in deciding whether the work involved in dealing with a particular FOI access application would "substantially and unreasonably" divert the resources of the agency. Apart from Queensland, only the Tasmanian and ACT FOI Acts (ss.20(1) and 23(1)(b) respectively) confine the decision-maker to considering only the number and volume of documents requested and the difficulties an agency would experience in identifying, locating or collating those documents.

B231. There may be occasions when access to only one document is sought by an applicant, but to locate that document may require searches of a very large number of records and require the substantial and unreasonable diversion of an agency's resources. Under the current wording of s.28(2), however, it would not be possible for an agency to refuse to deal with such an application.

B232. In many cases, the most time-consuming elements in dealing with an FOI access application are determining whether individual documents are exempt from disclosure, undertaking consultation with third parties, preparing schedules of documents, and writing statements of reasons for decision. In many cases, although there is a large volume of documents involved, the fact that they can be easily located by the agency precludes the application of s.28(2), although a great deal of time may be required to deal with those documents under the FOI Act. In such cases, I have been prepared to take into account factors of the kind mentioned at the start of this paragraph in granting an agency's application, under s.79(2) of the FOI Act, for additional time to deal with a complex FOI access application, where there was no great difficulty merely in identifying, locating or collating the requested documents. I consider that this would be the preferable course of action in most cases which impose a considerable strain on an agency to deal with an access application within prescribed time limits, but which are not so onerous as to constitute a serious diversion of the resources of the agency from performance of its functions.

B233. However, there may still be cases where the processing of an access application is so onerous that even a generous extension of time, or an arrangement for staged processing of the application, will not overcome the difficulties.

B234. The Commonwealth and Victorian FOI Acts permit an agency or Minister to refuse to deal with an access application having regard to the resources necessary to identify, locate and collate documents (although without reference to the number and volume of documents involved). However, both acts also provide (ss.24 and 25A(2) respectively) that an agency or Minister may decide not to deal with an application because the work involved in deciding whether to grant, refuse or defer access to documents (or to edited copies of documents) would substantially and unreasonably interfere with the functions of the agency or Minister, and that in so deciding, an agency or Minister may have regard to the resources which would be involved in:

- examining the documents;
- consulting with any third party or parties;
- making copies, or edited copies, of the documents; and
- notifying any interim or final decision on the application.

B235. The New South Wales, South Australian and Western Australian FOI Acts provide (at ss.25(1)(a1), 18(1) and 20(1), respectively) that an agency may refuse to deal with an application if the work involved would substantially and unreasonably divert the agency's resources from the exercise of its functions, without specifying or limiting the range of tasks involved in processing an access application that might so divert those resources, and without expressly mentioning, as a relevant factor, the number and volume of the documents involved.

B236. If agencies submit sufficient evidence of difficulties they have experienced that warrant amendment of s.28(2) to accord with s.24 of the Commonwealth FOI Act, then the Committee may consider such an amendment appropriate. However, in my view, consideration should be given to amending s.28(2) of the Queensland FOI Act to expressly provide that agencies may negotiate with applicants who make overly large, complex or unreasonable applications, with a view to reaching agreement on refining the scope of the application, or allowing additional time for consultation under s.51 of the FOI Act, or allowing an agency to make progressive decisions on separate parts of the access application within an extended timeframe, so that the applicant may have progressive access to documents.

B237. An amended s.28(2) could also make provision for an agency to apply to the Information Commissioner (in the event that agreement cannot be reached with the applicant) for an order permitting any of the above things (in a similar way to that by which an agency can now apply to the Information Commissioner, under s.79(2) of the FOI Act, for additional time to deal with an access application). This would have the virtue that more access applications would be processed, albeit under extended time-frames, rather than refused outright. If provisions of the kind referred to were introduced, it may be appropriate to retain s.28(2) in its current form. A charging regime of the kind referred to at paragraphs B200-B207 above would also be likely to inhibit access applications that posed an unreasonable strain on agency resources.

Section 28(3)

B238. Section 28(3) is modelled on s.24(5) of the Commonwealth FOI Act. The Victorian, Tasmanian and ACT FOI Acts contain similar provisions (s.25A(5), 20(2) and 23(2) respectively). It is, in my view, a provision which is too generous to agencies, and one which is susceptible to misuse by decision-makers unfamiliar with their agencies' documents, or seeking to limit their workload.

B239. This section is designed to entitle an agency to refuse an FOI access application, without first having identified any of the documents which may fall within the terms of that application, if it is apparent from the nature of the documents described by the applicant that they would all be exempt. In my view, such a conclusion could only reasonably be drawn in the rare event that an access application was framed in such specific terms as to request only documents that would clearly be exempt from disclosure to the applicant; for example —

- "I seek access to all documents submitted to Cabinet on topic X"

or

- "I seek access to any document/s which identify the person who complained about me to the police".

B240. Applications as specific, and as limited, as the above are uncommon. The more usual wording of applications seeking to elicit information of the above type would refer to all documents held by the agency which relate to topic X, or to all documents in the possession of the QPS relating to the complaint against, and investigation of, the applicant. It is difficult to conceive of any access application framed in that more usual manner, with which an agency could reasonably refuse to deal, relying on s.28(3), as it is always more probable than not that among the documents which fall within the terms of such an access application will be some which may not contain exempt matter, and to which the applicant may have a statutory right of access (in whole or in part). To invoke s.28(3) in these circumstances is to deny that right of access.

B241. It would not be appropriate to invoke s.28(3), without identifying and examining the requested documents, in respect of documents considered to be exempt under any exemption provision which turns on a judgment as to the proper characterisation of information contained in individual documents, or the effects of disclosure of the particular information contained in individual documents, or which turns on (or is qualified by) a public interest balancing test.

B242. I have seen instances of agencies invoking s.28(3) where it was quite inappropriate to do so, because the documents to which the applicant requested access should have been assessed individually, there being no justification for treating them, without examination, as belonging to an exempt class.

B243. I note that the ALRC/ARC Review recommended that s.24(5) of the Commonwealth FOI Act should likewise be repealed, and I recommend that s.28(3) of the Queensland FOI Act should likewise be repealed. The impact on agencies if this section were repealed should be minimal, as its use is only appropriate in comparatively rare circumstances. Alternatively, if it is considered that s.28(3) should be retained, it should be amended to require agencies to identify the exemption provision/s believed to be applicable, and to explain why all of the documents to which access is requested must necessarily be exempt thereunder. This would defeat the potential for misuse of s.28(3).

B244. **Recommendation:**

(a) Section 28(3) of the FOI Act should be repealed.

(b) Alternatively, if it is considered that the retention of s.28(3) may be of value in the rare cases where its use is likely to be appropriate, it should at least be amended to require the agency to identify the exemption provision(s) said to be applicable, and to explain why all of the documents to which an applicant has requested access must necessarily be exempt thereunder.

Additional grounds for refusal to deal with applications

B245. There has been some support in the past for the inclusion of a 'vexatious applicants' clause in the FOI Act. A number of agencies - and, indeed, my own Office - have had to deal with serial applicants, i.e., applicants who make one access application after another (and sometimes for the same documents). This type of applicant can be difficult to deal with, usually harbouring obsessive grievances, and manifesting dogged persistence in their pursuit.

B246. The only Australian jurisdiction which appears to have addressed this issue is Victoria: see s.24A of the Victorian FOI Act, which provides that an agency or Minister may refuse to deal with an application if access to the same documents or information has previously been refused by the agency or Minister, the Victorian AAT has upheld that decision, and there are no reasonable grounds for making the request again.

B247. I have had the experience of a particular applicant applying again to the same agency for documents that included the very documents in issue in a current review under Part 5 of the FOI Act, and upon again being refused access by the agency, applying again to me for external review of the second refusal of access. This bizarre tactic has been repeated several times with several different agencies. While I have the power to deal with it at external review level under s.77 of the FOI Act, agencies have no similar power at the levels of primary decision-making and internal review.

B248. While a provision similar to s.24A of the Victorian FOI Act would not relieve agencies of the need to deal with all serial applications, it could enable them to refuse to deal with applications for documents which are already the subject of a current application for review under Part 5 of the FOI Act, or which have been determined, on external review, to be exempt from disclosure to a particular applicant, to be non-existent or to be incapable of being found. It could also enable agencies to refuse to deal at the one time with more than one application by the same applicant for the same information or document(s).

B249. **Recommendation:**

A new subsection should be inserted in s.28 of the FOI Act (presumably in place of the existing s.28(3) if it is repealed in accordance with my above recommendation) in the following terms:

If an application for access to documents, received by an agency or Minister, seeks a document or documents, or certain matter therein, that—

(a) at the time of receipt of the access application is/are already the subject of a current review under Part 5 of the FOI Act in which the applicant for access, and the relevant agency or Minister, are participants; or

(b) at the time of receipt of the access application is/are already the subject of a prior access application lodged with the same agency or Minister by the same access applicant, and in respect of which a decision has not yet been made; or

(c)(i) has/have been the subject of a prior review under Part 5 of the FOI Act in which the same agency or Minister, and the same access applicant, were participants, and in which the commissioner made a decision to the effect that the relevant document(s) or matter were exempt from disclosure to the access applicant, or did not exist (or

were incapable of being located) in the possession or control of the relevant agency or Minister; and

(ii) the agency or Minister is satisfied that there are no reasonable grounds for the applicant to again seek access to the relevant documents or matter;

the agency or Minister may refuse to grant access to the requested document(s) or matter, without having caused the processing of that request to be undertaken.

(Such a decision would be a decision to which the statutory rights of internal review and external review would respectively apply, according to the terms of s.52(7)(a)(i) or (iii), and s.71(1)(a) or (d) of the FOI Act.)

B250. While no other Australian jurisdiction gives agencies a general right to refuse to deal with an application for access on the grounds that it is frivolous or vexatious, that power has been granted in Ontario (see *Freedom of Information and Privacy Act 1987*, s.10(1)(b)). Sections 5.1(a) and (b) of Regulation 460 provide that such action can be taken if the head of the agency is of the opinion that the request is part of a pattern of conduct that amounts to an abuse of the right of access, that it would interfere with the operations of the institution, that it is made in bad faith or that it is made for a purpose other than to obtain access. A similar power at agency level is proposed for inclusion in South African FOI legislation (see s.40 of the *Open Democracy Bill*).

B251. An alternative approach appears in the FOI legislation of British Columbia, where the head of an agency may make an application for an authorisation from the Information and Privacy Commissioner for the agency to disregard requests that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the agency. A similar provision is included in proposed amendments to the FOI legislation of Alberta. I have attached for consideration by the Committee extracts from the relevant legislation, and copies of decisions of the Information and Privacy Commissioner and the Supreme Court of British Columbia, dealing with the issue of frivolous or vexatious requests (Attachment B(vii)1).

B252. **Recommendation:**

The Committee should consider whether it is necessary or appropriate to amend the FOI Act to give agencies and Ministers a power to refuse to deal with applications under the FOI Act that are frivolous or vexatious, and if so, what legislative guidance should be given as to the kinds of behaviour by an applicant that might warrant the making of such a decision.

Whether data collection and reporting requirements, which inform the parliamentary and public understanding of how well the FOI Act is operating in Queensland, exceed what is necessary to achieve their legislative purpose

B253. The matters to be included in the annual report on the operation of the FOI Act (which is provided for in s.108 of the Act) are similar to those in the Victorian FOI Act and, in my view, require more information (there are 10 categories of information specified) than is necessary or useful in reporting upon this function of agencies and Ministers.

B254. Of the remaining jurisdictions, the Commonwealth, the ACT, Western Australia and Tasmania require agencies to report on no more than 5 or 6 of those categories. The New South Wales and South Australian FOI Acts do not specify what should be included in their respective annual reports - the information to be provided by agencies is at the discretion of the Minister (SA), or may be specified by regulation (NSW).

B255. The current reporting requirements in the Queensland FOI Act include some matters which are of little or no interest to the general public, and which do not assist the public to understand how, and with what degree of success, the FOI Act is being administered in Queensland, e.g., the names of decision-makers are unnecessary, as decisions are made on behalf of an agency or Minister.

B256. In my view, the following subparagraphs of s.108(4) should be retained, but subparagraph (d) should be reduced in scope to that which I have recorded opposite it below:

s.108(4)(a)	
s.108(4)(b)	
s.108(4)(d)	the number of applications for internal review of decisions (for access to and amendment of documents), and the provisions of the FOI Act under which the internal reviewing officer decided that matter was exempt from disclosure (existing s.108(4)(d)(iii))
s.108(4)(f)	
s.108(4)(g)	
s.108(4)(h)	
s.108(4)(j)	

B257. Information about the availability of reading rooms or other facilities (s.108(4)(i)) should be included in agencies' statements of affairs, published under s.18 of the FOI Act. While the information covered by s.108(4)(e) is of relevance and interest, it is routinely included in the Annual Reports of the Information Commissioner, required under s.101(2) of the FOI Act, and there is no necessity to duplicate it in an Annual Report prepared by the Minister for Justice and Attorney-General.

B258. I do not consider that it is necessary to distinguish the applications for, or decisions on, access, amendment and internal review received or made by agencies by reference to the officers involved. It is sufficient to report the total number of applications and decisions for each agency.

B259. Section 108(4)(b) specifies only the number of documents to which an agency determines that access should be refused. The reports prepared by the Department of Justice, however, have included the number of documents to which access is granted in full and in part, and the

percentage of documents in each category. (I note that the Commonwealth and Western Australian FOI Acts contain provisions to this effect.) While I do not consider the number of documents involved in an application necessarily reveals anything about an agency's effectiveness in complying with the requirements of the FOI Act, the above percentages are a useful measure, and one which is easily understood by both users of the FOI Act and the general public.

B260. The annual report has also included the time taken by agencies to deal with applications. It is useful to identify agencies that consistently fail to meet the statutory time limits imposed by the FOI Act, and also to ascertain whether there is scope, based on the performance being achieved by agencies, to reduce the presently prescribed time limits for dealing with applications.

B261. Section 108 does not specifically require the reporting of details of the numbers and outcomes of requests for amendment of information under Part 4 of the FOI Act. This appears to have been an oversight that should be corrected. (Such details have in fact been collected and published in previous Annual Reports.)

B262. **Recommendation:**

(a) Sections 108(4)(c), (e), and (i) should be deleted, and s.108(4)(d) should be amended to delete the requirement for the publication of the names of officers.

(b) Section 108(4)(b) should be amended so as to accord with s.93(3)(a)(ii) of the Commonwealth FOI Act.

(c) An additional subparagraph should be added to s.108(4) so as to require publication of the number of requests received for amendment of information, and particulars of the results of such requests.

(d) An additional subparagraph should be added to s.108(4) so as to require publication of the average time taken by agencies and Ministers to deal with access applications, and applications for amendment of information, and the percentage of applications which are not dealt with inside the prescribed time limits.

Whether time limits are appropriate

B263. The time limits in the Queensland FOI Act for the making of decisions by agencies on access, amendment, and internal review applications are similar to those in other Australian jurisdictions, and, in the case of decisions on access, more generous than the Commonwealth, Tasmania and the ACT (30 days) and New South Wales (21 days). Like Queensland, the Commonwealth and the ACT allow additional time (15, 30 and 15 days respectively) in cases where it is necessary to consult with third parties before making a decision on access.

B264. According to the Department of Justice's annual reports on the operation of the FOI Act in Queensland, the majority of agencies finalise applications within the specified time limits. Many agencies finalise uncomplicated applications well within the lower limit of 45 days (or 30 days for amendment applications). Only a small number of agencies, which attract the largest number of complex applications (including the Queensland Police Service and the Department of Families, Youth and Community Care) fail to finalise a significant proportion within the prescribed time periods.

B265. I do not consider that the prescribed time limits should be extended. The only reason for doing so would be to enable agencies to meet the statutory requirements in cases where they now fail to do so, and I am not persuaded that this would be the case. There will always be applications which are complex or contentious, or situations in which the resources devoted by an agency to dealing with FOI applications are inadequate, which make it difficult or impossible for an agency to make a properly considered decision within the required time. Extending time limits to deal with even some of these cases could unfairly penalise other applicants, if agencies regard the new time limits as an excuse to take extra time in finalising all applications, including simple ones which should be speedily resolved.

B266. It would be more productive to avoid the necessity for review of deemed refusals by allowing agencies and applicants to negotiate mutually acceptable extensions of time in which to complete large or complex applications, with a stipulation that an interim decision be made within the statutory time limit(s) on as many documents or parts of documents as possible. This would enable the applicant to access at least some of the information or documents he or she requires, while permitting the agency to deal with consultations, or complex parts of the decision, properly and fully.

B267. There is an unfortunate tendency, when an agency becomes aware that it may not be able to meet a statutory time limit, to abandon any attempt to do so and to take little or no further action on the application, unless and until the applicant applies for external review of the agency's deemed refusal of access to the relevant documents. This is an undesirable situation which should be avoided.

B268. After six years experience in the administration of the FOI Act, it is appropriate that the basic time limit for processing an access application (as prescribed by s.27(7)(b) of the FOI Act) should be reduced from 45 days to 30 days. Since cases where consultation with third parties under s.51 of the FOI Act seem to account for most of the cases in which agencies experience difficulties in complying with time limits, I consider that the words "15 days" in s.27(4)(b) of the FOI Act should be amended to "30 days". This would bring the Queensland FOI Act into line with the Commonwealth FOI Act.

B269. **Recommendation:**

(a) The numerals "45" in s.27(7)(b) of the FOI Act should be amended to "30".

(b) The numerals "15" in s.27(4)(b) of the FOI Act should be amended to "30".

(c) Provision should be made for agencies/Ministers and applicants to negotiate mutually acceptable response times outside the prescribed time limits of the FOI Act, subject to the requirement that a partial or interim decision be made within the prescribed time limits on as many documents or parts of documents as possible. (This would necessitate consequential amendments to s.27(4) and s.79(1), to ensure that the right to seek review by the Information Commissioner on the basis of a deemed refusal is still available in the event that an agency fails to comply with a negotiated extension of the statutory time limits.)

Term of Reference B(viii): Whether the FOI Act should be amended, and in particular:

...

(viii) whether amendments should be made to either section 42(1) or section 44(1) of the Act to exempt from disclosure information concerning the identity or other personal details of a person (other than the applicant) unless its disclosure would be in the public interest having regard to the use(s) likely to be made of the information

Identity

B271. I am not sure what prompted the inclusion of this term of reference. I am not aware of any similar provision in any other FOI legislation. Section 42(1) sets out exemption provisions that relate to law enforcement and public safety. It does not contain a public interest balancing test, except in the very narrow circumstances set out in s.42(2). In my view, it would be most inappropriate to include in s.42 a provision of the type proposed in this term of reference.

B272. Section 44(1) provides exemption for information concerning the personal affairs of a person unless its disclosure would, on balance, be in the public interest. I discussed the application of s.44(1) to names of persons in Re Stewart and Department of Transport (1993) 1 QAR 227, at pp.259-261, paragraphs 86-90. In Re Stewart, I indicated that the name of a person falls into a 'grey area' and would not necessarily be characterised as concerning the personal affairs of the person. However, I stated that disclosure of a person's name in the context of a particular document might well disclose information concerning their personal affairs, e.g., disclosure of the name of a person on a Criminal Offence Report might disclose that he or she was named as a suspect or as a victim.

B273. In practice, most references of any significance to members of the public acting in a private capacity will appear in a context where disclosure of the person's name would disclose information concerning their personal affairs, and so qualify for exemption under s.44(1), subject to the application of the public interest balancing test. The only significant practical effect of adding a further exemption of the type proposed would appear to me to be the extension of protection to:

(a) public servants acting in the course of their employment duties; and
(b) members of the public acting in a representative capacity (e.g., on behalf of a consumer or environmental group) or in the course of their business or professional affairs.

B274. In *Re Murphy and Queensland Treasury* (1995) 2 QAR 744, I decided that disclosure of the names of public servants appearing in documents created in an employment context would not disclose information concerning their personal affairs for the purposes of s.44(1). This aspect of my decision was affirmed by the Supreme Court in *State of Queensland v Albietz* [1996] 1 Qd R 215, at pp.221-222. In *Re Pope and Queensland Health* (1994) 1 QAR 616, I specifically endorsed the following observations, concerning s.33(1) (the personal affairs exemption) of the *Freedom of Information Act 1982* Vic, made by Eames J of the Supreme Court of Victoria in *University of Melbourne v Robinson* [1993] 2 VR 177, at p.187:

> *The reference to the* "personal affairs of any person" *suggests to me that a distinction has been drawn by the legislature between those aspects of an individual's life which might be said to be of a private character and those relating to or arising from any position, office or public activity with which the person occupies his or her time.* [emphasis added]

B275. Nothing in my experience of the FOI Act would warrant a general exemption for matter which would identify individual public servants engaged in their duties of office. Ministers and chief executives of agencies must ultimately be accountable for the actions and performance of their staff. However, I see no benefit in promoting a nameless and faceless public service below the level of chief executive. I consider that public servants must accept that they should be accountable for the way that they carry out their duties. To include a provision of the type proposed would raise a *prima facie* public interest consideration against disclosure of the names of public servants. I can see no reason why the identity of a public servant should start from that privileged position. Rather, I consider it appropriate that the present position be maintained so that an agency seeking to delete the name of a public servant should have to establish that it is protected under one of the existing exemption provisions.

B276. There are a number of exemption provisions which allow the protection of the name or identity of a public servant if the particular circumstances warrant it. They include:

- s.42(1)(b), if the public servant is a confidential source of information in relation to the enforcement or administration of the law;
- s.46(1), if the public servant has supplied information of a kind that does not answer the description in s.41(1)(a) of the FOI Act, on a confidential basis;
- s.40(c), if disclosure could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; and
- s.42(1)(c), if disclosure could reasonably be expected to endanger a person's life or physical safety. (I note that in *Re Murphy*, Queensland Treasury sought to protect the names of individual public servants, arguing that disclosure of the names to the applicant could reasonably be expected to endanger the life or physical safety of the staff concerned. On the facts before me in that case, I decided that neither that exemption nor others raised by Queensland Treasury were made out. My decision was unsuccessfully challenged by Queensland Treasury in the Supreme Court. I do not consider that the failure by Queensland Treasury to establish objectively reasonable grounds for exemption in that case can be used as a justification for a new exemption provision unparalleled in Australian FOI legislation.)

B277. As to names of persons acting in a representative or business context, individuals who are concerned can again rely on s.42(1)(b), s.42(1)(c) or s.46(1) in an appropriate case. In a business context s.45(1)(c) (which protects disclosures which could reasonably be expected to have an adverse effect on business, professional, commercial or financial affairs) may also be available. However, I must say that the issue of disclosure of the identity of persons acting in a representative capacity, or in the course of their business or professional affairs, has not arisen frequently for my consideration. In cases involving such persons, the issue for debate has normally concerned the substance of information provided to government or about the person, rather than the identity of the person. While one might be able to envisage examples of such

cases, it appears to me that the existing exemption provisions provide adequate protection in such cases.

B278. In summary, there are several existing exemption provisions under which members of the public, and, in appropriate circumstances public servants, can claim exemption in respect of their names or other identifying material. These include s.42(1)(b), s.42(1)(c), s.44(1) and s.46(1). I do not consider that there is any significant gap in the protection now offered by those exemption provisions. In my view, the only real benefit of such a provision would go to staff of agencies. I consider that the existing level of protection given to staff of agencies is adequate. Given the accountability aims of the FOI Act, I see no basis for further limiting the right of access granted to members of the community under the FOI Act in the terms put forward.

B279. I also have a further concern regarding the introduction of a new public interest balancing test which would require decision makers to have "regard to the use(s) likely to be made of the information". There are already three differently worded public interest balancing tests in the FOI Act. One requires decision makers to consider whether disclosure "would, on balance, be in the public interest". Another requires the decision maker to decide whether disclosure "would, on balance, be contrary to the public interest". The third requires a decision maker to consider whether disclosure is "required by a compelling reason in the public interest". The proposed test also calls for decision makers to assess the use or uses "likely" to be made of the information. The phrase "could reasonably be expected to" is already in use throughout the FOI Act. Introduction of a test involving an assessment of the uses "likely" to be made of the matter in issue would raise a question as to whether this test is in some way different from the test which now appears in several exemption provisions, embodied in the words "could reasonably be expected to". Further, it is far from clear to me whether the italicised words above are intended to limit or expand the public interest balancing test. I consider that introduction of the proposed public interest balancing test would add further unwarranted layers of complexity and uncertainty to the FOI Act.

Personal details

B280. I am not certain what is meant by "other personal details" in the term of reference. If it relates to such things as home address, home telephone number, height, date of birth, eye colour and the like, it would clearly already be characterised as information concerning the personal affairs of the person and therefore be exempt from disclosure under s.44(1) of the FOI Act, subject to a public interest balancing test. This matter is already protected under s.44(1) to the extent that it would be under the proposed new provision. It would be pointless to introduce a new provision covering this matter in the terms proposed.

Term of Reference B(ix): Whether the FOI Act should be amended, and in particular:

...

(ix) whether amendments should be made to the Act to allow disclosure of material on conditions in the public interest (for example, to a legal representative who is prohibited from disclosing it to the applicant)

B281. I am not aware of any provision in the FOI legislation of other jurisdictions, on which the proposal contained in this provision might be based. (Some jurisdictions permit legal representatives for the party challenging a refusal of access in proceedings before the independent merits review body, to see the documents in issue, upon their undertaking not to disclose the contents of those documents to their client, but only for the purpose of more effectively presenting a case on behalf of their client against claimed grounds of exemption. Such a practice is expressly prohibited by s.87(1) of the Queensland FOI Act. However, this does not appear, in any event, to be the situation contemplated by this term of reference.)

B282. I find it difficult to comment on this term of reference without any information as to the perceived mischief, or shortcoming in the operation of the FOI Act, that the proposal is aimed at, and without more detail of how the proposal might work in practice.

B283. For example, how are any conditions attached to disclosure of particular information to be enforced? Who would monitor compliance with the conditions, and how? What standard of proof would be required, by whom, and in what forum, to prove that a breach of conditions had occurred? What kind of sanctions would be imposed for a breach of conditions?

B284. A power to disclose information subject to conditions, that was intended to work largely on the principle that barristers or solicitors would be ethically bound to honour any undertaking given by them as to compliance with conditions on disclosure, would have the tendency to bring inequities to the administration of the FOI Act, working to the advantage of persons and corporations who could readily afford to retain legal representatives, and to the comparative disadvantage of those who could not readily afford to retain legal representatives.

B285. FOI decision-makers in agencies, faced with a borderline case where it may or it may not, on balance, be in the public interest for an access applicant to obtain particular information, may be prepared to lean toward disclosure, if there were an appropriate condition that could be imposed on disclosure, and satisfactory means of monitoring compliance with the condition, backed by the threat of meaningful sanctions for its breach. However, one can also foresee many agencies wanting to err on the side of caution by seeking to impose conditions in situations where unconditional access should be the norm. Presumably, there would then have to be a right to seek independent review of the reasonableness of the conditions imposed, or whether conditions should be imposed at all, or even whether, in respect of a document to which access has been denied, access should be granted subject to conditions.

B286. Without more details of the proposal suggested in this term of reference, I am inclined to the view that it would create more problems than it might solve. However, I may wish to comment further in light of any supporting material put in favour of the proposal in other submissions to the Committee.

Term of Reference C: Any related matter

Part A - General issues not specifically dealt with in Term of Reference B

Provisions re: deceased persons, intellectually disabled persons, and minors

C1. Decision-makers dealing with applications for access to, or amendment of, information which concerns the personal affairs of deceased persons, intellectually disabled persons or minors, are faced with substantial practical difficulties because of the failure of the FOI Act to make adequate provision concerning these matters.

Deceased persons

C2. The relevant provisions of the FOI Act concerning deceased persons are inconsistent with respect to the terminology they employ. While s.51(3) imposes on agencies an obligation to consult with the "closest relative" of a deceased person (in respect of applications for access to matter which concerns the personal affairs of the deceased), s.53(b) provides that the "next of kin" of a deceased person is entitled to apply for amendment of information concerning the personal affairs of the deceased. (Section 59(4)(a)(i) also employs the term "next of kin".) I note that neither of the terms "closest relative" or "next of kin" is defined in the FOI Act, or in the Acts Interpretation Act 1954 Qld, and that at common law, these terms may not include a deceased person's spouse.

C3. The present lack of uniformity and specificity in the Act's provisions leaves agencies dealing with applications for access to information concerning the personal affairs of a deceased person in the difficult position of determining the proper person to consult, in accordance with the obligation imposed by s.51 of the FOI Act. This is particularly so where the deceased person's closest surviving relatives are persons of the same degree of consanguinity (who may hold differing views as to whether information should be released), or where the person who is determined to be the deceased person's "next of kin" or "closest relative"' is mentally incompetent or a minor.

C4. Similarly, agencies in receipt of applications for amendment of information under Part 4 of the FOI Act, purportedly made by the "next of kin" of a deceased person, may encounter substantial difficulty in determining whether the applicant properly qualifies as "next of kin" in the circumstances of a particular case.

C5. Further, section 105 of the FOI Act provides that an application for access to documents that relate to the personal affairs of a person may be made by "the person's agent", provided that "the agent has the written authority of the person to obtain the information or is otherwise properly authorised by the person to obtain the information". This raises several practical difficulties for agencies; e.g., whether the agency relationship envisaged by s.105 extends to the personal representative of a deceased person's estate, and whether a person acting in the capacity of agent 'stands in the shoes' of the deceased person, such that the provisions of the FOI Act concerning the imposition of a $30 application fee and access charges do not apply.

C6. In regard to the latter point, reference is made to my decision in *Re Turner and Northern Downs Regional Health Authority* (1997) 4 QAR 23, in which I held that an applicant seeking access to medical records concerning her late husband (in her capacity as next of kin and executrix of the estate) was required to pay the $30 application fee provided for in s.29(2) of the FOI Act, and s.6 of the FOI Regulation, as the matter in issue did not concern her personal affairs.

Intellectually disabled persons

C7. The FOI Act does not contain any explicit provisions about access to information concerning the personal affairs of intellectually disabled persons. (By contrast, I note that the Western Australian Freedom of Information Act 1992 provides, in s.98, that an access application or application for amendment of information may be made, on behalf of an intellectually handicapped person, by the person's closest relative or guardian.)

C8. An external review application received by my Office illustrates some of the difficulties encountered by Queensland agencies in dealing with applications in the absence of any specific statutory guidance. The case involved an FOI access application, by the adult child of an elderly parent diagnosed with a form of senile dementia, to information concerning 'regulated admission' proceedings involving the parent, taken under the *Mental Health Act 1974* Qld. The patient's spouse (who may not fall within the scope of the terms "closest relative" or "next of kin", as noted above), was himself suffering from senile dementia, and a sibling of the access applicant asserted the right to make decisions concerning the affairs of the parent regulated under the *Mental Health Act*, by virtue of an enduring power of attorney (which the access applicant contended was invalid). In accordance with the requirements of s.105 of the FOI Act, the access applicant supplied the agency concerned with a "written authority" by the parent to whom the information related, but that authority was rejected by the agency on the grounds of the parent's intellectual disability.

Minors

C9. As indicated above, there is no specific provision in the FOI Act dealing with situations in which access is sought to information concerning the personal affairs of minors (by either a parent/relative/guardian of the minor, or by an unrelated third party). (Western Australia's FOI Act relevantly provides, in s.98, that an access application or an application for amendment may be made, on behalf of a child, by the child's guardian or the person who has custody or control of the child.)

C10. The absence of any specific provision in the Qld FOI Act leaves agencies in the difficult position of determining whether parents have a right of access to information concerning their minor children, or to express views on behalf of their minor children in respect of access applications lodged by third parties, or whether minor children have privacy rights which they are able to assert even against their parents (and if so, whether there should be a defined cut-off age, or whether each case should be determined on an assessment of the capacity of the individual minor). There has been one instance of a parent seeking access to records of interview between his children, and the police and child welfare authorities, who were investigating allegations of child neglect against the parents. I held that information concerning the personal affairs of the children was, in these circumstances, exempt from disclosure to their

father, even though he had procured what purported to be signed consents by the minor children to the disclosure to him of their records of interview.

C11. Clear statutory guidance on these issues should assist efficient administration of the FOI Act.

C12. **Recommendation:**

(a) Deceased persons:

(i) Consideration should be given to amending the FOI Act to include the personal representative of the deceased as a person to be consulted (for the purposes of s.51), and a person entitled to seek amendment of personal affairs information (for the purposes of s.53(b)). (See for example, s.27A(1)(a) of the Commonwealth FOI Act and s.26(5) of the South Australian FOI Act, which make specific provision for consultation with the personal representative of a deceased person).

(ii) The terminology employed in the FOI Act (i.e., "next of kin" and "closest relative") should be standardised as "closest relative" (or "nearest relative", as employed in other Queensland statutes - see, for example, the *Intellectually Disabled Citizens Act 1985* Qld). Whichever term is selected, it should be defined for the purposes of the FOI Act, to assist agencies in determining the appropriate individual with whom consultation should occur. (Examples of such definitions, which could be adapted for the purposes of the FOI Act, are the definitions of "nearest relative" in s.4 of the *Intellectually Disabled Citizens Act 1985* Qld, or the more comprehensive version in s.3 of the *Guardianship and Administration Act 1990* WA). For an example of a specific provision to address the difficulty encountered where the person who ought to be consulted under the statutory scheme is intellectually disabled, see s.32(4) of the Western Australian FOI Act.

(b) Intellectually disabled persons:

The "closest relative" or "nearest relative" provisions in Part 3 and Part 4 of the FOI Act (i.e., s.51(3), s.53(b) and s.59(4)(a)(i)) should also be made applicable to cases concerning intellectually disabled persons.

(c) Minors:

Consideration should be given to making specific provision in the FOI Act to clarify the rights of minors with respect to capacity to exercise the rights conferred by the FOI Act, rights to be consulted under s.51, and *et cetera*

C13. NOTE: In addition to the relevant provisions of other Australian FOI legislation referred to above, several overseas jurisdictions have addressed the difficulties adverted to above by including in their FOI legislation (or , in the case of the Republic of South Africa, proposed

legislation) specific 'omnibus' provisions, which may assist the Committee's deliberations in regard to these matters:

Province of Ontario (Canada)
(*Freedom of Information and Protection of Privacy Act*, S.O. 1987, s.66)

> ***66.*** *Any right or power conferred on an individual by this Act may be exercised,*
>
> *(a) where the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate;*
>
> *(b) where a committee has been appointed for the individual or where the Public Trustee has become the individual's committee, by the committee; and*
>
> *(c) where the individual is less than sixteen years of age, by a person who has lawful custody of the individual.*

Ireland
(*Freedom of Information Act 1997, (Section 28(6)) Regulations, 1999;* S.I. No. 47 of 1999)

> …
>
> ***2.*** *In these Regulations a reference to a section is a reference to that section of the* Freedom of Information Act, 1997 *(No. 13 of 1997).*
>
> ***3.(1)*** *Notwithstanding section 28(1), a request under section 7 in relation to a record access to which involves the disclosure of personal information (including person information relating to a deceased individual) shall, subject to the other provisions of the* Freedom of Information Act, 1997, *be granted where:*
>
> *(a) the requester is a parent or guardian of the individual to whom the record concerned relates and that individual belongs to one of the following classes of individual:*
>
> *(i) individuals who, on the date of the request have not attained full age (within the meaning of the* Age of Majority Act, 1985 *(No. 2 of 1985), or*
>
> *(ii) individuals who have attained full age (within the meaning aforesaid), who at the time of the request have a mental condition or mental incapacity or severe physical disability, the incidence and nature of which is certified by a registered medical practitioner and who, by reason thereof, are incapable of exercising their rights under the Act,*
>
> *being individuals specified in clauses (i) and (ii) access to whose records would, in the opinion of the head having regard to all the circumstances and any guidelines drawn up and published by the Minister, be in their best interests, or*

(b) the individual to whom the record concerned relates is dead ("the individual") and the requester concerned belongs to one of the following classes of requester:

(i) a personal representative of the individual acting in due course of administration of his or her estate or any person acting with the consent of a personal representative so acting,

(ii) a person on whom a function is conferred by law in relation to the individual or his or her estate acting in the course of the performance of the function, and

(iii) the spouse or a next of kin of the individual or such other person or persons as the head considers appropriate having regard to all the circumstances and to any relevant guidelines drawn up and published by the Minister.

***(2)** In this Regulation, "spouse" includes:*

(a) a party to a marriage that has been dissolved, being a dissolution that is recognised as valid in the State, or

(b) a man or woman who was not married to but cohabited as husband or wife, as the case may be, with the deceased individual.

Republic of South Africa
(*Open Democracy Bill*, B67-98)

***29(1)** Subject to subsection (2), the information officer of a governmental body must refuse a request for access to a record of the body if its disclosure would constitute an invasion of the privacy of an identifiable person (including an individual who died less than 20 years before the request is received) other than the requester concerned or other person contemplated in section 13(5).*

***(2)** Subsection (1) does not apply to a record in so far as it consists of information—*

…

(c) about an individual's physical or mental health, or well-being, who is—

(i) under the age of 18 years;
(ii) under the care of the requester; and
(iii) is incapable of understanding the nature of the request,

and if giving access would be in the individual's best interests;

(d) about an individual who is deceased and the requester is, or is requesting with the written consent of, the individual's next of kin; or

…

(3) *In subsection 2(d) "individual's next of kin" means—*

(a) an individual to whom the individual was married, with whom the individual lived as if they were married or with whom the individual cohabited, immediately before the individual's death;

(b) a parent, child, brother, or sister of the individual; or

(c) if—

(i) there is no next of kin referred to in paragraphs (a) and (b); or

(ii) the requester concerned took all reasonable steps to locate such next of kin, but was unsuccessful,

an individual who is related to the individual in the second degree of affinity or consanguinity.

Deletion of irrelevant material

C14. Section 27(3) of the FOI Act is causing confusion for agencies as to whether they are permitted to delete irrelevant material without having to consult with an applicant. Further, s.27(3) sets out the procedure to be followed "*with the agreement of the applicant*", but fails to provide for situations in which the applicant's agreement cannot be obtained.

C15. Where a document contains exempt matter which is clearly information that does not fall within the terms of the applicant's FOI access application, there should be significant resource savings for the agency processing the application if it were able to delete irrelevant matter, irrespective of whether the applicant agrees, rather than spending time in making determinations about the applicability of exemptions, consulting third parties, etc in respect of such matter.

C16. I note that in 1991, s.22 of the Commonwealth FOI Act was amended to expressly provide agencies with power to grant access to documents subject to the deletion of irrelevant material. These amendments were made as a result of conflicting decisions of the Commonwealth AAT as to whether the wording of the Commonwealth FOI Act permitted the deletion of irrelevant material (see paragraphs 7.20-7.22, at pp.99-100 of the 1987 Senate Standing Committee's Report on the Operation of the Commonwealth FOI Act). If amendments of a similar kind were made to the Qld FOI Act, s.27(3) could be left in its present form.

C17. **Recommendation:**

The FOI Act should be amended so as to adapt the 1991 amendments to s.22 of the Commonwealth FOI Act. Consequential amendments should be made to s.52 and s.71 to make it clear that an applicant should have rights of internal review and external review if the applicant is not satisfied that deleted matter was irrelevant, having regard to the terms of the FOI access application.

Term of Reference C: Any related matter

Part B - Recommendations for amendment of specific provisions of the FOI Act, not dealt with in Term of Reference B.

Section 6

C18. I recommend that s.6 be amended, by deleting the qualification "personal" which appears in relation to the affairs of the applicant. I have described the effect of s.6 in my decisions in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (in the context of information which is the 'shared personal affairs' of the applicant and another person) at paragraphs 172-189, particularly at paragraphs 178 and 186, and in *Re "KBN" and Department of Families, Youth and Community Care* (Information Commissioner Qld, Decision No. 98008, 30 June 1998, unreported) at paragraphs 57-59.

C19. I also described the effect, and the limitations, of the present wording of s.6 in my decision in *Re Pemberton and The University of Queensland* (1994) 2 QAR 293, specifically at paragraphs 191-193.

C20. The obvious limitation of s.6 is that it applies only when the matter in issue relates to the personal affairs of the applicant. The phrase "personal affairs" has a fairly narrow scope as I explained in my decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227. Section 6 in its present terms would not assist an applicant in relation to information which does concern the applicant, but does not concern the applicant's personal affairs, for example, information which concerns the applicant's employment or professional affairs. Such an applicant has a greater interest in obtaining access to that information than the public generally. The interest of the individual applicant, which is given recognition in s.6, is deserving of extension beyond the narrow scope of the applicant's "personal affairs" to the applicant's affairs generally.

C21. The proposed amendment would extend the availability of s.6 to applicants other than natural persons (e.g., a corporation could rely on it in respect of information concerning its business affairs), but I see no difficulty in principle in that regard.

C22. **Recommendation:**

Section 6 should be amended by deleting the word "personal".

Section 7 - definition of "official document of a Minister"

C23. The present definition of "official document of a Minister" would appear to comprehend all documents held by a Department under the control of the Minister and possibly documents held by some agencies, within a Minister's portfolio responsibilities, over which the Minister has more direct control. A Minister would traditionally, under the *alter ego* principle, be regarded as being entitled to access to any document held by his or her Department. On that interpretation, an FOI access application to the Minister would cover all documents, falling

within its terms, which are held by the Minister's Department as well as those held within the Minister's office.

C24. This has not, to my knowledge, caused any significant administrative problems, and there is not much doubt that a Department could be persuaded by its Minister to accept a part-transfer, under s.26 of the FOI Act, of an access application which the applicant insisted was intended to extend to relevant documents in the possession of the Minister's Department, as well as those in the possession of the Minister. But the Committee may wish to consider whether this consequence of the present definition of "official document of a Minister" was intended or desirable, and to clarify the definition.

Section 9 - definition of "public authority"

C25. The terms of s.9(1)(a)(ii) are ambiguous, and should be amended by Parliament to make clear their intended ambit. Section 9(1)(a) presently provides:

> ***9.(1)*** *In this Act—*
>
> ***"public authority"*** *means—*
>
> *(a) a body (whether or not incorporated) that—*
>
> *(i) is established for a public purpose by an enactment; or*
>
> *(ii) is established by government for a public purpose under an enactment;*

C26. The meaning of s.9(1)(a)(i) is relatively straightforward. It has been explained in my decisions in *Re English and Queensland Law Society Inc* (1995) 2 QAR 714, and *Re McPhillimy and Gold Coast Motor Events Co* (1996) 3 QAR 376, and considered by the Supreme Court of Queensland in *Queensland Law Society Inc v Albietz* [1996] 2 Qd R 580.

C27. However, in my view, there is a genuine ambiguity in the wording of s.9(1)(a)(ii) as to whether the words "under an enactment" qualify -

(a) the word "established" only; or
(b) the words "for a public purpose" only; or
(c) both the word "established" and the words "for a public purpose".

C28. The possibility stated in (c) above seems to me to be the least likely of the three possible interpretations outlined above. It describes a situation to which, in my view, the words of s.9(1)(a)(i) were more clearly directed, e.g., the establishment of the Criminal Justice Commission by the *Criminal Justice Act* for the public purposes described in that Act.

C29. The distinction in wording between "by an enactment" in s.9(1)(a)(i) and "under an enactment" in s.9(1)(a)(ii) indicates that, if the latter words were intended to qualify the word "established" at all, they were directed to enactments of a general nature which permit the establishment of bodies, e.g., the *Corporations Law of Queensland* or the *Associations Incorporation Act 1981*

Qld, and in which no prescribed public purpose for establishment of bodies under them would be found. (A court engaged in an exercise of statutory interpretation would impute to the legislature knowledge of the contents of its own prior enactments.) In my view, if the words "under an enactment" were intended to qualify the word "established", they were not also intended to qualify the words "for a public purpose".

C30. However, the words "under an enactment" may well have been intended to qualify only the words "for a public purpose". In that event, it would be sufficient that the body was established by government, and irrelevant whether or not it was established under an enactment, provided there was an enactment prescribing the public purpose for the discharge of which the body was established by government. For example, in the case of a body established by a local government authority to administer water resources and water supply, this could be as general as an enactment stating that the functions of a local government authority include the supply of water to ratepayers. In other words, there would be no necessity for the public purpose to appear in the same enactment under which the body was established, or indeed for the body to have been established under an enactment.

C31. In my view, the most logical interpretation of s.9(1)(a)(ii) is that it was intended to cover bodies established by government under an enactment, for a public purpose that need not be prescribed under an enactment. If that was Parliament's intention, it would be preferable to amend the wording of s.9(1)(a)(ii) to "is established by government under an enactment, for a public purpose".

C32. **Recommendation:**

The ambiguity in s.9(1)(a)(ii) which is outlined above should be resolved by legislative amendment.

C33. In s.9(1) as originally enacted (see p.1804 of Queensland Acts, 1992, Volume II), the qualifying words which appear at the end of s.9(1) - "but does not include a body that, under subsection (2), is not a public authority for the purposes of this Act" - were so positioned as to make clear that they were intended to qualify each subparagraph of s.9(1). In subsequent reprints of the FOI Acts, those words were repositioned in such a way as to make it appear that they were only intended to qualify s.9(1)(e). This appears to have been an error in the process of reprinting the FOI Act, as the relevant words make no sense as a qualification to s.9(1)(e) alone.

C34. **Recommendation:**

The Committee should recommend that in future reprints of the FOI Act, the words "but does not include a body that, under subsection (2), is not a public authority for the purposes of this Act" be repositioned to make it clear that they were intended to qualify each subparagraph of s.9(1).

Section 11(1)(e), s.11(1)(n) and s.11(2)

C35. I have addressed broader policy considerations arising under s.11 in my comments on term of reference B(iii). Here, I ask that the Committee recommend remedial action to cure drafting errors in s.11(1)(e), s.11(1)(n) and s.11(2).

(a) s.11(1)(e)

C36. Other similar paragraphs of s.11(1) operate by first identifying the body, specific functions of which are to be excluded from the FOI Act. The present format of s.11(1)(e) is illogical. It 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*
>
> ...

C37. This would be in harmony with the structure of s.11(1)(f). It would have the effect that a court, or the holder of a judicial office *et cetera*, would not be obliged to comply with the obligations imposed on agencies by Parts 2, 3 or 4 of the FOI Act, in respect of documents which relate to their judicial functions. This must surely have been the legislature's intention. It cannot, for instance, have logically been the intention to exclude entirely from the FOI Act any document relating to the judicial functions of a court. That would mean that a judgment issued by a court, that was held on a file of another agency subject to the FOI Act, would not be subject to the FOI Act. That would be an absurd result.

C38. **Recommendation:**

Section 11(1)(e) should be amended in the manner set out above.

(b) s.11(1)(n)

C39. It is difficult to accept that the words "commercially competitive activities" which appear in this provision were not intended to be "competitive commercial activities", the latter being a term which is defined in s.7 of the FOI Act, and which is used consistently in s.5 of the *Freedom of Information Regulation 1992* Qld.

C40. **Recommendation:**

The words "commercially competitive activities" in s.11(1)(n) should be amended to "competitive commercial activities".

(c) s.11(2)

C41. Section 11(2), in my opinion, contains a clear drafting error. It presently provides:

> *(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.* (my emphasis)

C42. This provision has been adapted from s.7(4) of the Commonwealth FOI Act. However, there appears to have been an oversight by the drafter that produces confusion. Subsection 7(4) of the Commonwealth FOI Act is in the following terms:

> *(4) In Part II of Schedule 2 a reference to documents in respect of particular activities shall be read as a reference to documents received or brought into existence in the course of, or for the purposes of, the carrying on of those activities.*

C43. Agencies are mentioned in Part II of Schedule 2 to the Commonwealth FOI Act according to a formula such as: "X Corporation in relation to documents in respect of its Y activities". Subsection 11(1) of the Queensland FOI Act does not use a similar verbal formula; in fact it contains no references to documents in relation to a particular function or activity of a named body. The only reference to the word "document" that occurs in subsection 11(1) is in paragraph (j), where it is not even used in conjunction with a reference to a particular function or activity.

C44. The error can be cured by inserting an appropriate reference to documents in s.11(1)(e) (in the way I have suggested above), s.11(1)(f), s.11(1)(m), s.11(1)(n), s.11(1)(o), s.11(1)(p) and s.11(1)(q). Thus, for example, s.11(1)(m) should read:

> *(m) Queensland Treasury Corporation in respect of documents in relation to its borrowing, liability and asset management related functions;*

C45. An alternative (and simpler) method of achieving the same result would be to amend s.11(2) to read as follows:

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

C46. **Recommendation:**

Section 11(2) should be amended in the manner set out above.

Determinations made under s.11, s.11A and s.11B - review rights

C47. The rights of internal review conferred by s.52 of the FOI Act (in respect of determinations made on access applications) expressly apply to "*a decision under this Part*" (being Part 3 of the Act, which consists of sections 21 to 52 inclusive). I am aware of at least one former agency (the Queensland Industry Development Corporation) which consistently took the position that determinations made under s.11 or s.11A of the FOI Act (dealing with bodies which are excluded from the Act's operation) are not decisions made under Part 3 of the Act, and thus are not subject to the right of internal review conferred by s.52 of the Act, nor ultimately the right of external review conferred by s.71 of the Act.

C48. It does not appear consistent with the whole framework of the FOI Act that an agency can unilaterally make such a determination, and deprive an applicant of any avenue of review.

C49. I have received three applications for external review from applicants denied access to documents by the QIDC in reliance on the former s.11(1)(k), or the present s.11A, of the FOI Act, despite the fact that none of the applicants received any information concerning rights of review in such cases. I am concerned that other individuals seeking access to documents held by agencies mentioned in s.11, s.11A, or s.11B, may have been deprived of the chance to seek review of determinations made in reliance on those provisions, by virtue of agencies taking the same view as that taken by the QIDC, and not advising applicants of the possibility of seeking review by the Information Commissioner in such situations.

C50. If applicants can find their way through to external review, I have so far successfully asserted my jurisdiction to determine what becomes a jurisdictional issue (see my decisions in *Re Christie and Queensland Industry Development Corporation* (1993) 1 QAR 1, and *Re English and Queensland Law Society Inc* (1995) 2 QAR 714. It is preferable that explicit jurisdiction be conferred in the FOI Act to permit applicants to seek internal review and external review when an agency relies on s.11, s.11A, or s.11B, as a basis for refusing to deal with an access application made in reliance upon the FOI Act.

C51. **Recommendation:**

(a) Section 52(1) of the FOI Act should be amended to read:

A person who is aggrieved by a decision is entitled to a review of the decision.

(b) Both s.52(7) and s.71(1) of the FOI Act should be amended, by adding a specific provision addressing the situation discussed above; i.e. :

(i) add as s.52(7)(a)(vi):

(vi) in accordance with s.11(1), s.11A, or s.11B, this Act does not apply to the agency or to a particular document of the agency to which access is sought.

(ii) add as s.71(1)(g):

(g) decisions under s.11(1), s.11A, or s.11B, that this Act does not apply to an agency, or to a particular document of an agency to which access is sought.

Section 22 (a)

C52. I raised a problem concerning the interpretation of s.22(a) in my decision in *Re "JM" and Queensland Police Service* (1995) 2 QAR 516. At paragraphs 30-36 of *Re "JM"*, I discussed the interpretive difficulty which is inherent in the words "open to public access" as used in s.22(a). I consider that an amendment along the lines set out at paragraph 36 of *Re "JM"* is necessary to clarify the meaning of the provision.

C53. **Recommendation:**

Section 22(a) should be amended by deletion of the words "public access", and insertion of "access by members of the public".

Section 22(e) (and s.48) - Adoption records

C54. Section 22(e) of the Act presently gives agencies a discretion to refuse access to "*adoption records maintained under the* Adoption of Children Act 1964". Further, the list of secrecy provisions set out in Schedule 1 of the Act (for the purposes of s.48 of the Act) includes s.59(3) of the *Adoption of Children Act.*

C55. A number of deficiencies in the provisions referred to above have been highlighted by applications for external review which have come before me for determination:

- There are problems in determining the proper scope of the wording of s.22(e); i.e. "*adoption records maintained under the* Adoption of Children Act 1964". Is it intended to include only those documents held by the Adoptions Branch of the Department of Family and Community Services whose existence is specifically mandated by the *Adoption of Children Act*, or is s.22(e) intended to apply more broadly, to any record concerning an adoption held by that Department, or indeed by other agencies (including District Health Services, which hold medical records concerning the birth of children who are subsequently adopted)?

- Because s.22(e) is worded so as to permit refusal of access to "records" rather than "matter" or "information", and because s.22(e) is not an exemption provision, s.32 cannot be relied upon to permit the deletion from a document, which could otherwise be disclosed, of information relating to a person's adoption.

- The relevant secrecy provision (s.59(3) of the *Adoption of Children Act*) prohibits the publication by any person of information of a confidential nature which is contained in the records of the Department of Family and Community Services, or which has been given to the person by an officer of that Department or other person engaged in carrying out the *Adoption of Children Act*. It would therefore not appear to preclude the publication of information which is in the records of other agencies, such as District Health Services, where that information has originated from a birth parent.

C56. **Recommendation:**

In view of the limitations on the present provisions, and to maintain consistency with the strict requirements of the *Adoption of Children Act 1964* with respect to preserving the anonymity of adoptive parents and children, consideration should be given to rewording s.22(e), in line with the broader provisions contained in other Australian FOI Acts - see, for example: NSW FOI Act, cl.20 of Schedule 1; WA FOI Act, cl.13(1)(e) of Schedule 1.

A suggested formula of words (suitable for its present position in the FOI Act) is:

22. An agency or Minister may refuse access under this Act to—

...

(e) matter relating to the adoption of a child or arrangements or negotiations for or towards or with a view to the adoption of a child.

However, s.22(e) is out of character with the provisions made by other paragraphs of s.22. I consider it preferable that s.22(e) be reframed as an exemption provision and moved into Part 3, Division 2 (perhaps as a new s.44(5)) of the FOI Act, in order that s.32 can then apply to it.

Section 26 - Additional application fees on part-transfer

C57. Section 26 of the FOI Act provides for transfer of applications from one agency to another, in whole or in part. The FOI Act is unclear as to whether, in the event of a part-transfer, an additional $30 application fee is payable to the agency that accepts the part-transfer (the receiving agency), in addition to the $30 fee payable to the agency to which the applicant applied (assuming that the application is for access to documents which do not concern the applicant's personal affairs).

C58. There is a reasonable argument that an additional application fee should be payable in such instances, especially where, if the access applicant had made proper inquiries, he/she should have appreciated the necessity to apply to each agency holding the required documents, thereby incurring a $30 application fee for each application. However, this could lead to cases where an applicant is charged a considerable number of $30 application fees in respect of one initial application which has been part-transferred to a number of different agencies.

C59. Such an approach could also slow down the handling of applications. Each agency receiving a part-transfer of a non-personal affairs access application would have to notify the applicant of the requirement to pay an application fee. Between the time of notification and the time the fee was paid, the time limit for dealing with the application would cease to run (see my decision in *Re Allanson and Queensland Tourist and Travel Corporation* (1997) 4 QAR 220). This would lead to a *de facto* extension of time for the receiving agency to make a decision.

C60. **Recommendation:**

Section 26 should be amended to clarify whether or not an additional application fee is payable to each receiving agency when an application for access to documents, which do not concern the personal affairs of the access applicant, is part-transferred.

Section 27(1) - Amendment to require notice to be given of review rights where a deemed refusal of access occurs.

C61. I note that while the FOI Act explicitly confers a right of external review on access and amendment applicants who do not receive a decision from the agency or Minister concerned within the appropriate time period set out in the Act, there is no mechanism in the Act for such applicants to be advised of their right to seek external review in such situations.

C62. While it could be argued that the lack of such notice is obviously not deterring all applicants from seeking review, I believe that there will be many instances in which applicants are unaware of the review avenue available to them.

C63. **Recommendation:**

(a) Agencies should be obliged, upon receipt of a notice under Part 2 of the FOI Act, or an application under either Part 3 or Part 4 of the Act, to notify the applicant of the applicable time limit for determination of the application in question, and the applicant's rights of review in the event of a deemed refusal.

(b) With respect to access applications, it is recognised that the time limit (the "appropriate period" per s.27(7) and s.27(4) of the Act) which an agency considers applicable at the time of receipt of an application may be subject to alteration. Agencies should also be required to notify an access applicant of that possibility, and to inform the access applicant that contact should be made with the agency to establish the correct time limit, before an applicant seeks to invoke the rights conferred by s.79(1) of the FOI Act.

(c) These requirements should be imposed by appropriate amendments to s.27(1) of the FOI Act.

(d) If my recommendations set out in paragraphs B236-B237, B266 and B269(c) of this submission are accepted, it would be appropriate for a notification to applicants of the kind suggested above, to draw attention to such additional provisions.

Section 34 - obligation to provide information on other possible agencies?

C64. Section 34(1)(b) of the Act provides that if an application relates to a document that is not held by the agency or Minister (to which/whom the application was made), the notice of decision must include "*the fact that the document is not so held*".

C65. **Recommendation:**

Consideration should be given to extending the 'notification of decision' obligations on agencies and Ministers (under s.34(1)(b)) to require that agencies and Ministers also take reasonable steps to provide an applicant with any information which may assist the applicant in identifying other agencies which hold or might hold a document which the applicant seeks.

Section 34(3)

C66. Section 34(3) provides that an agency or Minister is not required to include any exempt matter in the notice of decision which must be given to an applicant for access by virtue of s.34. It has come to my attention that some agencies have been using s.34(3) as a way around perceived limitations in s.35, i.e., they have treated s.34(3) as affording sufficient authority to not acknowledge the existence of, nor attempt to justify exemption for, a document (which falls within the terms of an FOI access application) in circumstances where it is considered that acknowledgment of the existence of the requested document would in itself disclose exempt matter, but not matter which is exempt under s.36, s.37 or s.42. Thus, an applicant who does not know or suspect that the document exists, is denied a proper opportunity to consider pursuing the rights of internal and external review conferred by the FOI Act in respect of what is, in effect, a refusal of access to a requested document.

C67. An example is where person A applies for access to the criminal record of person B. The Queensland Police Service (QPS) would argue that to give person A a notice of decision refusing access to the requested information on the basis that it is exempt matter under s.44(1) (a person's criminal record would not ordinarily qualify for exemption under s.36, s.37 or s.42, so that s.35 could not be invoked) in itself breaches person B's privacy interests by confirming that person B has a criminal record.

C68. However, while a person's criminal record may constitute information concerning that person's personal affairs for the purposes of s.44(1), there may well be circumstances in which its

disclosure would, on balance, be in the public interest, and hence it would not be exempt matter under s.44(1). If an applicant does not receive notice of the existence of the document, the applicant is deprived of the opportunity to address arguments on internal or external review as to why disclosure would, on balance, be in the public interest.

C69. In one case that was resolved informally at external review level, the applicant was a person who had been injured in a car accident and had applied to the QPS for information as to whether the other driver had been convicted for drink-driving, information which would assist the applicant to bring an action for damages for personal injuries. The QPS had been reluctant to give out any information which would confirm or deny that the driver had a criminal record. The applicant proceeded to external review in any event, at which point the QPS provided me with the document. The case was resolved informally when the applicant's action for damages was settled. I had, by that stage, formed the view that disclosure would, on balance, be in the public interest, having regard to the interests of justice for the injured applicant. However, most applicants for access, denied notice of the existence of a document, would not be aware of what might be achieved by pursuing rights of review.

C70. I do not believe s.34(3) was ever intended to be used in the fashion I have described above. If there are particular problem areas, such as persons seeking access to another person's criminal record, where the obligations imposed by s.34 are considered to have the potential to work unjustly, then they should be identified and specific provision made for them.

C71. The intent of s.34(3) should be clarified to establish that an agency is not required to include in its decision the substance of any exempt matter. However, it is inherent in giving reasons for the making of a decision that each document responsive to an application for access is described sufficiently for an applicant to be able to make an informed decision about whether to seek review of the decision. It may be useful to add a new s.34(2)(a) which would provide that the agency must specify the number and nature of the documents responsive to the applicant's request, and that, if it is over a certain number, then a schedule containing a brief description of the documents must be attached to the decision.

Sections 51 and 52 of the FOI Act

Inconsistent wording

C72. Section 51 of the FOI Act requires an agency or Minister to obtain the views of a government, agency or person about whether or not matter is exempt matter, the disclosure of which may reasonably be expected to be of substantial concern to the government, agency or person.

C73. Section 52, however, provides that a person who is aggrieved by a decision under Part 3 of the FOI Act is entitled to apply for internal review of the decision, and s.71(1)(f)(i) gives the Information Commissioner the power to investigate and review a decision to disclose a document contrary to the views of a person obtained under s.51.

C74. This inconsistency in wording gives rise to doubt as to whether governments and agencies were intended to have the right to apply for internal review of decisions of a kind mentioned in s.52(7)(b) with which they are aggrieved, and whether the Information Commissioner was

intended to have jurisdiction under s.71(1)(f) to deal with applications for external review by governments or agencies consulted under s.51.

C75. Of course, there is also a respectable argument that the word "person", if given its extended meaning under s.32D(1) and s.36 of the Acts Interpretation Act 1954 Qld, encompasses governments and agencies. (The word "person" includes a corporation as well as an individual. The word "corporation" includes a body politic or corporate. Another government would be a body politic. A statutory authority would be a body corporate. It is not entirely clear, however, whether a Department of State is either a body politic or body corporate.)

C76. It is preferable, however, for the statute to employ words that do not leave room for doubt as to the legislature's intention. If the policy on the extent of consultation required under s.51 of the FOI Act is to remain unchanged, amendments should be made to rectify the inconsistent wording which gives rise to the doubts identified above.

C77. However, I consider that policy on the extent of consultation required under s.51 of the FOI Act, and of corresponding rights to pursue 'reverse-FOI' applications on internal and external review, requires careful re-examination. If that policy is varied, consequential changes to the wording of s.51 may be required in any event.

Obligation to consult

C78. Clause 42 of the draft FOI Bill attached to EARC's Report on Freedom of Information provided for third party consultation requirements only where matter may have been exempt under the equivalent exemption provisions to the current sections 38, 44, and 45(1) of the Qld FOI Act. Corresponding 'reverse-FOI' internal and external review rights were given in the EARC draft FOI Bill only to persons who were entitled to be consulted about matter which may have been exempt under the equivalent provisions to the existing sections 38, 44 and 45(1).

C79. However, when enacted, the obligation to consult under s.51 of the FOI Act was not restricted to particular exemption provisions. Any information, the disclosure of which may reasonably be expected to be of substantial concern to a government, agency or person, must be the subject of consultation about whether or not the information is exempt matter under any of the 14 exemption provisions in the Queensland FOI Act.

C80. No other Australian FOI statute has such an onerous consultation provision. Those which impose requirements for consultation of third parties confine the requirements to information which may be exempt under provisions which correspond to s.38, s.44, s.45(1) and s.45(3) of the Queensland FOI Act. The right to pursue 'reverse-FOI' applications at internal and external review level is similarly confined.

C81. This departure from the accepted norm has imposed substantial additional burdens on Queensland FOI administrators in the processing of access applications, with corresponding resource costs, delays and inefficiencies. It has permitted large numbers of 'reverse-FOI' applications, including many without substance, brought by third parties who are simply determined to prevent an applicant for access from obtaining access to requested documents for as long as possible. There have been several instances of 'reverse-FOI' applicants wishing to contest an agency's judgment on the application of exemption provisions which should

properly be left to the judgment of the agency when the decision is in favour of disclosure to the initial applicant for access, e.g. whether disclosure of deliberative process documents would be contrary to the public interest (s.41), whether the disclosure of matter would have a substantial adverse effect on the management or assessment by an agency of its personnel (s.40(c)). For efficiency and resourcing reasons, third parties should not have the right to second-guess agency decisions in favour of disclosure, except where the documents affect the third party's interests so closely that there is an arguable case for exemption under s.44 or s.45, and perhaps also s.46(1)(a). (Section 38 must also be included in the interests of inter-governmental comity.)

C82 I have mentioned s.46(1)(a) even though no other Australian FOI statute mandates consultation with third parties in respect of their equivalent exemption provisions, or permits third parties to make 'reverse-FOI' applications which rely upon exemption provisions equivalent to s.46(1)(a). I consider that it may be too unfair, *vis-à-vis* a person who may be the beneficiary of an equitable or contractual obligation of confidence owed by an agency or Minister, to make provision in s.102 of the FOI Act deprive the person of any legal remedy in the event of disclosure of their confidential information under the FOI Act, without affording the person the right to be consulted, and to pursue a reverse-FOI application, to establish that disclosure of the information would found an action for breach of confidence, and hence that it is exempt matter under s.46(1)(a) of the FOI Act.

C83. When the government is expressing concern at the resource costs of administering the FOI Act, and considering the raising of fees and charges to inhibit demand, it is legitimate to ask why it was seen fit to part company with other Australian jurisdictions in imposing such a resource-costly consultation requirement, and whether that requirement should now be persisted with. It is clear from my experience that a large proportion of the mandatory consultation which takes place by virtue of s.51 is between government agencies. Why should this be mandated? It can proceed informally when and if agencies consider it appropriate.

C84. **Recommendation:**

(a) The Queensland FOI Act should follow the model set out in the Commonwealth FOI Act (s.26A, s.27, s.27A) and the New South Wales FOI Act (s.30, s.31, s.32, s.33) by confining the obligation (on an agency or Minister processing an FOI access application) to consult with affected third parties, to matter which may be exempt under s.38, s.44(1), s.45(1), s.45(3), or s.46(1)(a) of the Queensland FOI Act.

(b) In respect of consultation with third parties over matter which may be exempt under s.44(1), the obligation to consult should be conditioned by a provision which corresponds (with necessary adaptations) to s.27A(1A) of the Commonwealth FOI Act.

(Section 27A(1A) of the Commonwealth FOI Act provides that in determining whether a person might reasonably wish to contend that a document, so far as it contains personal information, is an exempt document under s.41 (the Commonwealth exemption for unreasonable

disclosure of personal information), the officer, minister, or reviewer, as the case requires, must have regard to the following matters:

(i) the extent to which the personal information is well known;

(ii) whether the person to whom the personal information relates is known to be associated with the matters dealt with in the document;

(iii) the availability of the personal information from publicly accessible sources; and

(iv) such other matters as the officer, minister or reviewer, as the case requires, considers relevant.)

(c) The right to pursue 'reverse-FOI' applications at internal and external review be confined to persons (including governments and agencies) consulted (or who should have been consulted) pursuant to the revised provisions recommended above.

PART 4 - AMENDMENT OF INFORMATION

Section 53

C85. The wording of s.53 of the FOI Act appears to presuppose that a determination has been made that the information in question "*is inaccurate, incomplete, out-of-date or misleading*". I suggest that s.53 should be re-drafted along the lines that are contemplated by s.59(2) - i.e. replace "*is inaccurate* etc" with "*claimed to be inaccurate* etc". I note that s.48 of the Commonwealth FOI Act, which is the counterpart to s.53 of the Queensland FOI Act is cast in terms of a person claiming that a document is "*incomplete*" *et cetera*.

C86. **Recommendation:**

Section 53 should be amended by inserting the words "claimed to be" before the word "inaccurate".

C87. I also note that the Queensland FOI Act does not include any requirement that the information which is sought to be amended is employed, or will be employed, for any administrative purpose (*cf*. s.48(b) of the *Freedom of Information Act 1982* Cth). For the purposes of the Queensland FOI Act, it is enough if an applicant can establish that the information in question is, on its face, inaccurate, incomplete, out-of-date or misleading. While one could argue that this is appropriate, since government should ensure that personal information which is collected and retained by agencies is accurate, complete and up-to-date, the possibility exists for great mischief to be done by persons seeking access to information which technically meets the requirements for amendment under Part 4 of the FOI Act, but which is not used, or available to be used, by the agency in any real sense. This issue has been addressed in s.48 of the Commonwealth FOI Act, which provides that a person is entitled to seek amendment of information which is incomplete,

incorrect, out of date or misleading; and which "*has been used, is being used or is available for use by the agency or Minister for an administrative purpose…*".

C88. **Recommendation:**

Section 53 should be amended by inserting the words "and which is being used or is available for use by the agency or Minister for an administrative purpose," at the commencement of the first line after subparagraph (b) in s.53.

.

Notification of review rights

C89. Part 4 should be amended so that the requirements for acknowledgment of an application for access to information (specifying what an applicant's review rights are) are also inserted into Part 4 (i.e., an equivalent of s.27(1), amended as suggested in these submissions, should be inserted in Part 4). The notification requirements under Part 4 should also extend to notifying applicants of their right to seek external review in the event that there is a deemed refusal by the agency to amend, once the 30 day time limit in s.57 expires.

C90. **Recommendation:**

There should be inserted in Part 4 of the FOI Act a notification provision equivalent to s.27(1) of the FOI Act (amended as recommended earlier in this submission).

Transfer of applications

C91. In its present terms, s.53 provides that once an applicant has had access to a document from an agency or Minister, the applicant's entitlement is to apply to "the" agency or minister (i.e. from which the applicant had access to the document, either under the FOI Act or otherwise) for amendment or correction of information in the document. I have encountered a number of cases in which applicants have obtained from agencies documents which they seek to amend, but which have originated from an agency other than the agency from which the applicant obtained access. On some occasions, the agency has been a 'passive recipient' of those documents, making no contribution to the production of those documents and without the ability to test the accuracy or otherwise of those documents. Procedurally, it would appear to me to be prudent to amend Part 4 of the FOI Act so as to allow transfer of such applications in much the same way as transfer of applications for access is permitted under s.26 of the FOI Act. Unfortunately, it would not be possible to merely adopt s.26 by reference, since the language of s.26(2) refers to the document to which an application relates being held, not by the receiving agency, but by the other agency. The situation that I am addressing here applies to the situation where the document that the applicant wants amended is held both by the receiving agency, and the proposed transferee agency. In this regard, I commend to the review s.51C of the Commonwealth FOI Act, as an example of a provision which appears to have recognised these difficulties and appears to me to afford an appropriate solution. The test for transfer which has been adopted in that provision, is that transfer may occur where the subject matter of the document in issue is more closely connected with the functions of the proposed transferee agency, than the receiving agency.

C92. **Recommendation:**

There should be inserted in Part 4 of the FOI Act a new provision allowing for transfer of applications to amend information. Section 51C of the Commonwealth FOI Act provides an appropriate model which could be adopted with necessary modifications.

Section 54 - Applicant to provide evidence

C93. The import of Part 4 is that the legislature has cast responsibility on agencies to ensure that they maintain records that are accurate, given the effect that inaccurate information in documents held by agencies can have on individual citizens. On the other hand, applications to amend information can be made difficult if applicants contend that documents are inaccurate and supply nothing in the nature of evidence or grounds to demonstrate that the documents are inaccurate. Under present conditions, the agency is obliged to conduct its own inquiries to prove that the documents concerned are correct.

C94. In my opinion, s.54 should oblige the applicant for amendment to supply a good deal more, by way of justification of the need for amendment, than is presently the case. I recommend that s.54(c) of the FOI Act be amended in terms which correspond to s.51A(c) of the Commonwealth FOI Act.

C95. **Recommendation:**

Section 54(c) of the FOI Act should be amended to correspond with s.51A(c) of the Commonwealth FOI Act.

Section 55 - Notification of Amendment

C96. In relation to documents which are in the possession of more than one agency, I would suggest that s.55 of the FOI Act be enhanced by requiring an agency which decides to amend information to notify all other recipients of the document. This obligation should apply to both governmental and non-governmental recipients of the documents in issue.

C97. **Recommendation:**

Section 55 should be amended to require an agency which amends a document to take reasonable steps to forward an amended copy to all other previous recipients of the document.

Section 59 - Notation of Information

C98. Based on the first eight words of s.59(2) of the FOI Act, it is arguable that an applicant may require an agency to add a notation to information that does not concern the applicant's personal affairs, since one of the reasons that an agency may refuse to amend information is that the

information does not relate to the applicant's personal affairs. I think the better view is that the word "information" in s.59(2) must be read as confined to information of the kind referred to in s.53. However, if the intention of s.59 is that an applicant's right to require a notation should only exist in respect of information relating to the applicant's personal affairs, it is preferable that this should be made clear.

C99. **Recommendation:**

Section 59(2) should be amended to make clear that it applies only to information concerning the applicant's personal affairs.

PART 5 - EXTERNAL REVIEW

Difficulties with external review of decisions under s.35

C100. I discussed the background to, and application of, s.35 of the FOI Act at paras 10-16 of my decision of *Re "EST" and Department of Family Services and Aboriginal and Islander Affairs* (1995) 2 QAR 645.

C101. It has become apparent that Part 5 of the FOI Act does not make adequate provision for review of decisions invoking a s.35 'neither confirm nor deny' response. In particular, the present legislative scheme only works satisfactorily where an agency or Minister has correctly invoked s.35, and the outcome of a review under Part 5 is to affirm the decision under review. Adequate provision has not been made for the situations where -

- a requested document, which exists, does not contain exempt matter under s.36, s.37 or s.42; or
- a requested document which does not exist, would not (if it did exist) contain exempt matter under s.36, s.37 or s.42;

and where hence, in either case, the agency was not entitled to invoke s.35. The terms of s.87(2)(a) prevent an applicant being informed of the details of the outcome of a review which is in the applicant's favour.

C102. In *Re "EST"*, I recommended that amendments be made to Part 5 of the FOI Act to permit more efficacious review of decisions by an agency or Minister to invoke s.35 of the FOI Act. The drafting of amendments to implement those recommendations would be quite complex, and there is no point in my attempting it here. If the Committee accepts the views which I expressed in *Re "EST"*, I ask that it recommend amendments to Part 5 of the FOI Act to implement them, and recommend that the Parliamentary Counsel consult with me (as well as the instructing Department) in respect of the drafting of appropriate amending provisions.

Information Commissioner's jurisdiction in 'sufficiency of search' cases

C103. I have held that I have jurisdiction to conduct an external review in relation to the 'sufficiency of search' by an agency to locate a document to which access has been requested under the FOI Act: see *Re Smith and Administrative Services Department* (1993) 1 QAR 22 at paragraphs 13 to 61, *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, and *Re Shepherd and Department of Housing, Local Government & Planning* (1994) 1 QAR 464. However, I consider it preferable, in the interests of applicants, that explicit jurisdiction in this regard be conferred on the face of the FOI Act. Appropriate models exist in s.26 of the Western Australian FOI Act, and s.55(1)(aa) and s.55(1)(ab) of the Commonwealth FOI Act (which paragraphs could be included in s.71(1) of the Queensland FOI Act).

C104. **Recommendation:**

The FOI Act should be amended to confer explicit jurisdiction on the Information Commissioner to review a decision on the basis of the applicant's complaints that an agency has not located and dealt with all documents in its possession or control which fall within the terms of the applicant's FOI access application.

Section 74 - Obligation of Information Commissioner to notify

C105. Section 74 of the FOI Act sets out the circumstances in which I am obliged to inform third parties that a decision is to be reviewed by the Information Commissioner. I have already commented on the need to amend s.74 in my 1992/3 Annual Report (paragraphs 4.12-4.15) and in my 1993/4 Annual Report (paragraphs 2.20-2.26). The relevant paragraphs have been extracted, for ease of reference by the Committee, as Attachment C1 to this segment of my submission. There is nothing I presently wish to add to what is explained in those paragraphs, but I am happy to provide further explanation or clarification on request.

C106. **Recommendation:**

Section 74 should be amended in the manner recommended in the paragraphs of my Annual Reports referred to above.

Section 76(1) - Inspection of documents by Information Commissioner

C107. Section 76(1)(b) provides that I may require the production of a document for inspection for the purpose of enabling me to make a determination whether a document in the possession of a Minister which is claimed not to be an official document of the Minister, is or is not an official document of the Minister. One can readily understand why I should have this power, since there may be many cases where documents in the possession of a Minister can be considered to be 'party political' documents and not "official documents of a Minister" as that phrase is defined in s.7 of the FOI Act. However, I consider that some enhancement to s.76(1) is called for, to enable the Information Commissioner to require production of a document, to determine, for example, whether the document falls within the terms of an FOI access application. I have encountered many disputes about whether or not particular documents fall

within the terms of an FOI access application, and in some cases it has been necessary for me to request production of those documents to my office for inspection. Section 76(1)(b) should be amended as follows:

> *(b) whether the document or matter falls within the terms of an application under s.25.*

. This amendment would cover the same territory covered by the present s.76(1)(b), and other possible issues, such as the one identified above.

C108. A new provision, s.76(1)(c) should also be inserted in the following terms -

> *(c) whether an application fee, or any charge (or the amount thereof) in respect of the provision of access to a document, is properly payable by the applicant for access to the document.*

Section 76(2)

C109. Section 76(2) should be amended to enable me to release documents provided to my office under s.76(1) to persons other than the agency, where that is necessary for the conduct of a review. I have explained the need for this amendment in my 1993/4 Annual Report at paragraphs 2.27-2.29. Those paragraphs have been extracted, for ease of reference by the committee, as Attachment C2 to this segment of my submission. There is nothing I presently wish to add to what is explained in those paragraphs, but I am happy to provide further explanation or clarification on request.

C110. **Recommendation**:

> **(a) Section 76(1)(b) should be amended in the manner set out above**
>
> **(b) A new s.76(1)(c) should be inserted in the FOI Act, in the terms set out above**
>
> **(c) Section 76(2) be amended in the manner recommended in the paragraphs of my Annual Report referred to above.**

Section 77 - Power of Information Commissioner not to review

C111. Section 77 of the FOI Act enables me to decide not to review, or not to review further, a decision in relation to which an application has been made for external review, if I am satisfied that the application is frivolous, vexatious, misconceived or lacking in substance. Two points need to be made about s.77 in the context of this review.

C112. Firstly, s.77(1) should be amended so as to make clear that I am entitled to invoke s.77(1) in respect of part only of the subject-matter of the application for review. As presently drafted, ss.77(1) and (2) employ inconsistent wording, which should be eliminated. Section 77(1) states that I can decide not to review or not to review further "*if satisfied that the application is*

frivolous etc". Section 77(2) refers to the Information Commissioner deciding not to review "*a matter to which an application relates*". The inconsistency could easily be remedied by -

- inserting the words "for review of that decision" before the words "is frivolous" in s.77(1); and
- substituting the word "decision" for the word "matter", and adding the words "for review" after the word "application", in the second line of s.77(2).

C113. Secondly, I have encountered many cases in which an applicant for external review has failed to take any action to progress the external review, or has failed to comply with directions. Such conduct has been responsible, in several cases, for delaying the time in which my external reviews are resolved. The consequences of such conduct are quite serious when the applicant for external review is a 'reverse-FOI' applicant, and the purpose of the application is to delay access to information that an agency has decided to release. In my view, I require a power to decide not to review, or not to review further, for 'want of prosecution' on the part of the applicant for review. The 'want of prosecution' power that I recommend would be a power to enable me not to review further an application for external review, upon the grounds of failure to comply with the directions of the Information Commissioner, or failure to notify a current address, for an unreasonable length of time. (I have encountered a number of cases in which applicants have changed addresses, but have not forwarded to me a current address making progress of an external review practically impossible.)

C114. **Recommendation:**

Section 77 of the FOI Act should be amended to read as follows:

77.(1) The commissioner may decide not to review, or not to review further, a decision in relation to which an application has been made under s.73 if the commissioner is satisfied that—

(a) the application for review of that decision is frivolous, vexatious, misconceived or lacking in substance; or

(b) the applicant has failed to comply with directions given by the commissioner, or has failed to inform the commissioner of a current address to which notices may be sent, for an unreasonable length of time.

(2) If the commissioner decides not to review, or not to review further, a decision to which an application for review relates, the commissioner must, as soon as practicable and in such way as the commissioner considers appropriate, inform—

(a) the applicant; and

(b) the agency or Minister concerned; and

(c) any other person informed under section 74(1)(b);

in writing, of the decision and of the reasons for the decision.

Section 79 - Information Commissioner's jurisdiction when extension of time granted

C115. Technically, there would appear to be no provision in the FOI Act which confers jurisdiction on me on the basis of a 'fresh deemed refusal' (i.e. further time has been granted to the agency or Minister under s.79(2), but the agency or Minister still has not determined the application within the further period of time allowed). The deeming provisions in s.79(1)(b) all refer back to the time periods provided for in s.20(2), s.27(4) or s.57, all of which are "initial" time limitations provided for under the FOI Act. The amendment that is required is to s.79(1)(b) which should be amended as follows:

> *(b) the time period provided in section 20(2), 27(4), 57, or any period of further time allowed by the Commissioner under subsection (2), has ended;*

C116. It would also then be appropriate to preface s.73(3) by inserting the following:

Subject to s.79,'

C117. **Recommendation:**

Section 73(3) and s.79(1)(b) should be amended in the manner indicated above.

(I note that other consequential amendments may be necessary if my recommendations at paragraphs B236-B237, B266 and B269(c) of this submission are accepted.)

Section 81 - Onus in 'reverse-FOI' cases

C118. I recommend that the onus of proof be changed in 'reverse-FOI' cases. I ask the Committee to consider my comments on this issue at paragraphs 2.30-2.31 of my 1993/4 Annual Report. I have extracted those paragraphs, for ease of reference by the Committee, as Attachment C3 to this segment of my submission. At paragraph 2.31 of that Annual Report, I set out a suggested form of amendment to s.81. This would bring the Queensland FOI Act into line with s.61 of the Commonwealth FOI Act, and s.102 of the Western Australian FOI Act.

C119. **Recommendation:**

Section 81 should be amended in the manner recommended in the paragraphs of my 1993/94 Annual Report referred to above.

Section 83(5) - Notification to affected parties in external reviews

C120. If my suggested alterations to s.74, relating to the notification to be given to parties other than the applicant and respondent agency, are accepted, then s.83(5) may be repealed. I raised this issue in paragraph 2.23 of my Annual Report for 1993/4 (see Attachment C1 to this segment of my submission). There is no further explanation which I presently wish to add. I am happy to provide further explanation or clarification, if requested.

C121. **Recommendation:**

If the amendments to s.74 recommended above are implemented, s.83(5) should be repealed.

Conferral of power to enter premises (of agencies subject to the FOI Act) and inspect documents

C122. In previous Annual Reports, I have suggested that, as Information Commissioner, I should have powers equivalent to those conferred by s.20 of the *Parliamentary Commissioner Act 1974* Qld. Those suggestions are contained in the 1992/3 Annual Report at paragraphs 4.9-4.11, in the 1993/4 Annual Report at paragraph 2.19, and in the 1997/98 Annual Report at p.20-21. The reasons for seeking such powers are explained in those paragraphs, which I have extracted as Attachment C4 to this segment of my submission.

C123. **Recommendation:**

Part 5 of the FOI Act should be amended to confer the Information Commissioner with powers equivalent to those conferred on the Parliamentary Commissioner for Administrative Investigations by s.20 of the *Parliamentary Commissioner Act 1974* Qld.

Section 87 - Commissioner to ensure non-disclosure of certain matter

C124. Section 87(1) requires the Information Commissioner not to disclose "exempt matter" or information of the kind mentioned in s.35 (i.e., information as to the existence or non-existence of a document containing matter that would be exempt matter under s.36, s.37 or s.42, where the agency has invoked a 'neither confirm nor deny' response).

C125. The difficulty with this provision is in determining whose assessment (that matter is exempt, or is 's.35 matter') counts for the purposes of s.87. There is an argument open that if I, as Information Commissioner, find that matter claimed to be exempt is not exempt, then there is no prohibition preventing me from disclosing the matter to the applicant, or in reasons for decision (see also s.88(2)). However, I have adopted the prudent approach, in not disclosing in my reasons for decision, matter which is claimed to be exempt, by an agency or third party, even where it is my ultimate finding that the matter is not exempt. This approach preserves the efficacy of the rights open to agencies or third parties to seek judicial review of my decisions.

(I have addressed the problems which arise in respect of review of decisions to invoke a 'neither confirm nor deny' response in my decision in *Re "EST" and the Department of Family Services and Aboriginal and Islander Affairs* (1995) 2 QAR 645. Some relatively complex amendments will be required to deal with those problems: see my comments at paragraphs C100-C102 above).

C126. To remove the doubt referred to above, I recommend that s.87(1) be amended by deleting the word "exempt" before the word "matter", and inserting after the word "matter" the following:

claimed to be exempt.

C127. Furthermore, the existing form of s.87(1) is unsuitable in the context where the applicant for review is a 'reverse-FOI' applicant. The 'reverse-FOI' applicant ordinarily knows the matter claimed to be exempt. The restraint on disclosure in 'reverse-FOI' cases should be directed to the initial applicant for access to information. I recommend that s.87(1) be recast so that the object is to prevent disclosure to "a participant (or to the representative of a participant)" whose right of access to information is in issue.

C128. Finally, s.87(3) is otiose and should be repealed. If an agency has refused access to a document under s.36, s.37 or s.42 without invoking a 'neither confirm nor deny' response, then the existence of the document will have been confirmed to the applicant for access long before the matter reaches the Information Commissioner. If the agency has invoked a 'neither confirm nor deny' response, then the relevant strictures on the Information Commissioner are already imposed by s.87(1) and (2).

C129. **Recommendation:**

(a) Section 87(1) should be amended to read as follows:

87.(1) On a review, the commissioner may give such directions as the commissioner considers necessary in order to avoid the disclosure of matter claimed to be exempt, or information of a kind mentioned in s.35, to a participant (or the representative of a participant) whose right to have access to the matter claimed to be exempt, or information of a kind mentioned in s.35, is in issue.

(b) Section 87(3) of the FOI Act is otiose and should be repealed.

<u>Section 93 - non-disclosure of documents</u>

C130. In the course of conducting external reviews, my Office comes into possession of many sensitive documents and much sensitive information. In recognition of this, Parliament has included a secrecy provision in the FOI Act in the following terms:

Secrecy

> ***93.*** *If a person who is or has been the commissioner or a member of the staff of the commissioner, otherwise than for the purposes of this Act or a proceeding arising under this Act, discloses any information that the person obtained in the course of the performance of functions under this Act or takes advantage of that information to benefit himself or herself or another person, the person commits an offence.*
>
> *Maximum penalty—20 penalty units.*

C131. Recently, court proceedings commenced by me to set aside a Writ of Non-Party Discovery served on me (in the course of a civil Supreme Court action to which I was not a party) raised (but did not answer because the Writ of Non-Party Discovery was ultimately withdrawn) a question as to whether and, if so, the extent to which, s.93 of the FOI Act precludes the disclosure to a Court, or party to Court proceedings, of documents obtained by the Information Commissioner in the course of performing functions under Part 5 of the FOI Act.

C132. I submit that, in order to ensure that Parliament's intention in passing s.93 is not circumvented, a new s.93(2) should be inserted in the FOI Act in terms similar to those of s.29(4) of the *Parliamentary Commissioner Act 1974* Qld, which provides:

> ***29.(4)*** *Neither the commissioner, the acting commissioner nor any of the officers of the commissioner shall be called to give evidence or produce any document in any court, or in any judicial proceedings, in respect of any matter coming to his or her knowledge in the exercise of his or her functions under this Act.*

C133. I recognise that my decisions are, and should remain, open to judicial review, and that the Court should be at liberty to make such orders relating to discovery as it sees fit in such cases. To make allowance for such cases, the provision could be prefaced by words along the lines, "*Except for the purposes of a proceeding arising out of the performance of the functions of the commissioner …*".

C134. **Recommendation:**

A new s.93(2) should be inserted in the FOI Act, in these terms:

> *(2) Except for the purposes of a proceeding arising out of the performance of the functions of the commissioner, neither the commissioner, nor any member of the staff of the commissioner, shall be required in any court, or in any judicial proceedings, to give evidence in respect of any matter coming to his or her knowledge in the exercise of his or her functions under this Act, or to produce any document obtained in the course of the performance of functions under this Act.*

Conferral of powers to punish for contempt

C135. I note that the three tribunals which conduct independent external review of FOI decisions for the Commonwealth, Victoria and NSW all have powers to take action with respect to contempt of the Tribunal. (See s.63 of the *Administrative Appeals Tribunal Act 1975* Cth, s.137 of the *Victorian Civil and Administrative Tribunal Act 1998* Vic, and s.131 of the *Administrative Decisions Tribunal Act 1997* NSW.)

C136. I submit that a contempt provision should be included in the FOI Act, to give the Information Commissioner similar powers to those held by tribunals discharging similar functions in other jurisdictions. Such powers are needed as a sanction for breach of directions given by the Information Commissioner under s.72(2) of the FOI Act, and which at present are honoured as much in the breach as the observance, by some (especially some serial applicants) who have worked out that they cannot be subjected to any meaningful penalty for non-compliance. This adds to the delay in finalising applications for review.

C137. If the committee is minded to recommend the inclusion of a contempt provision in Part 5 of the FOI Act, I consider that ss.137-139 of the *Victorian Civil and Administrative Tribunal Act 1998* Vic would, with necessary adaptations, constitute the most efficacious model.

C138. **Recommendation:**

(a) Provisions modelled on ss.137-139 of the *Victorian Civil and Administrative Tribunal Act 1998* Vic, with necessary adaptations, should be inserted in Part 5 of the FOI Act.

(b) The Committee should recommend that the Office of Parliamentary Counsel consult with the Information Commissioner (as well as the instructing Department) concerning the preferred form of draft clauses to be included in an amendment Bill for consideration by the Legislative Assembly.

Section 98 - Costs in Supreme Court proceedings

C139. The policy behind s.98 is that if an agency subject to the FOI Act wishes to challenge a decision of the Information Commissioner, then that agency should pay the reasonable costs of a party to such proceedings. It was intended that a citizen who successfully invokes the cheap, user-friendly procedures of the Information Commissioner in an FOI dispute, should not be placed at risk of a substantial order for costs if forced to defend the decision in the citizen's favour in expensive Supreme Court proceedings brought by a government agency.

C140. Because of the use of the term "the State", technical restrictions emerge which, to a significant extent, undermine the policy of s.98. For example, in judicial review proceedings arising out of my decision in *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663, the Cairns Port Authority, which was then clearly an agency subject to the FOI Act, challenged my decision to release documents over its objection, commencing judicial review proceedings in the Supreme Court. In the decision given by Thomas J in *Cairns Port Authority v Albietz* [1995] 2 Qd R 470, relating to costs (following the change of position by Cairns Port

Authority, which ultimately withdrew its application for judicial review), Thomas J considered that the term "the State" in s.98 should be interpreted to mean "the Crown" or "the State of Queensland". His Honour held that the Cairns Port Authority did not represent the Crown and was not entitled to the immunities of the Crown, referring to the decision of *Council of the Town of Gladstone v The Gladstone Harbour Board* [1964] St.R.Q 505. Thus, the Cairns Port Authority was not obliged by the terms of s.98 of the FOI Act to pay the reasonable costs of other parties to the proceedings.

C141. I recommend that s.98 should be amended so that the words "the State" are deleted and replaced by "an agency or a Minister". This would have the incidental effect of subjecting local authorities to the same obligations as State government agencies. If it is desired to avoid this, the words "the State" should be replaced by "an agency (other than a local government) or a Minister".

C142. **Recommendation:**

Section 98 should be amended in the manner indicated above.

<u>Section 99 - the entitlement of the Information Commissioner to appear in proceedings</u>

C143. I understood that the policy behind s.99 of the FOI Act was to overcome the restrictions placed on tribunals appearing to defend their decisions in judicial review proceedings, which were stated by the High Court of Australia in *R v The Australian Broadcasting Tribunal and Others ex parte Hardiman* (1980) 144 CLR 13. Instead, in *Re Cairns Port Authority v Albietz*, Thomas J read down the terms of s.99 so as to accord with the principle stated by the High Court in *Hardiman's* case. Thomas J held that amongst the limited factors which might justify the Information Commissioner entering the arena to argue against the Cairns Port Authority's case was the extent to which the original applicant for access to the information in issue might be handicapped in presenting a case to the court, because it did not know the content of the documents in question. His Honour considered that there was an insufficient justification in that case. His Honour's decision was a decision in relation to the question of costs, and the costs order that His Honour made in my favour as Information Commissioner, was limited to the extent that His Honour considered that my participation was justified.

C144. I consider that, in judicial review proceedings which may result in binding Supreme Court decisions as to the interpretation and application of significant provisions in the FOI Act, it is important and appropriate that the Information Commissioner, given his/her standard-setting role in the administration of the FOI Act, should have a right to participate, with a view to explaining to the Court his/her considered approach to the correct interpretation and application of the relevant provisions of the FOI Act, so that it can be taken into account by the Court in formulating whatever authoritative principles emerge from the eventual judicial decision.

C145. **Recommendation:**

Section 99 of the FOI Act should be amended to read:

(1) Without limiting the entitlements of the commissioner to participate in a proceeding on an adversarial basis when appropriate, in a proceeding arising out of the performance of the functions of the commissioner, the commissioner, or the commissioner's legal representative, is entitled to appear and be heard, in a role equivalent to that of amicus curiae, for the purpose of informing the court of the commissioner's views as to the correct interpretation and application of relevant provisions of this Act, or as to related issues.

(2) If the commissioner participates in a proceeding in the role referred to in subsection (1)—

(a) the commissioner must bear the costs of the commissioner's participation; and

(b) no award of costs may be made, in favour of another party to the proceeding, against the commissioner.

Term of Reference C: Any Related matter

Part C - The Need for a well-resourced Central Co-ordinating Office for the administration of the FOI Act

Introduction

C146. In the Report on the ALRC/ARC joint review of the *Freedom of Information Act 1982* Cth, shortcomings in the administration of the Commonwealth FOI legislation were identified:

> *In passing the FOI Act, the Parliament provided a statutory right of access to government-held information. It did not, however, establish a program management regime to oversee the implementation of what is a complex set of obligations. … There is no person or organisation who has general responsibility for overseeing the administration of the FOI Act. Nor is there any authority which monitors the way agencies administer the Act, identifies and addresses difficult or problematic issues and provides assistance and advice to the public on FOI. … The Review considers that many of the shortcomings in the current operation and effectiveness of the Act can be attributed to this lack of a constant, independent monitor of and advocate for FOI.* … (Report, pages 61-62; paragraph 6.2)

C147. The Report therefore recommended the creation of a new statutory office of "FOI Commissioner":

> *… the appointment of an independent person to monitor and promote the FOI Act and its philosophy is the most effective means of improving the administration of the Act. The existence of such a person would lift the profile of FOI, both within agencies and in the community and would assist applicants to use the Act. It would give agencies the incentive to accord FOI the higher priority required to ensure its effective and efficient administration. Vesting all the proposed functions in a single office will create the 'critical mass' required to ensure a public profile for FOI and greater effectiveness of the Act.* (Report, page 63; paragraph 6.4)

C148. The Report went on to discuss the specific functions to be performed by the proposed office, which it considered should primarily fall into two broad categories; i.e., to "*monitor agencies' compliance with, and administration of, the Act*" and to "*promote the Act and provide advice and assistance to agencies and members of the public*". (I note that the proposed Commonwealth FOI Commissioner was not intended to have the function of reviewing agency decisions on the merits and making binding decisions, a function which the ALRC/ARC Report recommended should remain with the Commonwealth Administrative Appeals Tribunal.)

Current administrative oversight regime in Queensland

C149. The only statutory administrative oversight provision in the Queensland FOI Act is that set out in s.108, under which the Minister administering the Act is required to prepare an annual report on the operation of the FOI Act, and cause a copy of the report to be tabled in the Legislative Assembly. Section 108(4) of the Act identifies ten specific categories of information, to be

collected by agencies and Ministers for inclusion in the annual report, concerning a variety of matters regarding their processing of applications under the FOI Act.

C150. The first annual report produced in accordance with s.108 by the then Department of Justice and Attorney General contained a short reference to the administrative activities being performed by the Freedom of Information and Administrative Law Division (FOIALD) within the Department in connection with the implementation and administration of the FOI Act:

> *FOIALD activities in relation to FOI have been in four main areas: legislative impact assessment and administrative systems design, training provision and information dissemination for State agencies and the public, data collection on FOI implementation, and answering public and official inquiries.* (see Freedom of Information Annual Report, 1992-1993, at p.8)

C151. As set out in that report, the specific FOI-related activities being carried out by the FOIALD at the time included:

- training (including courses for agency decision-makers and coordinators' forums)
- information dissemination (circulation of FOI information kits, posters and pamphlets)
- data collection (development of a computer program to gather the statistical data required under s.108(4); compilation of data for the s.108 annual report)
- answering FOI inquiries from agencies and the public.

C152. However, the last s.108 report which has been tabled to date (i.e., for the financial year 1996/97), records (at page 2) that the relevant area within the Department (then the Human Rights and Administrative Law Branch) had noted a decline in the demand for its FOI coordination/education functions, particularly in the Brisbane area. That decline was attributed to the Branch's publication of a Freedom of Information Policy and Procedures Manual, the development of specialised, in-house training programs within larger agencies, and agencies' increased familiarity with the Act.

C153. It was also noted that the Branch continued to receive many requests for assistance from local authorities and State government departments outside Brisbane, and was exploring options available to meet those needs (including facilitating training, re-introduction of coordinators' forums, regular updating and supply of my formal written decisions, and continued provision of those decisions to agencies which were unable to access them from my office's website). Further, the report indicated that numbers of inquiries continued to be received from the general public concerning their rights under the FOI Act, and that the Branch was meeting those demands by the provision of telephone advice, information packs and public speaking engagements.

C154. Since that report was tabled, however, there appears to have been a marked decline in the resources available within the Department to perform the educative and information functions described above. Apart from the ongoing collection and collation of statistical information for the purposes of s.108, responding to general telephone inquiries, and providing some basic information on FOI on its website (at: **http://www.justice.qld.gov.au/pubs/foi.html**), the Department appears to no longer be performing the administrative functions referred to in paragraph C151 above.

C155. My office receives a considerable number of telephone inquiries from members of the public, seeking general information about the operation of the FOI Act, or specific advice concerning issues which arise in the course of their dealing with agencies on FOI-related matters. Inquiries are also received from agency decision-makers, seeking advice concerning the proper interpretation of provisions in the Act, or assistance with specific procedural matters relating to the processing of applications under the Act. However, I have generally taken the view that, by virtue of my statutory role as the independent external review authority under the Act, it would be inappropriate in most cases (especially those that are likely to become the subject of a review under Part 5 of the FOI Act) for me to provide the type of specific advice and assistance which is sought, except in respect of purely procedural or jurisdictional matters. As a result, most inquiries are referred to the relevant area within the Department of Justice.

Need for change

C156. I consider the current situation in Queensland, as described above, to be unsatisfactory, for similar reasons to those identified in the ALRC/ARC Report, quoted in paragraphs C146-C147 above. In my view, the absence in Queensland of any central coordinating body, charged with statutory responsibility to oversee the general administration of the FOI Act, to monitor agencies' compliance with the provisions of the legislation, to promote the legislation, and to provide assistance and advice to both agencies and members of the public, seriously undermines the effectiveness of the legislation. The FOI Act is intended to provide for open and accountable government, which can only be achieved, in my view, if the legislative framework includes an office with ongoing, proactive oversight responsibility similar to that envisaged for the Commonwealth FOI Commissioner in the ALRC/ARC Report.

Specific responsibilities

C157. Adopting the general framework of the relevant discussion in the ALRC/ARC Report (see pages 63-74; paragraphs 6.5-6.27 of the Report), I consider that the central coordinating office for FOI in Queensland should fulfil the following administrative functions:

Monitoring compliance and administration

- conduct agency audits
- collect and analyse statistical data from agencies
- prepare an annual report on the operation of the FOI Act

Advice and awareness

- act as a general resource for agencies and the general public
- publicise the FOI Act
- conduct training courses, practitioners' forums
- publish guidelines on how to interpret and administer the FOI Act
- act as a facilitator in communications between applicants and agencies
- identify and comment on legislation policy issues

Agency audits

C158. The ALRC/ARC Report identified this task as one of the principal functions to be performed by the central coordinating body:

> *The FOI Commissioner should conduct audits of agencies to ensure that their practices and administration are adequate… . Audits will enable the Commissioner to examine an agency's FOI practices closely, to identify systemic problems and to appreciate the variety in FOI requests received across government agencies. The FOI Commissioner may decide to conduct an audit if a complaint suggests the possibility of unsatisfactory FOI practices in a particular agency. Alternatively, an agency may ask the FOI Commissioner to conduct an audit to help it assess its FOI practices and to identify deficiencies If deficient procedures are found, the FOI Commissioner should consult with and advise the agency on how to improve them. Failure to address an identified problem may result in adverse comment in the Commissioner's annual report.* (ALRC/ARC Report, page 64; paragraph 6.7)

C159. The proposed audit role would be similar to that of 'own motion' investigations conducted by the Parliamentary Commissioner for Administrative Investigations. In addition to the matters referred to in the ALRC/ARC Report, the conduct of agency FOI audits would enable the coordinating body to identify particular documents, or classes of documents, which could be made available outside the scope of the FOI legislation, either through administrative schemes, or routine access via an agency website or reading room. It would also provide an avenue for fostering the notions of openness and accountability which underlie the legislation, by encouraging agencies to rely on the exemption provisions in the FOI Act only when absolutely necessary, rather than simply because they are technically able to do so. Such measures would have obvious benefits for the public, in terms of the increased availability of information held by government. But agencies would also benefit, in terms of a reduction in the resources which would be otherwise required to make formal determinations under the FOI Act in respect of such information.

Statistics and Annual Report

C160. I have already commented on the specific reporting requirements set out in s.108 of the FOI Act. I consider that the collection, collation and analysis of the statistical data collected by agencies is an important element in the overall administration of the legislation, to be performed by the body having responsibility for that task. Similarly, the production of an annual report on the operation of the legislation is essential, as a means to identify and comment on deficiencies in agency practices, as well as broader policy issues which may require legislative action.

Advice and Awareness

Public education

C161. For the FOI Act to fulfil its objectives, the public must be aware of the rights conferred by the Act, and how to exercise those rights. I consider that there is an ongoing need to raise the profile of FOI in Queensland, through a coordinated program of publicity (employing posters, pamphlets, information kits, radio spots, and public speaking engagements) and educational resource information to be utilised in secondary schools. In conjunction with these specific public education tasks, the coordinating body should also function in an advisory capacity for the public,

to provide specific information concerning the rights conferred by the Act, and details of the administrative processes to be followed, in seeking access to, or amendment of, government-held information. This approach is in line with other current "access to justice" strategies implemented across the justice sector.

Training and dissemination of information for practitioners

C162. I consider that, in light of turnover in staff administering FOI within agencies, there is an ongoing need for the provision of training programs for those charged with making formal determinations of applications made under the Act. As the Department of Justice no longer conducts any FOI training courses, some agencies conduct specialised in-house training sessions, while others utilise programs conducted by private consultants. Unfortunately, this approach results in a lack of consistency in the information conveyed concerning the interpretation and application of the Act. It would be far preferable, in my view, if such training were coordinated and conducted by a central body.

C163. An important adjunct to the conduct of formal training programs is the dissemination of relevant information concerning the Act to decision-makers and other practitioners. The FOI Policy and Procedures Manual, as developed by the Department of Justice, is a very useful resource for practitioners, but, as envisaged in the Manual itself, needs to be updated on a regular basis to take account of developments in the FOI Act, and formal decisions interpreting the Act. My office presently publishes on its website all decisions in the Information Commissioner's formal decision series, for the benefit and assistance of FOI administrators and users of the FOI Act. With sufficient additional resourcing, it should be possible for my office (if asked to undertake the function) to produce and maintain an up-to-date annotated version of the FOI Act, with commentary on procedural matters, and references to key principles established in my published decisions, and in relevant decisions of courts and other tribunals. This would afford a valuable resource to FOI administrators and users of the FOI Act.

C164. Another possible task for the central coordinating body would be the reintroduction of FOI Coordinators' forums, previously organised by the Department of Justice, which provided an excellent opportunity for the discussion of particular issues, and exchange of information about developing trends, among agency FOI practitioners.

C165. The proposed central coordinating body should also utilise other avenues for disseminating summaries of, and commentaries upon, my formal decisions, and those of other tribunals and courts in FOI cases, and other significant developments, including the production of a regular newsletter (similar to that produced by the Information Commissioner of Western Australia), and contributions to the Freedom of Information Review (a bi-monthly publication with Australia-wide readership, focussing on FOI issues).

Facilitation

C166. As noted in the ALRC/ARC Report (at page 68, paragraph 6.16):

> *FOI requests can deteriorate into adversarial disputes. Once this happens, the likelihood of an outcome satisfactory to both parties is small. In many of these*

instances, the early involvement of an independent third party, at the request of either party, could aid communication between the parties and act as a 'circuit breaker'.

C167. The Report then referred to comments by the Information Commissioner of Western Australia, to the effect that the Advice and Awareness sub-program within her office acted in such a capacity, and had been able to successfully resolve many disputes between applicants and agencies at an early stage, thus avoiding the necessity for such matters to proceed to a formal external review. In many cases, an applicant who is dissatisfied with an agency's handling of a particular matter, may be satisfied by an independent assessment of the facts, or the applicability of the relevant provisions of the FOI Act, in a particular matter.

Legislative policy

C168. As a result of its ongoing involvement in the broad spectrum of FOI-related issues, the central coordinating body would be in an ideal position to undertake research projects on FOI and related information policy matters, and to identify particular matters which may require legislative action.

Proposed Structure

C169. My Office has the necessary expertise to fulfil the functions of such a body, if provided with the additional resources necessary to discharge that role. If this were considered desirable, it would be preferable to adopt the model implemented in Western Australia, where the Information Commissioner fulfils the dual role of conducting external reviews of decisions made by agencies under the FOI Act, and undertaking advice and awareness functions of the type discussed above. In order to carry out its statutory responsibilities, the Office of the Information Commissioner (WA) encompasses two sub-programs - "Complaints" and "Advice and Awareness". The office is structured so that each sub-program operates independently of the other, reporting directly to the Information Commissioner, in order to preserve the integrity and independence of the external review process.

C170. At present, the Information Commissioner is not conferred by the Queensland FOI Act with any general commission to supervise the administration of the FOI Act within government agencies. The jurisdiction and functions of the Information Commissioner are confined to that of a specialist tribunal empowered to review decisions falling within the categories specified in s.71 of the FOI Act. If it was considered desirable to give an expanded role to the Office of the Information Commissioner, legislative amendments would be necessary to confer the additional functions. A clear legislative imprimatur would also be advisable to overcome any perceptions that it was inappropriate for the independent external review authority to conduct reviews of disputed decisions in which members of the staff of that authority have had some involvement in an advisory capacity at the primary decision-making level. It would be necessary on a practical level for administrative arrangements to be implemented to ensure that an officer who became involved in an advisory capacity at primary decision-making level within an agency, had no involvement in the processes of a subsequent review of that decision under Part 5 of the FOI Act. However, it has been the experience of the Western Australian Information Commissioner that intervention by the staff of her Advice and Awareness Unit to assist with credible independent advice concerning disputes or difficulties that arise in primary decision-making has assisted greatly in keeping to comparatively moderate levels the number of disputes that proceed to external review, and in

keeping the extent of the issues in dispute at that stage within a manageable scope. This, in turn, has permitted speedy resolution of the cases which do proceed to external review.

C171. Section 63 of the *Freedom of Information Act 1992* WA relevantly provides:

> *(1) The main function of the Commissioner is to deal with complaints made under this Part about decisions made by agencies in respect of access applications and applications for amendment of personal information.*
>
> *(2) The functions of the Commissioner also include —*
>
> …
>
> *(d) ensuring that agencies are aware of their responsibilities under this Act;*
>
> *(e) ensuring that members of the public are aware of this Act and their rights under it;*
>
> *(f) providing assistance to members of the public and agencies on matters relevant to this Act.*

C172. In her first Annual Report on the operation of the Western Australian FOI Act, the Information Commissioner commented on the advantages of the administrative structure employed in Western Australia:

> *There are distinct advantages in having these two sub-programs within one office as problems which arise between agencies and applicants can often be resolved informally before the matter comes within the formal review process. The ongoing monitoring, advisory, training and awareness raising functions are also enhanced by having ready reference to the Information Commissioner's interpretations and formal decisions. Advice and assistance can be given early in the process where problems are identified. Experience in both sub-programs is used by the Information Commissioner in strategic planning.* (Annual Report, 1993-1994, p.6)

C173. **Recommendation:**

(a) With the aim of revitalising the administration of the FOI Act in Queensland, the Committee should recommend that an appropriate body undertakes a central co-ordinating role in the administration of the FOI Act in Queensland, and that it be adequately resourced to undertake the functions set out in paragraph C157 above.

(b) If it is considered desirable to have the Office of the Information Commissioner undertake that role, then

(i) s.71 of the FOI Act should be amended to include provisions analogous to s.63(2)(d), (e) and (f) of the Western Australian FOI Act; and

(ii) responsibility for the reporting requirements in s.108 of the FOI Act should be transferred from the Department of Justice to the Information Commissioner, and a new subsection in terms analogous to s.111(3) of the Western Australian FOI Act should be inserted in s.108 of the Queensland FOI Act.

Attachment B(ii)1.

Extract from the Information Commissioner's Annual Report 1994/95

The Cabinet matter/Executive Council matter exemptions of the FOI Act - s.36 and s.37

3.4 When the FOI Act commenced in November 1992, it contained a Cabinet exemption provision which, in my opinion, struck an appropriate balance between the degree of secrecy necessary in the Cabinet process to protect the convention of collective Ministerial responsibility and, on the other hand, the public interests in openness, accountability and informed public participation in the processes of government, which the FOI Act was intended to promote.

3.5 Section 36, as originally enacted in 1992, was in the following form:

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

(a) it has been submitted, or is proposed by a Minister to be submitted, to Cabinet for its consideration and was brought into existence for the purpose of submission for consideration by Cabinet; or

(b) it forms part of an official record of Cabinet; or

(c) it is a dru. of matter mentioned in paragraph (a) or (b); or

(d) it is a copy of, or contains an extract from, matter or a draft of mutter mentioned in ***paragraph*** *(a) or (b); or*

(e) its disclosure would involve the disclosure of any deliberation or decision of Cabinet, other than matter that has been officially published by decision of Cabinet.

(2) Matter is not exempt under subsection (1) if it is merely factual or statistical matter unless -

(a) the disclosure of the matter under this Act would involve the disclosure of any deliberation or decision of Cabinet; and

(b) the fact of the deliberation or decision has not been officially published by decision of Cabinet.

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

(4) In this section -
"Cabinet" includes a Cabinet committee.

3.6. Section 36 as originally enacted was a provision which accorded very closely with recommendations, as to the proper scope of a Cabinet exemption provision, in two highly regarded reports prepared by committees comprised of parliamentarians, able to bring the insight and perspective of the political "insider" to their work: the first was the 1979 report by the Senate Standing Committee on Constitutional and Legal Affairs on the Commonwealth Freedom of Information Bill 1978 (Commonwealth Parliamentary Paper No. 272/1979); and the second was the 1989 report by the Legal and Constitutional Committee of the Parliament of Victoria titled "Report upon Freedom of Information in Victoria",

3.7 I referred to those reports, and explained the correct interpretation and application of s.36 of the Queensland FOI Act, as originally enacted, in my reasons for decision in *Re Hudson* as *agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade Development (1993)* 1 QAR 123, published in August 1993. The document in issue in that case was a Cabinet submission, which had already been considered by Cabinet. The respondent Department had made a decision that the Cabinet submission was exempt under s.36(l)(a) of the FOI Act, except for any merely factual matter contained in the submission, which by virtue of s.36(2) was not eligible for exemption under s.36(1). The respondent Department had in fact disclosed to the applicant some information from the Cabinet submission, which it accepted was merely factual matter within the terms of s.36(2). In my reasons for decision, I found (applying principles as to the characterisation of information as merely (or purely) factual which had been stated in a previous decision of a Full Court of the Federal Court of Australia) that there was additional information in the Cabinet submission which was merely factual matter, and not eligible for exemption under s.36(1) by virtue of s. 36(2). It is clear from my reasons for decision (at p. 148) that I approached the issue on the basis that matter expressing the opinions and recommendations of individual Ministers on policy issues and policy options requiring Cabinet determination, was entitled to, and deserving of, exemption under s.36(1) of the FOI Act.

3.8 Nevertheless, some three months later, the *Freedom of Information Amendment Act* 1993 Qld introduced amendments to s.36 which considerably broadened the scope of the exemption, with the second reading speech by the then Minister for Justice and Attorney-General claiming that the amendments were made necessary by my reasons for decision in the aforementioned case. That in itself was surprising since the views I expressed in *Re Hudson/Fencray,* as to the proper interpretation and application of s.36 of the FOI Act, happened to accord with the guidelines published to FOI administrators in the "Freedom of Information Policy and Procedures Manual" (in particular at p. 110-l 15 thereof) issued by the Department of Justice and Attorney-General. The Minister had submitted that manual to Cabinet for approval prior to its publication. The November 1993 amendments to s.36 of the FOI Act corresponded fairly closely to amendments made in mid-1993 to the Cabinet exemption provision (s.28) in the *Freedom of Information Act 1982* Vic: see the *Freedom of Information (Amendment) Act 1993* Vic. No other Australian jurisdictions have considered it necessary to give their Cabinet exemptions in FOI legislation such an extended reach as was contained in the 1993 amendments made in Victoria and Queensland.

3.9 On the first occasion I had to revisit s.36 in a published decision, *Re Woodyatt and Minister for Corrective Services* (Information Commissioner Qld, Decision No. 95001, 13 February 1995, unreported), I made comments that were critical of the extremely wide coverage of the amended s.36 exemption which (rather than focussing on protection of secrecy for proceedings within Cabinet and for the contribution of individual Ministers to Cabinet deliberations and decision-making) seemed designed to extend unqualified protection to the contributions of those who brief Ministers on issues that are to come or may come before Cabinet (amended s.36(1)(c)), any document submitted to Cabinet for its consideration, whether or not the document was initially prepared for submission to Cabinet (amended s.36(l)(a)), and any document which a Minister has at some time proposed for submission to Cabinet, irrespective of whether that proposal was subsequently abandoned (amended s.36(I)(b)). Documents of this kind would formerly have fallen under the deliberative process exemption (s.41) and would have been exempt only if the disclosure of their contents would be contrary to the public interest.

3.10 In *Re Woodyatt,* at paragraph 12, I expressed the view that the requirement under s.36(l)(a), as originally enacted, that to qualify for exemption information must have been brought into existence for the purpose of submission for consideration by Cabinet, placed sensible limits on

the scope of the exemption. I gave examples of unwarranted consequences of dispensing with that requirement, *viz:*

- documents submitted to Cabinet merely to provide background information relevant to a proposal contained in a Cabinet submission, and which do not reflect the views of a Minister on the proposal (but which could be valuable for informing the general public, or any interested member thereof) would be exempt, even though not initially prepared for the purpose of submission to Cabinet.

- documents submitted to Cabinet which had previously been prepared and used for another purpose, or even released into the public domain, such as a Green paper, would be exempt.

- an avenue for potential abuse of the accountability objects of the FOI Act was permitted, by enabling an agency or Minister to prevent disclosure of an embarrassing or damaging document, merely by ensuring that it was submitted to Cabinet for its consideration (even though the document was not initially prepared for the purpose of submission to Cabinet).

3.11 I expressed the hope that guidelines would be issued to FOI decision-makers encouraging the appropriate exercise of the discretion conferred by s.28(1) of the FOI Act in respect of documents technically exempt under the extremely wide coverage of the amended s.36(1), but the disclosure of which could do no harm to the effective working of the Cabinet process.

3.12 That has not, to my knowledge, occurred. Rather, in March 1995, the *Freedom of Information Amendment Act 1995* Qld introduced amendments to s.36 and s. 37 of the FOI Act which expanded the coverage of these exemption provisions even further. Both the 1993 and 1995 amendments were justified by the then Minister for Justice and Attorney-General as being necessary to prevent the undermining of the convention of collective Ministerial responsibility, and to safeguard the confidentiality of the Cabinet and Executive Council process. Those amendments, however, appear to be based on a conception of the extent of the Cabinet/Executive Council process which far exceeds that which has been understood in other Australian jurisdictions, with the notable exception of Victoria since 1993.

3.13 In fact, so wide is the reach of s.36 and 37, following the 1993 and 1995 amendments, that they can no longer, in my opinion, be said to represent an appropriate balance between competing public interests favouring disclosure and non-disclosure of government information. They exceed the bounds of what is necessary to protect traditional conceptions of collective Ministerial responsibility (and its corresponding need for Cabinet secrecy) to such an extent that they are antithetical to the achievement of the professed objects of the FOI Act in promoting openness, accountability and informed public participation, in the processes of government.

3.14 I consider that it is time for the Queensland Parliament to reconsider the rationale for inclusion of a Cabinet exemption and an Executive Council exemption in the FOI Act and to ask whether s.36 and s.37 of the FOI Act, in their present form, sit comfortably with the professed objects of the FOI Act.

3.15 When first enacted in 1992, s.36 of the Queensland FOI Act contained all the features of a balanced Cabinet exemption provision which had been recommended by the Senate Standing Committee on Constitutional and Legal Affairs in its 1979 report on the Commonwealth Freedom of Information Bill 1978. The Senate Committee made it clear that it was concerned to preserve the effectiveness of the Cabinet system and to preserve the secrecy surrounding Cabinet discussions. Paragraph 4.21 of its report, said: "*...our recommendations, if adopted,*

would clearly protect the confidentiality of all Cabinet deliberations; they will preserve the necessary degree of secrecy for advice tendered to Cabinet and would in no way expose the individual views or opinions of ministers in a way which could adversely affect the doctrine of collective responsibility".

3.16 The Senate Committee referred (at paragraph 18.2) to the kinds of documents that would be protected from disclosure by its recommended Cabinet exemption provision:

> *Cabinet submissions (and documents prepared in support); Cabinet business lists; departmental notes containing details of proposals in Cabinet submissions and decisions; correspondence between ministers, between ministers and departments and between departments, which disclose Cabinet deliberations and decisions; and drafts of legislation being prepared in accordance with Cabinet decisions.*

3.17 Clause 24(l)(a) of the Bill approved by the Senate Committee would have extended exemption from disclosure to a document that had been submitted to Cabinet for its consideration, or was proposed by a Minister to be so submitted, but (by virtue of clause 24(4)) only if it was brought into existence for the purpose of submission for consideration by Cabinet. (That clause would, in effect, have corresponded precisely with the effect of s.36(l)(a) of the Queensland FOI Act, as originally enacted in 1992 .)

3.18 The Senate Committee expressed the view (at paragraph 18.6) that:

> *Notwithstanding this limitation many documents will possibly be included as Cabinet documents that should not be. For instance, it is possible that a minister may order the compilation of a broad category of important statistics on Australian social or economic life, for consideration by Cabinet, in relation to a proposed policy. Again, Cabinet may require a major study, primarily of a factual nature, on the feasibility of a new policy or on the implications for Australia of a projected proposal. Reference can also be made to important reports prepared by such bodies as the Administrative Review Council on new or proposed legislation, which we understand are often submitted to a minister for consideration by the Cabinet. Of a comparable nature are the reports of consultants. Quite often these are prepared, at considerable cost to the public, to evaluate the efficiency of existing government programs. Each of these examples refers to a document that has been brought into existence for the purpose of submission to Cabinet. In each case the document, which is an important one of public interest, could be treated as conclusively exempt as a Cabinet document.*
>
> *... Essentially, the clause is designed to protect the Cabinet decision-making process. Yet, in protecting anything that is submitted or proposed to be submitted to Cabinet, it goes far beyond what is reasonably necessary for this purpose. To disclose documents of the type to which we referred in the previous paragraph is to disclose only the raw material on which the Cabinet process operates; it is not necessarily to disclose anything about Cabinet process itself. (my* emphasis)

3.19 The 1989 "Report upon Freedom of Information in Victoria" by the Legal and Constitutional Committee of the Victorian Parliament (the Victorian Report) discussed (at pp.70-72) both the virtues and vices of Cabinet secrecy:

> *The convention [of* collective ministerial responsibility] serves *several important constitutional purposes. It secures the responsibility of Cabinet to the Parliament and, through the Parliament, to the electorate. The coherence of government exercises pressure on the opposition to unite in the presentation of alternative policies and ministries. The convention assists in the maintenance of government control of legislation and public expenditure. It acts as a strong incentive towards the co-ordination of departmental policies and actions. More practically, Cabinet unanimity conforms with the expectations of the electorate which, in general, disapproves of divisiveness in its government ... .*
>
> *However, some of the political purposes facilitated by the convention have been the subject of substantial criticism ... . It is argued that the accretion* **of** *power at the centre of government has been at the cost of effective accountability to both Parliament and people ... .*
>
> *Similarly, there has been criticism of the degree to which collective Ministerial responsibility has been productive of secrecy throughout government. Excessive secrecy can be seen as counter-productive to effective government since it conceals and distorts the process of decision-making... Secrecy, like the ripples of a pond, can radiate from its centre in Cabinet to encircle the entirety of governmental administration. . . .* [Reproduced here was part of the passage from the Fitzgerald Report which is set out below.]
>
> *It is partly in response to such criticism that freedom of information legislation has been introduced in many nations with Westminster type govemments.*
>
> *It is a central question for this inquiry to determine what degree of secrecy should attach to Cabinet and other documents in order to effectively preserve the convention of collective ministerial responsibility. In examining this question, the Committee must weigh carefully two competing public interests. There is first, the public's interest in preserving the proper and efficient conduct of affairs of state. Secondly, there is the public interest in ensuring that, in the conduct of those affairs, the government is fully accountable to the people it exists to* serve.

3.20 After an extensive analysis of constitutional convention, the recommendations of national and international commissions of inquiry, similar legislative provisions, relevant case-law and the evidence presented to it, the Victorian Legal and Constitutional Committee (with four of the six ALP members voting with the conservative majority) concluded that it was only documents which disclosed the individual submissions or opinions of Ministers, and the nature and content of their collective deliberations, that should be protected as Cabinet documents. For example, the Committee said (at paragraphs 7.53-7.54):

> 7.53 *... The Committee has been consistent in its view that only documents which, if disclosed, would undermine the unanimity of Cabinet should be protected as Cabinet documents. Therefore, documents which canvass or disclose the individual views or votes of Cabinet members should be exempt. Further, for the reasons already given, the decisions of Cabinet should not be disclosed unless and until the government determines that this is appropriate. However, factual documentation provided to assist Cabinet in its deliberations pre-dates decisions based upon it and in consequence will not disclose these decisions. Therefore, in the Committee's opinion, the disclosure of*

background material will not prejudice the maintenance of the convention of collective ministerial responsibility.

7.54 The availability of Cabinet's raw material will provide the community with a means of assessing the appropriateness of Cabinet decision making. Moreover, it will also assist the Parliament in exercising its legislative and supervisory functions. The Committee believes that these are important factors militating in favour of disclosure.

3.21 In an article titled "Freedom of Information and Cabinet Government: Are They Compatible in Every Dissimilar Respect?" (1994) 1 Australian Journal of Administrative Law 208, Mr Spencer Zifcak, a legal academic who assisted the Victorian Legal and Constitutional Committee in the preparation of the report referred to above, argues that:

. . . the key principles which should govern the disclosure of Cabinet documents are these:

(1) The convention of collective Ministerial responsibility should be preserved. Cabinet documents should, therefore, remain secret until their disclosure will no longer prejudice Cabinet's effectiveness.

(2) Consistent with the convention 's protection, however, only those documents whose disclosure is likely to undermine the unity of Cabinet should be protected. So, any document which reveals an individual Minister's submission to Cabinet, the deliberations of Cabinet or the Cabinet 's decisions should remain confidential.

(3) It follows, therefore, that documents which will not disclose the individual views or votes of Ministers in Cabinet need not be protected as Cabinet documents. Thus, any document not prepared for the purpose of consideration by Cabinet need not be accorded protection as a Cabinet document since, by definition, it cannot disclose Cabinet's deliberations or decisions. Similarly, any documents which form the raw material of Cabinet discussion such as factual, statistical, technical and scientific documents should be capable of release.

(4) To avoid undue pressure on the Cabinet to respond to matters raised in this latter class of documents, however, they should be withheld from disclosure until after the decision to which they relate has been made.

Legislation based on these principles would strike an appropriate balance between the public's interest in effective Cabinet discussion and its interest in drawing the Cabinet to account for its actions. The views and votes of Ministers in Cabinet would remain confidential but external and factual material on which the Cabinet relied in making its decisions could eventually be disclosed providing a benchmark against which the appropriateness and propriety of its decisions might be judged.

lf one accepts this analysis, it becomes apparent that it is quite incorrect for politicians to claim that, in order to prevent the very foundations of the Westminster system from crumbling, every document considered by or relevant to Cabinet's deliberations must remain off-limits to the public. On the contrary, it is only those documents whose disclosure would have the effect of

fracturing Cabinet's unity and hence Cabinet's collective responsibility that require protection.

3.22 *I* endorse the arguments made in the above-quoted passage and urge the Queensland Parliament to consider carefully whether s.36 and s.37 of the FOI Act should be amended so as to accord with them.

3.23 I note that in his second reading speeches introducing the 1993 and 1995 amendments to s.36 and s.37 of the FOI Act, the then Minister for Justice and Attorney-General placed reliance on the decision of the High Court of Australia in *Commonwealth of Australia v Northern Land Council (1993) 67* ALJR 405. It is true that in the *Northern Land Council* case the High Court held that the interest of a government in the maintenance of the secrecy of deliberations within Cabinet constitutes a public interest that will be accorded protection by the courts in all but exceptional cases. However, the High Court was careful to confine this statement of principle to documents of the kind in issue before it, i.e. documents recording the actual deliberations of Cabinet. The six majority judges saw fit to point out (at p.406) that the documents in issue in the case were "documents which record the actual deliberations of Cabinet or a Committee of Cabinet", and not "documents prepared outside Cabinet, such as reports or submissions, for the assistance of Cabinet. "

3.24 In his second reading speech introducing the Freedom of Information Amendment Bill 1995, the then Minister for Justice and Attorney-General stated that the High Court had, in the *Northern Land Council* case "recognised the public interest in maintaining the confidentiality of the Cabinet process". With respect, there is nothing in the *Northern Land Council* case which supports the proposition that the High Court has recognised a public interest in maintaining the confidentiality of anything so amorphous and ill-defined as "the Cabinet process". The High Court limited its remarks to the protection of the public interest in preserving the confidentiality of the actual deliberations of Cabinet or a Cabinet Committee. There was abundant protection from disclosure of deliberations of Cabinet or a Cabinet committee, and of the contributions of individual Ministers, in s.36 of the FOI Act, as originally enacted in 1992. The *Northern Land Council* case affords no support in principle for the extensions of the scope of s. 36 and s.37 made by the 1993 and 1995 amendments.

3.25 The Fitzgerald Report had in 1989 warned Queenslanders of the dangers of excessive Cabinet secrecy (at pp. 126-127):

> *Although "leaks " are commonplace, it is claimed that communications and advice to Ministers and Cabinet discussions must be confidential so that they can be candid and not inhibited by fear of ill-informed or captious public or political criticism. The secrecy of Cabinet discussions is seen as being consistent with the doctrines of Cabinet solidarity and collective responsibility under which all Ministers, irrespective of their individual views, are required to support Cabinet decisions in Parliament.*
>
> *It is obvious, however, that confidentiality also provides a ready means by which a Government can withhold information which it is reluctant to disclose.*
>
> *A Government can deliberately obscure the processes of public administration and hide or disguise its motives. If not discovered there are no constraints on the exercise of political power.*
>
> *The rejection of constraints is likely to add to the power of the Government and its leader, and perhaps lead to an increased tendency to misuse power.*

> *The risk that the institutional culture of public administration will degenerate will be aggravated if, for any reason, including the misuse of power, a Government's legislative or executive activity ceases to be moderated by concern for public opinion and the possibility of a period in Opposition. . . .*
>
> *The ultimate check on public maladministration is public opinion, which can only be truly effective if there are structures and systems designed to ensure that it is properly informed. A Government can use its control of Parliament and public administration to manipulate, exploit and misinform the community, or to hide matters from it. Structures and systems designed for the purpose of keeping the public informed must therefore be allowed to operate as intended.*
>
> *Secrecy and propaganda are major impediments to accountability, which is a prerequisite for the proper functioning of the political process. Worse, they are the hallmarks of a diversion of power from the Parliament.*
>
> *Information is the lynch-pin of the political process. Knowledge is, quite literally, power. If the public is not informed, it cannot take part in the political process with any real effect.*
>
> *The involvement of Cabinet in an extended range of detailed decisions in the course of public administration gives principles intended to apply in different circumstances an operation that cannot have been contemplated or intended. Excessive Cabinet secrecy has led to the intrusion of personal and political considerations into the decision-making process by bureaucrats and politicians.*

3.26 Thus, the maintenance of an appropriately balanced Cabinet exemption in FOI legislation is consistent with the Fitzgerald reform agenda in Queensland. In my opinion, the 1993 and 1995 amendments to s.36 and s.37 of the FOI Act have resulted in exemption provisions of unwarranted breadth, which have re-opened the potential for abuse of Cabinet secrecy warned of in the passage from the Fitzgerald Report quoted above.

3.27 Section 36, in its current form, provides:

> ***36.(1)*** *Matter is exempt matter if-*
>
> (a) *it has been submitted to Cabinet; or*
>
> (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*
>
> (d) *it is, or forms part of, an official record of Cabinet; or*

(e) *its disclosure would involve the disclosure of any consideration of Cabinet or could otherwise prejudice the confidentiality of Cabinet considerations or operations; or*

(f) *it is a draft of matter mentioned in paragraphs (a) to (e); or*

(g) *it is a copy of or extract from, or party of a copy of or extract from, matter mentioned in paragraphs (a) to (f).*

(2) *Subsection (1) does not apply to matter officially published by decision of Cabinet.*

(3) *A certificate signed by the Minister stating that specified matter would, if it existed, be exempt matter mentioned in subsection (I), but not mutter mentioned in subsection (2), establishes, subject to part 5, that, if the matter exists, it is exempt mutter under this section.*

(4) *In this section -*

"Cabinet" *includes a Cabinet committee or subcommittee.*
"chief executive" *means a chief executive of a unit of the public sector.*
"consideration " *includes -*
(a> discussion, deliberation, noting (with or without discussion) or decision; and
(b) *consideration for any purpose, including, for example, for information or to make a decision.*
"draft" *includes a preliminary or working draft.*
"official record", *of Cabinet, includes an official record of matters submitted to Cabinet.*
"submit" *matter to Cabinet includes bring the matter to Cabinet, irrespective of the purpose of submitting the matter to Cabinet, the nature of the matter or the way in which Cabinet deals with the matter.*

3.28 Under s.36(l)(a) in its present form, any document (even a bundle of thousands of documents) can be made exempt by placing it before Cabinet. A Minister, or official with sufficient influence to have a document placed before Cabinet, now holds the power, in practical terms, to veto access to any document under the FOI Act by adopting this mechanism. It does not matter that the document was not created for the purpose of submission to Cabinet, or that the disclosure of the document would not compromise or reveal anything about the Cabinet process. It is not even necessary that the document be in any way relevant to any issue considered by Cabinet. At any time, even at a time after an FOI access application has been made for that specific document, a document may be made exempt by placing it before Cabinet.

3.29 Moreover, under s.36(l)(c) in its present form, the same result can be achieved without even arranging for a sensitive document to be submitted to Cabinet. For example:

- Under s.36(l)(c), any document prepared for the use or briefing of a Minister can now be rendered exempt merely by the Minister proposing (to whom is not specified, arguably any member of staff would suffice) that a matter to which it relates should go to Cabinet. Neither the document in question nor the related matter need ever reach the Cabinet room. The Minister therefore has it within his or her power to transform a document created without any intention that it or its subject matter would ever be dealt with by Cabinet, into exempt matter under s.36(1)(c).

- A similar possibility arises under s.36(l)(c) in relation to documents prepared for a chief executive, if a Minister can be persuaded to propose to take a matter dealt with in the documents before Cabinet. From a practical point of view, this leaves open the

possibility that an enormous number of documents dealing with the everyday activities of an agency can be made exempt under s.36(l)(c), on the basis of a decision of a Minister. In earlier times it would, of course, have been open to agencies to argue that documents of this type were exempt under s.4 I(1) of the FOI Act, on the basis that disclosure would not be in the public interest. Now there is an option available to a Minister to avoid having to deal with public interest considerations.

- The general words, "in relation to a matter", appearing in s. 36(l)(c), leave much ground for FOI decision-makers to conclude that a document relates to some item that has gone to Cabinet at some stage in history. Since its inception, Cabinet has no doubt dealt with most subject matters that are administered by Departments and agencies subject to the FOI Act. An FOI decision-maker need only draw a link between a document prepared for a chief executive or Minister and some matter which once went, or was proposed to go, to Cabinet.

3.30 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(l)(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.

3.3 1 Citizens are entitled to feel cynical about the achievement of the accountability objects of the FOI Act in the face of these provisions. Much of the benefit of the FOI Act is prophylactic - the prospect of public scrutiny should deter officials from impropriety and encourage the best possible performance of their functions. However, the intended prophylactic effect of accountability measures of this kind is negated if there exists a certain method for evading scrutiny in the event of problems arising, by preventing the disclosure of embarrassing or damaging information. Moreover, the prospect of concerned citizens obtaining documents which would permit informed participation in the policy development phase of some issue which is ultimately intended to go before Cabinet or Executive Council is also reduced, by these exemption provisions, to something which is entirely at the discretion of Ministers, or officials with sufficient influence to create circumstances which attract the application of these exemption provisions in the manner noted above.

3.32 The other disquieting factor in this context is the all-pervasive nature of Cabinet government. It is not just that every decision of importance is routed through Cabinet, but that an enormous number of minor decisions, of significance only to small segments of the public or to individuals, are routed through Cabinet and/or Executive Council. An extraordinary number of routine administrative decision-making powers are, by long convention, vested by statute in the Governor in Council. Therefore, the potential negative impact on access to information posed by s. 36 and s.37 in their present form is enormous.

3.33 The beneficial objects of FOI legislation, which include -

Cl keeping the community informed of government's operations,
❑ promoting open discussion of public affairs,
❑ promoting informed public participation in the processes of government, and
❑ enhancing the accountability of government, and government officials,

were intended to be secured by the conferral (in s.2 l of the FOI Act) of a legally enforceable right of access to documents of agencies and official documents of Ministers, subject only to

limited exceptions designed to protect the private and business affairs of members of the community, and ***essential*** public interests (see s.5(2) of the FOI Act).

3.34 It is an unavoidable weakness in the scheme of the FOI Act that officials in the executive branch of government must necessarily be made judges in their own cause (subject to the right to seek independent external review) on whether exceptions to the s.21 right of access (which is designed to promote accountability of the executive branch of government) apply in respect of particular documents or parts of documents. But the right of access conferred by s.2 1 of the FOI Act is rendered illusory, when it is within the power of Ministers or influential officials to defeat the right of access by making use (in the manner described above) of excessively broad exemption provisions, which go much further than is needed to protect ***essential*** public interests. It becomes, in effect, a right of access subject to Ministerial veto.

3.35 The concerns which I have expressed about the potential for abuse of s.36 and s.37 following the 1993 and 1995 amendments are not merely fanciful. An effective 'Ministerial veto' has already been employed to ensure exemption of documents prepared by all Departments in 1994 for the purpose of briefing Ministers in preparation for their appearances before Budget Estimates Committees of the Parliament. A number of shadow ministers, and one journalist, requested access under the FOI Act to briefing documents of this kind. These documents had not been prepared for the purpose of submission to Cabinet (indeed the purpose for which they were prepared had been spent), yet within the 45 days allowed for processing after the first such FOI access application was lodged, the documents had been placed before Cabinet, and each applicant for access was met with the assertion that the documents were exempt under s.36 of the FOI Act: see ***Re*** *Beanland* ***and Department of Justice and Attorney-General*** (Information Commissioner Qld, Decision No. 95026, 14 November 1995, unreported).

3.36 Another significant consequence of the broad reach of these amendments is the extension of unqualified protection (from disclosure and public scrutiny) to the contributions of those officials who brief Ministers and chief executives on issues that are to come or may come before Cabinet. When first enacted, the FOI Act recognised a distinction between two types of deliberative process matter. The first type was matter which might disclose the views of a Minister on matter taken to Cabinet, and the deliberations and decisions of Cabinet. This type of matter was to be afforded protection under s.36(1), regardless of any countervailing public interest which might favour disclosure. The second type of matter was the opinion and advice of public servants (not prepared specifically for the purpose of submission to Cabinet) which the Minister and the Cabinet might or might not choose to accept. Provision was made under s.4 l(1) for this matter also to be made exempt, but only if it could be shown that disclosure of the particular information would be contrary to the public interest.

3.37 The rationale for this distinction can be drawn from Chapter 4 of the 1979 Report of the Senate Standing Committee on Constitutional and Legal Affairs, which discusses the interplay between FOI legislation and the Westminster system of government, and Chapters 18 and 19 of that report, which deal specifically with the two exemption provisions. In essence, the distinction was made because it was considered that a blanket exemption for matter expressing the views of Ministers on matters taken to Cabinet was justified on public interest grounds but that, in the case of the advice and opinions of public servants, each case should be considered on its merits, with non-disclosure being called for only when the public interest, on balance, weighed against disclosure.

3.38 The recent amendments are very much contrary to this approach. They allow a great deal of opinion and advice, given by public servants to a Minister or a chief executive, to be characterised as exempt matter under s.36(l)(c), regardless of whether release of the documents would be in the public interest. My major concern in this regard is the potential to undermine the achievement of one of the major objects of the FOI Act, i.e. fostering informed

public participation in the processes of government, by stifling access to information about proposed policy developments, because the issue is ultimately proposed to go before Cabinet. In this regard. I draw attention to remarks I made *in Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs (1993)* 1QAR 60 (at pp. 113-115, paragraphs *158, 160-163):*

> *158. There are sound reasons why the class of documents entitled to strict protection under s.36 of the FOI Act should be narrowly confined. To do so will permit full scope to the object of fostering informed public participation in the processes of developing policy proposals, and this in turn will benefit the Cabinet process itself and through it, the public interest. I do not suggest that elected governments do not have the legitimacy and authority to make decisions without public consultation. In circumstances requiring urgent government action, there may be no practical alternative, and some government decision-making and policy-forming processes may be quite inappropriate for public consultation. There can be no doubt, however, that public consultation is a natural expression of the* ***democratic process,*** *and most governments are aware that to ignore it would be to their own peril. The mobilisation of majority public opinion against the announcement of a new government policy proposal tends to signal a government in difficulty.*
>
> ... [an extract from the Cabinet Handbook, atpp32-35, was quoted here]
>
> *160. In the pursuit of open and accountable government, the Queensland Government has placed a high value on the importance of consultation in the development of Government policy proposals. This is in sympathetic accord with the public participation objects of the FOI Act discussed at paragraphs 58 to 75 above. Interestingly, the only embargo which the Cabinet Handbook (see the fourth paragraph of the extract quoted) places on the disclosure of information to persons and organisations external to government (to allow for meaningful consultation) is that no Cabinet document, or previous or proposed discussions or deliberations by Cabinet, are to be disclosed. This roughly accords with the scope of the protection afforded by s.36 of the FOI Act.*
>
> *161. The extracts from the Cabinet Handbook quoted above seem to contemplate a managed process of consultation, where the agency developing a proposal for consideration by Cabinet selects the persons or organisations who will be accorded the opportunity of consultation. (Pages 27-28 of the Cabinet Handbook discuss the use of Green papers and White papers in a consultation process for policy development, which is aimed at achieving a high level of information dissemination, public discussion and comment, and which is open to all; but the Cabinet Handbook contains no guidelines which indicate when that process should be adopted, leaving it to the choice of individual Ministers and Chief Executives).*
>
> *162. The right of access to government-held information conferred by the FOI Act may assist interested persons or organisations who are not selected for participation in a consultative process, first, to discover that an agency is developing a policy proposal, and second, to obtain the information which would permit meaningful participation; for instance by seeking to make their views known to the agency or the responsible Minister.*

> ***163.*** *The general tenor of the Cabinet handbook on the subject of consultation is quite consistent with the notion that if an interested person or organisation has views to contribute to a policy formulation process, they should be taken into account with all other relevant views, so that the deliberation and decision-making processes within Cabinet itself can take account of all facets of public opinion, and all views which for instance question the factual or technical bases of a proposal under consideration. Not all relevant information is in the possession of government. The process of public consultation is generally a learning process, both for the government officials and the members of the public who engage in it. Not even our elite bureaucratic policy makers have a monopoly on wisdom. In the processes of Cabinet deliberation and decision, the relative strengths and weaknesses of all relevant options will be canvassed, so that Cabinet can make an informed choice according to its judgement of what the public interest requires. The Cabinet process is likely to produce better outcomes, in the public interest, when the legitimate concerns of all persons and groups have been taken into account, and the factual and technical data and assumptions on which a proposal is based have been exposed to the scrutiny of interested persons and groups.*

3.39 I do not see any logical justification for extending the cloak of Cabinet secrecy to policy advice rendered by public servants, without regard to a public interest balancing test of the kind provided for in s .4 l(1) of the FOI Act. I consider that the public in general, and certainly that segment of it which takes a keen interest in political matters, is aware that conflicting interests have to be reconciled in most of the difficult policy areas in which governments have to make decisions, and that there would be something severely deficient with the processes of government if alternate views and different policy options were not being put, and on occasions put strongly, in advice received by the government. I consider that the Queensland community is, and must be treated as, quite capable of distinguishing between policy advice given to a Minister by his or her officials, any view which the Minister then forms to take to Cabinet (which ordinarily should be clothed with the secrecy which properly applies to deliberations of Cabinet), and a government decision arrived at after consideration of all relevant advice.

3.40 The FOI Act was, after all, introduced with the aim of making democracy work in a better fashion by allowing a well-informed public and Opposition to make governments and individual officials more accountable and responsive to the public they are elected, or appointed, to serve. This includes a government having to be prepared to defend its policy choices against more informed scrutiny and questioning than had been the case in times when governments had an almost unfettered discretion to control the dissemination of government-held information. This may be inconvenient to a government in power, but there is no doubt that it is for the greater benefit of our system of government and the community as a whole.

3.41 Finally, I wish to draw the Queensland Parliament's attention to interim recommendations made by the joint Australian Law Reform Commission/Administrative Review Council review of the Commonwealth FOI Act ("the ALRC/ARC review") in its Discussion Paper 59 (DP 59) published in May 1995. The ALRC/ARC review made these observations on the Cabinet exemption in the Commonwealth FOI Act:

> 6.5 ***Nature of exemption.*** *The exemption for Cabinet documents has always been controversial. It is a class exemption that can be claimed without consideration of the public interest or whether disclosure of the particular document will cause harm. It seems to contradict the principle of open government. Cabinet is the 'peak body' for government decision making yet*

its processes are secret. The Review's general view on exemptions is that they should focus on a clearly identified harm or a weighing of the public interest. Cabinet documents, however, deserve special consideration. Absolute confidentiality is essential to the effective functioning of the collective decision making process that characterises the Cabinet model of government. To breach that 'Cabinet oyster' would be to alter our system of government fundamentally. Amending the FOI Act is not the appropriate way to effect such a radical change. Section 34 is one of the few cases in which an exception to the general rule that the harm or public interest consideration that justifies an exemption must be identified within the provision itself is appropriate. In this case, the harm is the invasion of Cabinet secrecy. The Act should, however, urge agencies not to claim the exemption where it is clear that no harm would befall the system of Cabinet decision making. Provision for a conclusive certificate should continue.

...

6.6 ***Definition of Cabinet document,*** *A document currently falls within the exemption for Cabinet documents if it has been submitted to and was prepared specifically for consideration by Cabinet, if it is an official record of the Cabinet or it is a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published. Despite the apparently clear wording to the contrary, documents that have been submitted to Cabinet but that were not createdfor that* ***purpose*** *have been held to be exempt. This is not acceptable. Section 34 (1)(a) should be amended to clarify that the exemption only applies to documents prepared for Cabinet to ensure that agencies do not abuse the exemption by having documents taken to Cabinet merely to avoid disclosure under the FOI Act. [my* emphasis]

3.42 This affords further endorsement of my view that s. *36* of the FOI Act, as originally enacted in 1992, struck the appropriate balance for a Cabinet exemption provision in FOI legislation. In my opinion, the 1993 and 1995 amendments represent a giant leap backwards in terms of achievement of the objects of the FOI Act. The ultimate losers are the public of Queensland who are denied the benefits of an FOI Act that functions in a manner conducive to the achievement of the beneficial objects identified in paragraph 3.33 above. I recommend that s.36 of the FOI Act be amended to restore it to the form in which it was first enacted in 1992.

3.43 Thus far, I have frequently referred to s.37 in tandem with s.36. I will give some further examples, specific to s.37, of the enormous negative impact which the unwarranted breadth of this provision has for the FOI Act.

3.44 Section 37, in its current form, provides:

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

(a) *it has been submitted to Executive Council; or*

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

(c) *it was prepared for briefing, or the use of, the Governor, a Minister or a chief executive in relation to a matter -*

(i) *submitted to Executive Council; or*

(ii) *that is proposed, or has at any time been proposed, to be submitted to Executive Council by a Minister; or*

(d) *it is, or forms part of, an official record of Executive Council; or*

(e) *its disclosure would involve the disclosure of any consideration of Executive Council or could otherwise prejudice the confidentiality of Executive Council considerations or operations; or*

(f) *it is a draft of mutter mentioned in paragraphs (a) to (e); or*

(g) *it is a copy of or extract from, or part of a copy of or extract from, matter mentioned in paragraphs (a) to (f).*

(2) *Subsection (1) does not apply to matter officially published by decision of the Governor in Council.*

(3) *A certificate signed by the Minister stating that specified mutter would, if it existed, be exempt matter mentioned in subsection (1), but not mutter mentioned in subsection (2), establishes, subject to part 5, that, if the matter exists, it is exempt matter under this section.*

(4) *In this section -*

***"chief executive"** means a chief executive of a unit of the public sector.*
***"consideration "** includes -*
(a> discussion, deliberation, noting (with or without discussion) or decision; and
(b) *consideration for any purpose, including, for example, for information or to make a decision.*
***"draft"** includes a preliminary or working draft.*
*"official **record ",** of Executive Council, includes an official record of mutters submitted to Executive Council.*
***"submit"** matter to Executive Council includes bring the matter to Executive Council, irrespective of the purpose of submitting the matter to Executive Council, the nature of the matter or the way in which Executive Council deals with the mutter.*

3.45 A vast number of statutory approvals (for all manner of activities) and routine administrative decisions affecting the rights and interests of citizens, are required by statute to be made by the Governor in Council. This is evident from an inspection of any issue of the *Government Gazette.* It is arguable that any matter relating to such approvals or routine administrative decisions (if prepared for the use, or briefing, of a chief executive or Minister who formulates, or formally tenders, a recommendation or advice to the Governor in Council) is exempt matter under s.37(l)(c). For example, all documents put before a Minister in relation to a proposed rezoning could be argued to relate to the application placed before the Governor in Council and therefore to be exempt. In another case, job applications sent to the chief executive of an agency might be said to relate to the approval by the Governor in Council of appointment of the successful applicant and so be rendered exempt. Moreover, matter which is required to accompany the advice/recommendation submitted to the Governor in Council, or anything which the Minister or his officials choose to submit with it, even though not strictly required (hence my concern at the potential for abuse), may become exempt matter under s.37(l)(a).

3.46 *So* far *as* s.37 is concerned, the potential for abuse is similar, or greater, in extent to that presented by s.36, but the answer may well be that, rather than returning s.37 to its original form (as I have recommended for s.36) the whole section should simply be repealed. Any matter of perceived importance or political sensitivity which must be submitted to the Governor in Council will invariably be considered by Cabinet or a Cabinet committee or sub-committee beforehand, so that exemption under s.36 will be available when necessary. Nothing would be lost in terms of necessarv protection, and much would be gained in terms of opening up access to documents which sheh light on the workings of government, if s.37 were to be repealed. Documents submitted to Executive Council would ordinarily fall within s.41(1)(a) of the FOI Act, so that any which are not exempt under s.36 by reason of their prior consideration by Cabinet, will qualify for exemption under s.41(1) if their disclosure would be contrary to the public interest.

3.47 The repeal of the Executive Council exemption in the Commonwealth FOI Act has been recommended by the ALRC/ARC review. Paragraph 6.10 of DP 59 states.

> *Section* 35 *exempts Executive Council documents. Experience in the 13 years since the FOI Act came into operation suggests the exemption was included unnecessarily. Executive Council documents tend to be a formal record of matters contained in other documents available from agencies. Sensitive Executive Council documents would be protected by specific exemptions such as those for national security and personal information. In the interest of having us few exemptions as possible and simplifying the Act, the Review proposes that s. 35 be repealed. It has been suggested that Executive Council documents should not be available until they have been considered by the Council. The Review is of the opinion that requests for draft Executive Council documents would be rare and that, even if one was made, genuinely sensitive material would be protected by one of the other specific exemptions.*

3.48 Nothing in my experience of Queensland government, or of the operation of the Queensland FOI Act, suggests that there is any greater need for a specific exemption provision dealing with Executive Council matter in this jurisdiction than in the Commonwealth jurisdiction. Rather, the reverse is true. In Queensland (by long convention), far more routine decision-making which directly affects individual citizens, and about which they should be entitled to information, is vested in the Governor in Council, than is the case with respect to the Governor-General in Council (the usual Commonwealth practice being to vest administrative decision-making powers in individual Ministers or statutory office-holders).

3.49 I recommend that s.37 of the FOI Act be repealed. If that is not acceptable, I recommend as an alternative that s.37 be amended to restore it to the form in which it was first enacted in 1992.

Cabinet matter/Executive Council matter exemptions

3.24 At paragraphs 3.4 to 3.49 of my third Annual Report, I discussed at length the rationale behind the Cabinet matter and Executive Council matter exemptions (s.36 and s.37 of the FOI Act, respectively), the history of amendments to those provisions, and the justifications given for the amendments.

3.25 I stated my view that, so wide is the reach of s.36 and s.37 (following amendments to those provisions in November 1993 and March 1995) that they can no longer be said to represent an appropriate balance between competing public interests favouring disclosure and non-disclosure of government information. They exceed the bounds of what is necessary to protect traditional concepts of collective

Ministerial responsibility (and its corresponding need for Cabinet secrecy) to such an extent that they are antithetical to the achievement of the professed objects of the FOI Act in promoting openness, accountability and informed public participation in the processes of government. The centrepiece of the FOI Act, the conferral by s.2 1 of a legally enforceable right of access to documents of agencies and official documents of Ministers (subject only to limited exceptions designed to protect the private and business affairs of members of the community, and *essential* public interests: see s.5(2) of the FOI Act), has been reduced, in practical terms, to a right of access subject to Ministerial veto.

3.26 Of particular concern is the extent to which the 1993 and 1995 amendments to s. 36 and s. 37 derogate from the achievement of the accountability and public participation objects of the FOI Act (see paragraphs 3.28 to 3.34 of my third Annual Report). The prospect of public scrutiny should deter officials from impropriety and encourage the best possible performance of their functions. The equation here is straightforward (and to the benefit of the wider public interest): if public officials have sound reason to believe that an effective accountability measure is in place which affords an avenue for exposure of improper, unlawful or incompetent behaviour, their efforts are more likely to be directed to avoiding the occurrence of such behaviour or, if it occurs, to acknowledging it promptly, correcting it, and seeking to implement measures to prevent a re-occurrence, rather than seeking to avoid disclosure of such behaviour. However, the intended prophylactic effect of accountability measures of this kind is negated if there exists a certain method for evading scrutiny in the event of problems arising, by preventing the disclosure of embarrassing or damaging information.

3.27 In my third Annual Report, I recommended that Parliament amend the FOI Act to return s.36 to its original form (as first enacted in 1992), and preferably to repeal s.37, or else to return s. 37 to its original form.

3.28 I consider that the basis in principle for making those recommendations was adequatelv explained in Chapter 3 of my third Annual Report, and I will not here expand on my previous comments, except to note that the ALRUARC Report has since made firm recommendations for amendments to the Commonwealth FOI Act—

(a) to make abundantly clear that s.34(l)(a) (being the key element of the Cabinet exemption provision in the Commonwealth FOI Act) applies only to documents that have been brought into existence for the purpose of submission for consideration by Cabinet; and

(b) to repeal the exemption for Executive Council documents (s.35 of the Commonwealth FOI Act).

These recommendations (which accord with my recommendations for the amendment of the Queensland FOI Act) were based on considerations similar to those explained in Chapter 3 of my third Annual Report (see paragraphs 9.7 to 9.14 of the ALRUARC Report). The justification given in the ALRUARC Report (at paragraph 9.9) for recommendation (a) above was as follows:

> *The proposal was intended to ensure that agencies cannot abuse the exemption by attaching documents to Cabinet submissions merely to avoid disclosure under the FOI Act. The Department of Prime Minister and Cabinet supports the proposal.*
>
> The intention of the proposal is certainly consistent with the original understanding of the purposes of the words in s.34(l)(a).

A number of other submissions also favour the proposal on the basis that as much government information as possible should be available. It is difficult to see how disclosure of documents that have not been brought into existence for the purpose of consideration by Cabinet could be detrimental to the Cabinet process.

> The convention of collective ministerial responsibility is undermined only by disclosure of documents which reveal Ministers' individual views or votes expressed in Cabinet. Documents nbt prepared for the purpose of submission to Cabinet do not, by definition, disclose such opinions.
> [DC Pearce (ed) *Australian Administrative Law* Butterworths 1995, 2220.1

3.29 I consider that the amendments to s.36 and s.37 which I have recommended are necessary to restore the credibility and effectiveness of the FOI Act. I respectfully suggest that this is an issue which deserves the timely attention of the whole of the Parliament, given the Parliament's constitutional responsibility (as the representative institution of the electors) to ensure adequate and effective accountability measures in respect of the exercise of powers and functions committed to the executive branch of government, and the importance (to that end) of ensuring the existence of a meaningful right of access to government-held information.

Continuing concerns with regard to s.36 and s.37 of the FOI Act

3.6 In my 1994/95 and 1995/96 annual reports, I discussed the amendments that were made to s.36 and s.37 of the FOI Act in November '1993 and March 1995. I expressed the view that they exceeded the bounds of what was necessary to protect traditional concepts of collective ministerial responsibility (and its corresponding need for Cabinet secrecy) to such an extent that they are antithetical to the achievements of the professed objects of the FOI Act in promoting openness, accountability and informed public participation in the processes of government.

3.7 The provisions allow scope for the "manufacture" of an exemption claim by giving blanket exemption to documents placed before Cabinet or Executive Council, even for documents that were not prepared for the purpose of submission to Cabinet or Executive Council, and indeed even for documents which have been previously published (see paragraph 3.18 below). They extend a right to keep secret numerous documents created to brief a Minister or chief executive on an issue, which documents may in no way indicate the views of the Minister or Cabinet on any particular topic. The only exception to the Cabinet and Executive Council exemptions is also worded far too narrowly (see paragraph 3.18 below). Several cases which I have dealt with during the reporting period have given me cause for concern about the way that agencies apply the provisions.

3.8 In one case, a quarterly statistical report covering aspects of one agency's operations had for some time been provided by the agency to a body representing a profession with a legitimate ongoing interest in the agency's operations. The report was clearly relevant to the activities of the professional body, and to matters of public interest concerning expenditure of public funds. The arrangement, which had operated outside the FOI Act, ceased when the agency decided that the quarterly statistical report should no longer be provided to the professional body. The professional body then requested access to the report under the FOI Act, and was first met with a decision that the report had been prepared for inclusion in a Cabinet Information Paper and was therefore exempt under s.36(1)(c). By the time of the internal

review decision, the agency determined that the report had been submitted to Cabinet and was therefore exempt matter under s.36(1)(a) of the FOI Act. Thus, a category of information routinely prepared by an agency for monitoring its own operations (rather than for the purpose of submission to Cabinet), which had for some time been made available for scrutiny by an interested professional body, was insulated from disclosure under the FOI Act, simply by the fact of its having been submitted to Cabinet for information purposes, and without any requirement under the terms of the applicable exemption provision to consider whether disclosure of the information would be preferable in the interests of furthering the public interest objects of the FOI Act. (Factors of the last-mentioned kind should, however, be taken into account when an agency decision-maker exercises the discretion conferred by s.28(1) of the FOI Act in deciding whether or not to refuse access to a document or matter which satisfies a relevant test for exemption.)

3.9 Another case involved a report prepared on the activities of a public servant. A second public servant who was mentioned briefly in a number of places in the report applied under the FOI Act for access to the report. The case came before me on the basis of a deemed refusal of access (see s.79 of the FOI Act), and, shortly after that, the report was submitted to Cabinet, in conjunction with an oral submission by the relevant Minister. The agency then relied on s.36(1)(a) of the FOI Act to refuse the applicant access to the small segments of matter in the report relating to him. As is my usual practice in such cases, I required the agency to provide evidence of the material facts which must be proved to establish a case for exemption under s.36(1) or s.37(1) of the FOI Act. Cabinet records were provided to me which briefly recorded the fact that the report had been noted by Cabinet in conjunction with an oral submission from the relevant Minister. There was no way of telling from those records whether the report had been submitted to Cabinet merely for the purpose of insulating it from disclosure under the FOI Act. Given the sensitivity of the report as it affected the main subject of the report, it is probable that the report was noted by Cabinet for legitimate purposes, and the timing of the oral Cabinet submission relative to the processing of the FOI access application was probably merely coincidental. However, it was difficult to see any possible basis on which disclosure to the access applicant of the segments of the report which concerned him could have revealed anything about Cabinet discussions or proposals, or compromised the integrity of the Cabinet process in any way.

3.10 These cases show that regardless of how closely requested information relates to an individual applicant for access, or how great the public interest in disclosure of particular information, an agency may refuse access to a document under s.36 or s.37, whether or not the document was created for the purpose of submission to Cabinet or Executive Council, or would reveal anything about the Cabinet or Executive Council process.

3.11 In my view, not only are the provisions too wide but they are relied on more frequently than is reasonable. As another example, one local authority objected to disclosure of a draft development plan on the basis that the final plan had been submitted to Executive Council for its approval. The document in issue, being a draft of a document submitted to Executive Council, was arguably exempt matter under s.37(1)(f). Even though the final version of the document appeared to have been published by decision of Executive Council, the draft itself had not, and so the exception in s.37(2) arguably did not apply. Fortunately, my staff negotiated the disclosure to the applicant of a part of the draft, which resolved the review. However, one must question the sense in having a provision so widely framed that it does not allow for a balancing of the public interest considerations telling for and against disclosure of a draft document, where the final version of the document has been made public.

3.12 *Cases* such as those discussed above could be remedied by judicious exercise of the discretion conferred on agencies and Ministers by s.28(1) of the FOI Act (a discretion which it is not open to me to exercise on external review because of the specific provision made by s.88(2) of the FOI Act). Section 28(1) does not require an agency or Minister to refuse access to exempt matter. It confers a discretionary power to refuse access to exempt matter which may be exercised or not exercised at the discretion of the relevant agency or Minister: see *Re Norman and Mulgrave Shire Council* (1994) 1 QAR 574 at p.577 (paragraph 13). It is therefore important for agency decision-makers to consider carefully the exercise of that discretion, particularly in cases involving s.36(1) and s.37(1), since the terms of those exemption provisions do not call for consideration of public interest factors favouring disclosure of particular information, or even the fact that the information in issue is already in the public domain. Regardless of whether s.36 and s.37 are returned to the form in which they were originally enacted (and I strongly urge that they should be), decision-makers within agencies should have proper regard to the nature of the discretionary power which they exercise under s.28(1) of the FOI Act.

3.13 At paragraph 3.11 of my third annual report (1994/95) and at paragraphs 3.19-3.20 of my fourth annual report (1995/96), I urged the Queensland government to follow the example of the Commonwealth government by issuing guidelines for agencies on the exercise of the discretion conferred by s.28(1) of the FOI Act, which guidelines ought to focus on the need to assess whether any genuine harm could follow from disclosure of a document, or particular information in it, before making a decision to invoke an exemption provision that is technically available. That has not occurred. It would be welcome to see the Queensland government demonstrate continued support for the spirit of the FOI Act by issuing guidelines of the kind suggested.

3.18 In my decision in *Re Lindeberg and Department of Families, Youth & Community Care* (Information Commissioner Qld, Decision No. 97008, 30 May 1997, unreported), I drew attention to the unduly limited nature of the only exception to the Cabinet and Executive Council exemptions. Subsections 36(2) and 37(2) provide, in effect, that matter is not exempt under s.36(1) or s.37(1) if it has been officially published by decision of Cabinet or Executive Council, respectively. I have reproduced below, for consideration by Parliament, my comments in paragraphs 26-30 of *Re Lindeberg:*

> *26. This case has again highlighted an absurd anomaly caused by the present wording of s. 36(2) and s. 37(2) of the FOI Act, which afford the only exceptions to the operation of s.36(1) and s. 37(1), respectively, of the FOI Act. I first drew attention to the anomaly in* Re Beanland *at paragraphs 6.5-66, in connection with an agency's claim that 100 pages of material that had been disclosed to Mr Russell Cooper MLA, in his capacity as a member of a budget estimates committee of the Queensland Parliament, was nevertheless exempt from disclosure to Mr Cooper, in the capacity of an applicant for access under the FOI Act.*
>
> *27. Cabinet or the Governor in Council will sometimes turn their attention to authorising official publication of their decisions or of material put before them for consideration, and make a decision us to the manner and/or timing of official publication. However, it is* ***also*** *frequently the case that material that is technically exempt matter under s. 36(1) or s.37(1) of the FOI Act (e.g., through having been submitted to Cabinet*

or Executive Council) is published through official channels (e.g., through a Ministerial press statement, through inclusion in answers to Parliamentary questions (with or without notice), through tabling in Parliament, or through release of a Green Paper) without Cabinet or the Governor in Council ever having been asked to turn their attention to, or ever having made a formal decision about, official publication of that material. Generally, there is nothing untoward about such publication, which may occur weeks, months or years after any sensitivity attending consideration of a matter by Cabinet, or the Governor in Council, has dissipated.

28. *In the present case, the substance of the decision made by the Governor in Council on 7 February 1991, which is recorded in page 249, has become a matter of public record through a Ministerial statement to Parliament some four years later. However, the matter in page 239 remains exempt under s.37(1) of the FOI Act, because it has not been officially published by decision of the Governor in Council. To my mind, it is absurd that publication of information through an official channel of the Queensland government should not constitute a sufficient exception to the application of s.36(1) and s.37(1) of the FOI Act.*

29. *I have previously expressed my views on the need for amendments to s.36 and s.37 of the FOI Act . . . . In addition to those views, I feel it is necessary to respectfully suggest that Parliament give consideration to amending s.36(2) and s.37(2) of the FOI Act so that they read as follows:*

> *(2)* Subsection (1) does not apply to matter officially published by government.

30. *That wording would ensure that FOI access was not available in respect of Cabinet or Executive Council matter that was published only by virtue of an unauthorised leak, and it would not affect the ability of Cabinet or Executive Council to control the dissemination of sensitive information where Cabinet or Executive Council desires that control, but it would remove the present anomaly that permits agencies and Ministers to claim exemption under s.36(1) and s.37(1) of the FOI Act in respect of information that has been released into the public domain through official channels of the Queensland government.*

CHAPTER 3

GENERAL OBSERVATIONS ON THE FOI PROCESS IN QUEENSLAND

In each of my last four Annual Reports, I have sought to draw the attention of the Legislative Assembly to problems I have perceived in the operation of the FOI Act. In several instances, I have recommended amendments to the FOI Act to enhance the effectiveness of the Act's operation, and the furthering of the Act's professed objects. No changes have yet occurred to the FOI Act in response to those recommendations. Nevertheless, in a triumph of optimism over experience, I have decided to briefly address some old and new issues in this Chapter.

Need to wind back overly broad exemption provisions

In previous annual reports, I have raised concerns about a number of amendments made to the FOI Act which I see as marking a significant retreat from the principles of openness, accountability and responsibility which the FOI Act was intended to enshrine. Those changes involved-

* amendments to the FOI Act in November 1993 and March 1995 which radically expanded the scope of the Cabinet/Executive Council exemption provisions;
* the inclusion of provisions (s. 11A and s.11B of the FOI Act) which exclude the application of the FOI Act to documents relating to the commercial activities of government owned corporations (GOCs) and local government owned corporations (LGOCs); and
* the inclusion of provisions which exclude the application of the FOI Act to bodies holding aggregate student data.

With respect to the amendments to the Cabinet/Executive Council exemption provisions (s.36 and s.37 of the FOI Act), I have expressed in previous annual reports the view that those amendments exceed the bounds of what is necessary to protect traditional concepts of collective ministerial responsibility (and its corresponding need for Cabinet secrecy) to such an extent that they are antithetical to the achievement of the professed objects of the FOI Act, i.e., to promote openness, accountability, and informed public participation in the processes of government.

One of the concerns I have previously raised is that s.36 and s.37 in their present form allow scope for the 'manufacture' of an exemption claim by giving blanket exemption to documents placed before Cabinet or Executive Council, even for documents that were not prepared for the purpose of submission to Cabinet or Executive Council, and indeed even for documents which have previously been published. The centrepiece of the FOI Act, the conferral by s.21 of a legally enforceable right of access to documents of agencies and official documents of Ministers (subject only to limited exceptions designed to protect the private and business affairs of members of the community, and *essential* public interests: see s.5(2) of the FOI Act) has been reduced, in practical terms, to a right of access subject to Ministerial veto. In my 1995/96 Annual Report, I noted that the prospect of public scrutiny deters officials from impropriety and encourages the best possible performance of their functions. If that prospect can, in effect, be evaded (as it can be under s.36 and s.37) and the disclosure of embarrassing or damaging information prevented, one of the chief objects of the FOI Act - accountability of government - is defeated.

I note that, prior to the June 1998 general election, the Hon Peter Beattie MLA introduced into Parliament a private member's Bill (the *Freedom of Information Amendment Bill 1998)* which sought to amend s.36 and s.37 of the FOI Act in two main respects:

(a) by amending the definitions of "Cabinet matter" and "Executive Council matter" to specifically exclude Ministerial expenses matter; and
(b) by providing that s.36(1) and s.37(1) would not apply where action taken to bring matter within the terms of a s.36(1) or s.37(1) exemption provision was taken predominantly for the purpose of making it exempt matter.

I welcome the spirit and intention of the Bill in attempting to counter the potential for abuse of s.36 and s.37 of the FOI Act, as presently enacted. However, I consider that the application of the Bill's provisions with respect to (b) above would have given rise to considerable practical difficulties, and would not have redressed all the problems to which I have previously adverted. The Bill lapsed on the dissolution of Parliament in May 1998, but I will briefly record my views, so that the Parliament might take them into account in the event that it is asked to consider similar provisions in any future Bill put before the Parliament.

The Bill would have required the relevant FOI decision-maker (whether that be an agency decision-maker, or the Information Commissioner upon an application for external review) to decide the "predominant purpose" for which matter in issue was submitted to Cabinet or Executive Council (or for which action was taken that otherwise brought matter within the terms of the s.36(1) or s.37(1) exemption provisions). The decision-maker would have been required, in effect, to judge whether matter was submitted for a legitimate purpose, or whether it was submitted predominantly for the purpose of avoiding disclosure under the FOI Act.

The application of such a test would, in my view, be productive of substantial practical and evidentiary difficulties. An applicant for access will rarely be in a position to shed any light on the purpose for submission of a document to Cabinet or Executive Council. The best evidence as to the purpose for submission to Cabinet or Executive Council would ordinarily come from the Minister who submitted the document or his/her senior officials/advisers. Such evidence is unlikely to ever directly support a finding that action has been taken for the predominant purpose of avoiding disclosure of a document under the FOI Act. Therefore, in most, if not all, cases, any decision favouring disclosure by virtue of cl.36(2)(c) or cl.37(2)(c) of the *Freedom of Information Amendment Bill 1998* would have to be based on inferences drawn from whatever material could be discovered in investigations by the decision-maker. Given the inherent difficulties in divining a colourable, improper purpose from actions that can relatively easily be clothed with the appearance of legitimacy (it seems that documents are commonly submitted to Cabinet merely for information purposes: I am unable to assess whether this is a practice that has escalated since the advent of the FOI Act), and given the relatively limited investigative powers of agency decision-makers and my office, the provisions would seem to me to be destined to provoke considerable investigative effort for little result (*cf.* the cases referred to in paragraphs 3.8-3.9 of my 1996/97 Annual Report).

Moreover, it is a relatively easy thing for an access applicant to allege an improper purpose, and put the onus on decision-makers to investigate it and disprove it. I question whether the additional resources which would need to be expended by this office, by agencies and by Ministers and their senior officials/advisers, in investigating or answering such allegations, would be justified given the inherent difficulties of the nature of the inquiry.

While I commend the intentions behind the Bill, I consider that the correct conceptual approach to reducing or eliminating the potential for abuse of s.36 and s.37 of the FOI Act (in their present form) lies in re-thinking the appropriate boundaries, and degree, of secrecy that is genuinely essential for the proper functioning of the Cabinet/Executive Council process, having regard to the nature of our representative democracy (see paragraphs 3.8 - 3.9 of my 1995/96 Annual Report and paragraphs 3.1

- 3.4 of my 1996/97 Annual Report), the objects of the FOI Act, and the fact that control for the time being of the powers of executive government is conferred in trust to be exercised for the benefit of the citizenry (see paragraphs 3.10 - 3.12 of my 1995/96 Annual Report). If the scope of permissible Cabinet/Executive Council secrecy is confined within proper (and, in my view, much tighter) bounds, any need to examine motives for bringing documents within those bounds is significantly diminished. For reasons that I hope were adequately explained in chapter 3 of my 1994195 Annual Report, I consider that the correct balance would be achieved simply by amending the FOI Act to return s.36 to its original form (as first enacted in 1992), and preferably by repealing s.37, or else returning s.37 to its original form (as first enacted in 1992).

Exclusion of Government-owned corporations from the FOI Act

3.50 1994/95 saw the commencement of a program of exclusions of Government-owned corporations (GOCs) from the FOI Act. A new s.11A and Schedule 2 were inserted in the FOI Act by the *Queensland Investment Corporation Amendment Act 1994* Qld, and further exclusions of individual GOCs have been made by other complementary legislation.

3.51 I have two concerns with these developments. Firstly, I consider the policy itself to be inappropriate, for reasons explained at paragraphs 3.63-3.71 below. Secondly, the implementation of the policy has miscarried through an apparent lack of understanding of how the FOI Act operates. In this regard, I propose to address s.11 and s.11A of the FOI Act, and

the unsatisfactory position which has been reached with respect to exclusions from the FOI Act for GOCs and other bodies performing commercial functions.

3.52 Confusion is evident in the Minister's second reading speech on the introduction of the Queensland Investment Corporation Amendment Bill 1994 where it is said (at Hansard, 30 August 1994, p.9011):

> *"Secondly, the Bill provides for the exemption of the QIC and GOCs generally, from the administrative law regime of freedom of information and judicial review in respect of their commercial activities. This will place GOCs on an equal footing with their private sector competitors.*
>
> *This amendment corrects an existing anomaly in the FOI legislation which enables an exempt document to lose its exempt status in the hands of a non-exempt body. It is expected that this amendment will greatly facilitate the performance monitoring process under corporatisation which requires GOCs to provide commercially sensitive information to Treasury, which is a non-exempt body for the purposes of the FOI Act.. ."*

3.53 With respect, the amendments to the FOI Act effected by the *Queensland Investment Corporation Amendment Act 1994* Qld, and complementary legislation in respect of other GOCs, have achieved a state of affairs where (relying on the catch-cry of creating a level playing field for GOCs to operate, free of impediments which do not affect private sector corporations) GOCs have actually been accorded, under the terms of s.11A of the FOI Act, a more privileged position in respect of the application of the FOI Act than all private sector corporations and business entities.

3.54 There never was, with respect, an anomaly in the FOI Act which enabled an exempt document to lose its exempt status in the hands of a non-exempt body. A document which satisfies the test for exemption under any of the exemption provisions in Part 3, Division 2 of the FOI Act is an exempt document no matter who has possession of it. Of course, one can only apply for access under the FOI Act to a Minister or an agency which is subject to the FOI Act. What I think the Minister was meaning to convey was that a document which is not subject to the FOI Act while it is in the possession of a body which is excluded from the application of the FOI Act (either generally or in respect of documents relating to particular functions) becomes subject to the FOI Act when it comes into the possession of a Minister or an agency subject to the FOI Act. If it is truly an exempt document, however, it will be an exempt document in the hands of the Minister or agency subject to the FOI Act.

3.55 This cannot accurately be described as an anomaly. The position is precisely the same in respect of documents created by, or about, the commercial affairs of a private sector business corporation, or the personal affairs of a citizen (neither of whom are bodies subject to the FOI Act): such documents are subject to the FOI Act when they come into the possession of a Minister or an agency subject to the FOI Act, and the general exemption provisions in Part 3, Division 2 of the FOI Act are considered sufficient to protect sensitive information from disclosure.

3.56 In terms of creating a level playing field, then, the only measure necessary to equate GOCs with private sector business corporations is to make them (under s. 11(1)) bodies which are not subject to the FOI Act. To go any further is to confer special advantages on GOCs; however, this is precisely what s.11A of the FOI Act has done (see paragraphs 3.59-3.63 below). In my view, it is appropriate that Parliament consider legislative amendments to rectify this situation, and bring some sense of order to the making of exclusions from the FOI Act. It is necessary that I first explain the effect of s. 11(1) and s.11A of the FOI Act.

3.57 Section I 1(1) of the FOI Act lists bodies to which the FOI Act does not apply, either generally, or in respect of particular functions of those bodies. (Section 1 1(1)(j) is somewhat anomalous in this list, since it applies to every agency subject to the FOI Act in respect of a defined class of documents, i.e. documents received from Commonwealth agencies whose functions concern national security. ***Qrtaere*** whether it should more appropriately have been dealt with as an exemption provision - perhaps in an additional subsection of s.38). The inclusion of a body in s. 1 I(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; under Part 4, to deal with applications for amendment of personal affairs information) either generally, or in respect of specified functions. It does not mean that documents created by, or concerning, the bodies (or the bodies in respect of specified functions) mentioned in s. 1 l(1) can never be subject to the FOI Act. Copies of any such documents which are in the possession or control of an agency which is subject to the FOI Act will be capable of being accessed under the FOI Act (subject to the application of the exemption provisions), as is the case with documents created by, or concerning, any private sector corporation or private citizen, which find their way into the possession or control of an agency which is subject to the FOI Act.

3.58 Section 1 l(l)(q) provides for an agency, part of an agency or function of an agency, to be excluded, by regulation, from the application of the FOI Act.

3.59 Section 11A provides that the FOI Act does not apply to documents received, or brought into existence, in carrying out activities of a GOC mentioned in Schedule 2, to the extent provided under the particular application provisions mentioned for the GOC in the Schedule.

3.60 Section 11A operates in a way that is materially different from s. 11. In effect, it erects a class of documents to which the FOI Act does not apply, whether they are in the possession of a GOC, or, for example, a Minister exercising a supervisory function over the GOC, or even a law enforcement or regulatory body exercising law enforcement or regulatory functions which affect the GOC. (The operation of s. 11A is also materially different from exemption provisions which apply by reference to whether a document falls within a defined class of documents, e.g. s.36. A person may apply for access to Cabinet documents and, pursuant to s.28(1), an agency or Minister may decide to grant access even though they are exempt documents. By contrast, no valid application for access under the FOI Act may be made in respect of documents falling within the class defined by s. 1 IA.)

3.61 The FOI Act does not apply to private sector business corporations like, for instance, Mt Isa Mines Ltd (MIM). But if documents brought into existence by MIM come into the possession of, say, the Department of Minerals and Energy (DME), through exercise of its regulatory functions, any person has a right to apply to the DME for access to those documents, and to be given access to them under the FOI Act, unless they fall within the terms of an exemption provision. Precisely the same position would apply to Suncorp Insurance and Finance (Suncorp) in respect of any documents created by Suncorp which come into the possession of, say, Queensland Treasury, notwithstanding that the FOI Act does not apply to Suncorp by virtue of s. 1 l(l)(o).

3.62 The effect of s. 11A is to give GOCs a more privileged position with respect to the application of the FOI Act, not only as compared to all private sector business operators, but even as compared to government-owned commercial bodies which are mentioned in s. 11(1), or in regulations made under s. 1 l(l)(q). What possible justification is there, in principle, for this state of affairs‘? If there is sufficient protection from competitive harm for MIM and Suncorp

in s.45, and other exemption provisions, of the FOI Act (which I believe there is), why should GOCs be given any more privileged treatment?

3.63 My primary concern is that the FOI Act is in danger of dying the death of a thousand cuts unless the recent trend towards more and more exclusions of particular bodies, or particular functions or classes of documents in respect of particular bodies, is arrested and, preferably, reversed. The Queensland Parliament should, in my opinion, adopt the same approach to the application of the FOI Act to GOCs as has been recommended (see the extracts below) by the ALRC/ARC review of the Commonwealth FOI Act in respect of the application of the Commonwealth FOI Act to Government Business Enterprises (GBEs).

3.64 Failing that, the present anomalies in the Queensland FOI Act in the treatment of these bodies should at least be removed. There would actually be a net benefit, in terms of the general accountability objects of the FOI Act, if s. 11A were repealed, and the GOCs which presently have the benefit of it were instead named in additional paragraphs of s. 11(1). There should be a standardisation of approach, with the GOCs included in s. 11(1) according to this formula: "(name of GOC) in respect of documents in relation to its competitive commercial activities", or "its commercial activities" if the GOC has no competitor (but in that case, one has to ask what is the justification in principle for the GOC to obtain special treatment at all).

3.65 The ALRC/ARC review's DP 59 notes that there is no general rule governing the application of the Commonwealth FOI Act to GBEs. Some GBEs are entirely exempt; others are exempt only for specific categories of documents. There appears to be no logical basis for these differences (see paragraph 10.6 of DP 59).

3.66 DP 59 summarises the arguments against extending the Commonwealth FOI Act to GBEs as follows:

- the objectives of the Commonwealth FOI Act (which focus on the accountability of executive government which has a duty to act in the interest of the whole community) are irrelevant to GBEs (which operate in a commercially competitive environment) and that GBEs should not be directly accountable to the public through FOI.

- regulatory mechanisms which apply generally to the private sector or to the particular industry within which the GBE operates provide sufficient accountability. Further in a genuinely competitive market, market mechanisms ensure a high quality of administration thus removing the need for the accountability provided by FOI.

- being subject to the Commonwealth FOI Act would disadvantage GBEs in relation to their private sector competitors, place additional administrative and financial burdens on GBEs, and reduce their competitiveness.

3.67 Arguments in favour of extending the Commonwealth FOI Act to GBEs were:

- the need to protect commercial interests, and the existence of private sector accountability mechanisms and market forces, do not displace the need for public accountability of GBEs, because:

  - GBEs represent the expenditure of much public money, and should be publicly accessible and accountable for the use of that money;

  - GBEs are accountable to Ministers financially and strategically and the public has a democratic interest in their workings;

- traditional private sector corporate reporting, accounting and audit requirements do not provide public accountability or individual justice. FOI and other administrative law mechanisms have the potential to provide such results and other benefits generally; and

- the competitive environment does not facilitate a fair and just provision of goods and/or services. Private remedies might assist, but the cost of justice may take these outside the reach of most individuals. By contrast, administrative law remedies are by and large cheaper and more accessible and likely to lead to public accountability and better decision making, possibly even in the commercial sphere.

- because of their nexus with government, GBEs enjoy advantages over their private sector competitors. It is important that information relating to the real rate of return targets, public authority dividend requirements, community service obligations and a host of other requirements be as transparent as possible, bearing in mind all the privileges that GBEs have over private sector organisations such as access to capital, cost of capital, immunity from threat of takeover by corporate raiders, and taxation and other regulatory privileges.

- Information relating to regulatory functions, as well as public functions or the delivery of services, should be subject to FOI, particularly where those functions are carried out in a less competitive or monopoly market.

3.68 Other factors taken into consideration by the ALRC/ARC Review were the relevance of FOI objectives to GBEs - democratic objectives (public scrutiny and accountability) and privacy objectives (individuals' right to obtain information about themselves in possession of government, including employees of these bodies). Finally, DP 59 argues that private sector accountability mechanisms do not displace the role of FOI. The nature of accountability produced by market forces is of limited benefit to the individual consumer and the recent emergence of industry-based dispute resolution schemes (e.g. industry 'Ombudsmen') evidences the deficiencies of market forces and traditional private sector methods of addressing consumer dissatisfaction.

3.69 The recommendations of DP 59 are that, due to the connection between GBEs and government, the need for some degree of accountability leads to the conclusion that the Commonwealth FOI Act should apply to GBEs. DP 59 recognised the need to protect commercial activities of a GBE that are undertaken in a market environment where there is real competition. An amendment to make it clear that the s.43 exemption in the Commonwealth FOI Act was able to be invoked by GBEs was considered to be all that was necessary in this regard. (The equivalent exemption provision in the Queensland FOI Act, s.45, already clearly applies to Queensland GOCs.) DP 59 argued that it is unnecessary for any GBE to be exempted by way of exclusion in a schedule to the Act.

3.70 Finally, the ALRC/ARC review recognised that subjecting GBEs to the Commonwealth FOI Act could impede some of the policy objectives behind creating GBEs, for example, increasing competition in various industries. Also, as a practical matter, determining whether a particular document of a GBE should be exempt because it concerns its competitive commercial activities could be problematic. Nevertheless, it was stated that the review would need further evidence to be persuaded that those difficulties outweighed the benefits to the community of extending the Commonwealth FOI Act to GBEs.

3.71 I entirely endorse the position reached by the ALRC/ARC review in Chapter 10 of DP 59. The considerations raised apply equally to Queensland GOCs, which should, in my opinion, be subject to the FOI Act.

3.72 To give effect to that position, s. 11A and Schedule 2 of the FOT Act would need to be repealed (and any necessary consequential amendments made to complementary legislation). Section 1 1(l)(n) and all provisions of the *Freedom of Information Regulation* 1992 which, pursuant to' s. 11 (l)(q) of the FOI Act, exclude a body from the FOI Act in respect of the body's competitive commercial activities, should also be repealed. All bodies covered by these provisions should be subject to the FOI Act. Section 45 and other exemption provisions afford them sufficient protection from competitive harm.

3.73 However, if it is desired, as a matter of policy, to equate the position of GOCs operating in a competitive commercial environment with that of private sector corporations, then s. 1 1A and Schedule 2 of the FOI Act should be repealed (and any necessary consequential amendments made to complementary legislation) and the GOCs should be named in separate paragraphs of s. 1 l(l), just as Suncorp Insurance and Finance is now dealt with in s. 11(1)(o). If exclusion of all of a GOCs activities is not considered necessary, then GOCs which operate in a competitive commercial market should be named in separate paragraphs of s1 1(1) according to the following verbal formula: "(name of GOC) in respect of documents in relation to its competitive commercial activities".

Government-owned corporations

3.30 At paragraphs 3 SO to 3.73 of my third Annual Report, I raised two concerns relating to the exclusion of Government-owned corporations (GOCs) from the FOI Act, under s. 11A of the FOI Act: firstly, whether the policy of excluding GOCs from the FOI Act was appropriate at all; and secondly, my concern that a major error of principle had occurred in the manner by which exclusions from the operation of the FOI Act weie effected.

3.31 In respect of the first issue, I referred to the considerations relied on to support this position espoused by the ALRC/ARC review in its interim position paper (Discussion Paper 59), which was that the Commonwealth FOI Act should apply to Commonwealth government business enterprises (GBEs). It is appropriate, therefore, that I note that there was a partial retreat from that position in the final ALRC/ARC Report. In essence, the final ALRC/ARC Report recommended that GBEs that are engaged predominantly in commercial activities in a competitive market should not be subject to the FOI Act, and that this should be effected by excluding them from the definition of bodies that are subject to the Commonwealth FOI Act. It is also recommended that other GBEs, not predominantly engaged in competitive commercial activities, should be subject to the Commonwealth FOI Act.

3.32 The Commonwealth Ombudsman (a member of the ARC) recorded her disagreement with this recommendation, and her view that all GBEs should be subject to the Commonwealth FOI Act. In her view, the question goes beyond a test of the operation of the marketplace (assuming it is competitive). Other considerations (related to Community Service obligations, the public interest, accountability for the exercise of statutory powers and management of public assets) require that the principles of transparency and accountability should apply to GBEs, though they should have the right to claim exemption for commercial and competitive documents under the provisions of the Commonwealth FO I Act .

3.33 My view remains in accord with that expressed by the Commonwealth Ombudsman. I consider that GOCs should be subject to the Queensland FOI Act, and that their commercial interests are adequately protected by the exemptions available to agencies which are subject to the Queensland FOI Act. I note in this regard that the principles discussed in paragraphs 3.10 and 3.11 above are

applicable in theory to any agency in the executive branch of government, notwithstanding that the executive may choose to conduct certain functions through the medium of a government-owned corporation.

3.34 My second concern is the inappropriate manner in which s. 11A of the FOI Act operates (as explained at paragraphs 3.56 to 3.64 of my third Annual Report) to give the GOCs covered by it a special position of privilege with respect to the operation of the FOI Act. In effect, s. 11A erects a class of documents to which the FOI Act does not apply, whether they are in the possession of a GOC, or, for example, a Minister exercising a supervisory function over the GOC, or even a law enforcement or regulatory body exercising law enforcement or regulatory functions which affect the GOC. In doing so, it gives GOCs which are subject to s. 11A a more privileged position with respect to the application of the FOI Act than all private sector business operators, and a more privileged position than those government-owned commercial bodies whose exclusion or part-exclusion from the FOI Act is dealt with in a different manner (and with more sensible consequences) under s. 1 l(l), or in regulations made under s. 1 1(l)(q), of the FOI Act.

3.35 A review application made during the reporting year illustrates the point. A freelance journalist applied to the Queensland Transmission and Supply Corporation (the QTSC) for access to documents relating to the "Eastlink" electric power supply project. The journalist was refused access to all documents by the QTSC on the basis that they were excluded from the application of the FOI Act by s. 11A, read in conjunction with s.256 of the *Electricity Act 1994*, because they were documents received or brought into existence in carrying out activities of the QTSC conducted on a commercial basis. The QTSC claimed entitlement to refuse access to documents on this basis, without regard to whether disclosure might assist in the discussion of a matter of considerable public interest and significance.

3.36 What is even more alarming, however, is that if the QTSC's characterisation of the requested documents was correct, then it is strongly arguable that, under the wording of s. 1 1A, the exclusion from the application of the FOI Act would extend even to copies in the possession of the responsible Minister, or of a government regulatory agency charged with administering laws (passed by Parliament for the benefit or protection of the public) which govern some aspect of the operations of the QTSC, e.g., fair trading laws, laws regulating pollution, laws regulating public health and safety.

3.37 A significant proportion of the activities of government involve the regulation of private sector business activity in the interest of the greater public good, with regulatory agencies necessarily acquiring information about the operations of many businesses. The avowed objects of the FOI Act of "enhancing government's accountability and keeping the community informed of government operations" (see s.5(1)(a) and s.5(1)(b) of the FOI Act) must also logically extend to facilitating an appropriate level of scrutiny of how well these functions of government are performed in the interests of the public. Information about the business operations of any private sector business, or indeed any government-owned commercial entity not covered by s. 1 1A of the FOI Act, which is in the possession of a Minister or an agency subject to the application of the FOI Act, is capable of being accessed under the FOI Act, subject to the protection of legitimate commercial interests afforded by the exemptions in the FOI Act.

3.38 Section 11 A of the FOI Act, however, manages to accord privileged treatment to the GOCs covered by it (the antithesis of. the "level playing field" rationale for not subjecting publicly owned bodies which conduct commercial activities in a competitive market to public sector accountability mechanisms) at the same time as it imposes an unnecessarily wide restriction on the accountability (through access to information that would permit public scrutiny and debate on issues of public importance) of those GOCs, to their ultimate owners, the people of Queensland.

3.39 Irrespective of whether the views I have expressed in paragraph 3.33 above, or the more moderate position espoused in the final ALRC/ARC Report (see paragraph 3.3 1 above) are considered worthy of further attention by the Parliament, I respectfully suggest that legislative amendments are warranted to remove the anomalies caused by s. 1 IA of the FOI Act, and I refer to the suggestions which I made, in that regard, in paragraphs 3.64, 3.72, and 3.73 of my third Annual Report.

3.40 My concerns about the effect of s. 1 1A have been heightened by the *Transport Infrastructure (Rail) Regulation 1996,* which further widens the scope of the exclusion enjoyed by one GOC Queensland Rail. Section 199(1) of the *Transport Infrastructure Act 1994* provides that the FOI Act *"does not apply to a document received or brought into existence by a transport GOC in carrying out its excluded activities".* The term "excluded activities" means "commercial activities" and "community service obligations prescribed under a regulation". Section 5(1) of the *Transport Infrastructure (Rail) Regulation 1996* provides that any activity of Queensland Rail, other than an activity performed under its community service obligations, is an activity conducted on a commercial basis, i.e., a "commercial activity". This section (assuming it is a valid exercise of the power to make a regulation under the *Transport Infrastructure Act)* renders redundant any attempt to consider whether a particular activity of Queensland Rail is, or is not, in fact, conducted on a commercial basis. In essence, it removes from the scope of the FOI Act all documents received or brought into existence by Queensland Rail in carrying out any activities other than its "community service obligation" activities. If valid, it takes Queensland Rail even further outside the scope of the FOI Act, and provides it with still greater protection than that afforded to private sector competitors.

3.41 It is of concern that such important changes to the way in which the FOI Act operates should be made by way of regulation (and that such amendments can be initiated by Departments which are not charged with the administration of the FOI Act); rather than amendment to the FOI Act itself, which would draw the attention of rhe public to the significance of the change.

Continuing concerns with regard to exclusion of agencies from the FOI Act

3.14 I discussed my concerns about the exclusion of government owned corporations (GOCs) from the FOI Act at paragraphs 3.50 to 3.73 of my third annual report (1994/95) and at paragraphs 3.30 to 3.41 of my fourth annual report (1995/96). I indicated my view that s. 11A in all likelihood estends protection to GOCs beyond that enjoyed by any private sector competitor. While the situation relating to state GOCs remains of concern, the reporting period has seen the introduction of s.11B of the FOI Act, which applies in a similar vein to local government owned corporations (LGOCs). This amendment is even more disturbing, because it does not appear to require legislative approval for the creation of an LGOC, merely a series of local authority resolutions. It therefore appears possible for a local authority to protect many of its functions from accountability under the FOI Act without the input or overview of Parliament, again in such manner as to put the LGOC in a more protected position, with respect to the application of the FOI Act to documents concerning commercial activities, than any private sector competitor.

3.15 I also note that exceptions to the operation of FOI legislation are being included in other legislation without reference in the FOI Act. This is the case with s.423(2) of the *WorkCover Queensland Act 1996*, whereby documents of WorkCover Queensland relating to certain of its commercial activities are excluded from the application of the FOI Act. I have previously expressed concerns about the scope of such exclusions for GOC's and similar bodies, but to confer them without amendment to the FOI Act itself gives rise to additional concerns. It not only promotes confusion and uncertainty among citizens who ought to be able to rely on reference to the FOI Act and *Freedom of Information Regulation 1992* Qld (the FOI Regulation) to ascertain the precise scope of the legislative scheme, but it also fails to direct the attention of Parliament to the significance of granting such a privilege to a public authority, in the manner that seeking an amendment of the FOI Act or FOI Regulation would do.

Attachment C 4.

Extract from the Information Commissioner's Annual Report 1992/93

4.9 By another letter to the Minister for Justice and Attorney-General dated 19 February 1993, I requested that consideration be given to making two further amendments to Part 5 of the FOI Act. These requests have not been acted upon although the Minister did indicate to me bv letter that it may be possible to include one of the amendments in a proposed Justice (Miscellaneous Provisions) Bill being considered for introduction in August/September 1993. In mv letter to the Minister dated 19 February 1993, I raised concerns about two issues, the first of which was occurring with surprising frequency in applications for review lodged with the Information Commissioner, namely where an applicant complains of an agency's failure to provide access to documents in situations where:

(a) the documents are admitted by an agency to exist, or to have existed, but are claimed to now be lost, misplaced or destroyed; or

(b) the agency claims that some or all of the documents to which a person has requested access do not, and never did, exist.

4.10 In *Re Smith*, I determined that I have jurisdiction to inquire into a Department's refusal of access to documents in these circumstances, but I remain convinced that I should be given more adequate powers to deal with inquiries of this nature. To enable a proper and thorough investigation and review of both situations (a) and (b), I believe that the Information Commissioner should be conferred with powers equivalent to those conferred on the Parliamentary Commissioner by s.20 of the *Parliamentary Commissioner Act 1974*, i.e. the power to enter any premises occupied or used bv an agency subject to the FOI Act, and power to inspect those premises or anything for the time being therein. I consider that it would be a significant shortcoming in the FOI Act, capable of manipulation or &exploitation by an unprincipled agency official, if an agency could escape thorough scrutiny by claiming that documents to which access has been requested do not, and never did, exist.

4.11 *My* views in this regard have been strongly influenced by my colleague, the Victorian Ombudsman, who has advised that in his role under the Victorian FOI Act of investigating situations (a) and (b), his officers in the great majority of cases find it necessary to access an agency's premises and carry out physical inspections in

order to obtain a sufficient understanding of an agency's filing and document handling systems (and the weaknesses in those systems) so as to be able to be satisfied that a document does not exist or cannot, after a thorough and diligent search, be located. If my powers in respect of an unto-operative agency remain confined to examining witnesses under s.85 of the FOI Act away from the agency's premises and record system5 (without ever having the opportunity to gain the first hand understanding of an agency's records management system which would allow for meaningful questioning) and to ordering further searches for documents, I consider this would be a more cumbersome, more inefficient and less timely method of proceeding, than having my officers conduct investigations at the site of the problem. I can see no objection in principle to conferring such powers on the Information Commissioner as are already conferred on the Parliamentary Commissioner by s.20 of the *Parliamentary Commissioner Act* 1974: it is mereiy the case of a government "watchdog" agency beinggiven intrusive powers with respect to other government agencies for the purpose of ensuring that those other government agencies are not permitted to frustrate the rights conferred on citizens by the FOI Act.

Extract from the Information Commissioner's Annual Report 1993/94

Additional Powers for Sufficiency of Search cases

2.19 In paragraphs 4.9 - 4.15 of my first Annual Report, I called for two amendments to be made to the FOI Act concerning the Information Commissioner's powers and procedures under Part 5. The first one concerned the conferring of powers on the Information Commissioner equivalent to those conferred on the Parliamentary Commissioner by s.20 of the *Parliamentary Commissioner Act 1974* (i.e. the power to enter into any premises occupied or used by an agency subject to the FOI Act, and power to inspect those premises or anything for the time being therein) so as to strengthen the powers available to me to deal with "sufficiency of search" cases. I note that no action has been taken by the government in respect of this issue.

Extract from the Information Commissioner's Annual Report 1997/98

Need for powers of entry and search

In my first Annual Report (1992/93) at paragraph 4.9 - 4.11, I recommended that (in order to permit the more efficient and effective discharge of my functions in 'sufficiency of search' cases) the Information Commissioner be conferred with powers equivalent to those conferred on the Parliamentary Commissioner by s.20 of the *Parliamentary Commissioner Act 1974* Qld, i.e., the power to enter any premises occupied or used by an agency subject to the FOI Act, and power to inspect those premises or anything for the time being therein. I cautioned that it would constitute a significant shortcoming in the FOI Act, capable of manipulation or exploitation by an unprincipled agency official, if an agency could escape thorough scrutiny merely by maintaining a claim that documents, to which access has been requested, do not exist. I could see no objection in principle to a government 'watchdog' agency being given intrusive powers with respect to other government agencies for the purposes of ensuring that those other government agencies are not permitted to frustrate the rights conferred on citizens by the FOI Act. However, no action has been taken to

I dealt with a case during 1997/98 in which the applicant asserted that a local authority had not identified and dealt with all documents in its possession or control which fell within the terms of his FOI access application. I received two written assurances from officers of the local authority that it had in fact done so. Subsequently, in court proceedings involving the applicant and the local authority, the local authority tendered additional documents which clearly fell within the terms of the applicant's FOI access application. I am presently investigating whether officers of the Council deliberately breached the duties imposed by the FOI Act, with a view to assessing whether I should recommend disciplinary action in accordance with s.96 of the FOI Act. However, I consider that this case reinforces the need to confer powers of entry and search on the Information Commissioner, so that I can deal more efficiently and effectively with the substantial number of 'sufficiency of search' cases I receive each year, rather than relying on questioning of, and assurances received from, agency officials.

Attachment C 3.

Extract from the Information Commissioner's Annual Report 1993/94

Section 81 - Modified Onus in "Reverse FOI" cases

2.30 Section 5 1(2)(e) of the FOI Act provides that where an agency or Minister, after having consulted with a third party in the circumstances prescribed by s.5 1(1), decides (contrary to the views of the third party) that the matter in issue is not exempt matter, the agency or Minister must nevertheless refrain from giving access to the matter in issue until the third party has exhausted the rights of review available under the FOI Act. Section 7 1(l)(f) of the FOI Act makes it clear that a third party is entitled to apply for review by the Information Commissioner of decisions to disclose documents contrary to the views of the third party obtained under s.5 1 of the FOI Act. Applications of this kind are commonly referred to as "reverse FOI" applications. I have already referred, in paragraph 2. 16 above, to the fact that the "reverse FOI" procedures in the FOI Act are capable of abuse by a third party who wishes to assert that documents are exempt merely for the purpose of delaying, for as long as possible, access by the original applicant for access. Section 8 I of the FOI Act provides:

> *81. On a review by the Commissioner, the agency which or Minister who made the decision under review has the onus of establishing that the decision was justified or that the Commissioner should give a decision adverse to the*

2.31 I have referred to the potential for abuse of the "reverse FOI" procedures, but even where the applicant in a "reverse FOI" application has a legitimate case to argue, it is difficult to see any justification for imposing on an agency or Minister, which has decided in favour of giving access to documents under the FOI Act, an onus of establishing that documents in issue are not exempt. In my opinion, it is consistent with the object of the FOI Act (see s.4 of the FOI Act) that the party which asserts that documents in issue are exempt should bear the onus of establishing its case. This principle has been recognised in s.61(2) of the Commonwealth FOI Act (following amendments made in I99 1) and in s. 102(2) of the *Freedom of Information Act 1992* WA. I recommend that s.8 1 of the FOI Act be amended as follows:

> *81(1) Subject to subsection (2), on a review by the Commissioner, the agency which or Minister who made the decision under review has the onus of establishing that the decision was justified or that the Commissioner should give a decision adverse to the applicant.*
>
> *(2) On a review by the Commissioner of a decision of the kind identified in section 71(1)(f)(i) or section 71(1)(f)(ii), the applicant for review has the onus of establishing that the matter which the relevant agency or Minister has decided to disclose, is exempt matter.*

Attachment C 2.

Extract from the Information Commissioner's Annual Report 1993/94

Section 76(2)

2.27 During the course of the reporting period I have noted a further significant flaw in a provision in Part 5 of the FOI Act, which prevents, or makes unnecessarily difficult, the process of giving to a person who has been notified of a review, a meaningful opportunity to participate by being provided with copies of the documents in issue (assuming that such documents are not exempt *vis-à-vis* that person). The flaw is in s.76(2) of the FOI Act which has gone to unnecessarily extreme lengths to ensure the security of documents claimed to be exempt that are produced to the Information Commissioner in accordance with s.76(1). Section 76(2) of the FOI Act is in the following terms:

> *(2) The Commissioner must do all things necessary to ensure -*

(a) that a document or matter produced to the Commissioner under subsection (I) is not disclosed to a person other than a member of the staff oj 'the Commissioner in the course of performing duties as a member of the staff; and

(b) the return of the document or matter to the person who produced it at ***the*** *end* ***of*** *the review.*

2.28 Take the situation of a document provided, in confidence, bv person X to a government agency, which the agency claims (in response to an FOI access application by person Y) to be exempt under s.46 of the FOI Act. The Information Commissioner requires the agency to produce the document under s.76 of the FOI Act. It then becomes apparent that person X is a person whose interests may be adversely affected if it is decided that the document in issue is not exempt. Natural justice requires that person X be given an opportunity to be heard on the question of whether or not the document is exempt. If s.76(2) is interpreted literally, it not only prevents the Information Commissioner from forwarding a copy of the document in issue to person X, the person who originally supplied it to a government agency, it also prevents the Information Commissioner from even discussing the contents of the document with person X. The same difficulty would arise if applicant Y were seeking access to personal affairs information concerning person X which X had supplied to the government, or commercially valuable information about corporation XYZ which that corporation had supplied to a government agency. The literal application of s.76(2) would cause enormous practical problems for the conduct of a review under Part 5, in situations of this kind, and would run directly contrary to the aim of conducting a streamlined review process which eliminates unnecessary expense and delay. I consider that an amendment should be made by adding words to the effect of the following words, at the end of the present paragraph (a) in s.76(2) of the FOI Act:

...staff, or to a person to whom it is necessary to disclose the document or matter for the purposes of the conduct of a review under this Part; and

2.29 The vast majoritv of persons whom the Information Commissioner contacts because thev mav be affected by the disclosure of a document under review, are persons who cannot afford. or do not wish to seek, legal representation to present a case to the Information Commissioner. I would wish to have my staff try to assist these people to make their views known to me on the issues which arise for de termination. But if s.76(2) is applied literally, the discussion of the contents of a document in issue with such persons would be prohibited.

4.12 I have also requested an amendment to s.74 of the FOI Act to recast it in the following terms:

> *"74.* (I) *Before starting a review, the Conmissioner must inform the applicant and the agency or Minister concerned that the decision is to be reviewed.*
>
> *(2) The Commissioner rnay take such steps as are practicable to inform another person who the Commissioner considers could be affected by the decision the subject of the review, that the decision is to be reviewed. "*

4.13 I consider that it is logically preferable that notification of third parties who may be affected should be discretionary rather than mandatory. I have already had cases involving information communicated in confidence about an identifiable third party, where both the identity of the confider as well as the content of the information confided were claimed to be exempt under s.46 of the FOI Act. In those circumstances, one is left in a position of being obliged to inform the third partv of review proceedings that mav affect them, but being unable (because of s.76(2) and/or s.87(1) of the FOI 'Act) to give any information as to the nature of the material in dispute and how it may affect the third party, so that there is no practical possibility of meaningful participation by the third party in the review proceedings. In such circumstances, I consider it appropriate that I should have a discretion as to whether or not to inform the third party who may be affected.

4.14 There are further reasons for seeking this amendment to *s.74* which have been conveyed to the Minister, but as they are of an extremely sensitive nature and relate to a matter still before me for determination, I do not consider it appropriate to disclose them in this report.

4.15 My proposed subsection 74(2) (set out above) would confer the flexibility to avoid problems of the kind referred to above, while still allowing for the requirements of natural justice to dictate that a third party be notified of review proceedings and given the opportunity to participate when that is practical and necessary in the third party's own interests.

Section 74

2.20 The second amendment which I called for was an amendment to s.74 of the FOI Act. Section 74 was amended by the *Freedom **of** Information Amendment* Act 1993, but not in a manner which appropriately dealt with all of the practical difficulties which s.74 poses. The amendments made to s.74 did not repair the structural flaws inherent in it, but merely left it intact, renumbered as s.74(1), while adding a new s.74(2) to deal with particular problem cases that were causing concern to one agency. One of those problem cases was before me, and was resolved (by negotiation) during the reporting period. It involved an applicant for review who had been convicted of sexual offences against children and was seeking access to the statements provided by the children during the course of investigation. Pursuant to s.74 as originally enacted, I was probably obliged to attempt to inform those children that the application for review had been made, because they might have been affected by the decision the subject of the review. The documents in issue, however, were almost certain to

have been found exempt, if formal determination had been required, and there seemed to be no logical reason to contact the children, perhaps causing them fresh distress, unless and until it appeared that the documents in issue might be liable to disclosure under the FOI Act. The new s.74(2) of the FOI Act is intended to cover situations of a similar kind to that case. However, the amendment to s.74 which I suggested in my first Annual Report would have met not only that situation, but other, less dramatic, situations that nevertheless cause significant practical difficulties in the conduct of reviews under Part 5 of the FOI Act.

2.21 In my opinion, s.74 needs to be given further attention by the legislature. Section 74 is merely a notice provision. It purports to impose a mandatory obligation on the Information Commissioner to notify certain persons, before commencing a review, that a decision is to be reviewed. However, the only mandatory obligation for notification of persons which it is necessary, appropriate, and practicable to require, before starting a review, is an obligation to notify the applicant for review and the agency or Minister responsible for the decision of which review is sought. All that the scheme of Division 4 of Part 5 of the FOI Act requires of an applicant to initiate a Part 5 review, is that the applicant lodge an application for review in writing giving particulars of the decision for review. In practice, I request the applicant to provide a copy of the letter notifying the decision (and the reasons for decision) of which review is sought, so as to be satisfied that I have jurisdiction to review. I then issue letters to the decision-maker and applicant, in accordance with s.74, notifying them that the decision is to be reviewed, and also requesting, in the letter to the decision-maker, the supply of all relevant documents. It is only when the relevant documents are obtained and inspected that an assessment can be made of what other persons could be affected by the decision subject to review. Thus, it is pointless to maintain in a legislative provision the fiction that the Information Commissioner is in a position to even consider (let alone to take any practicable steps towards) giving notice to persons other than the applicant and the relevant decision-maker, before starting a review. The present s.74(1), should therefore be amended in the manner suggested in paragraph 4.12 of my first Annual Report, that is:

> *74(1) Before starting a review, the Commissioner must inform the applicant and the agency or Minister concerned that the decision is to be reviewed.*

2.22 As to notifying other persons who may be affected by the decision the subject of review, it seems to me that there are two sensible approaches. The first is that suggested in my recommended s.74(2) as set out in paragraph 4.12 of my first Annual Report, where I suggested that a separate subsection 74(2) should provide as follows:

> *(2) The Commissioner may take such steps as are practicable to inform another person who the Commissioner considers could be affected by the decision the subject of the review, that the decision is to be reviewed.*

2.23 In terms, this makes the giving of notice discretionary rather than mandatory, but the exercise of the discretion would, as a matter of law, be governed by the common law rules of natural justice/procedural fairness. Since the legal requirements of procedural fairness will apply in any event, the other acceptable approach would be to make no specific provision at all for notice to parties other than the applicant and respondent. It is appropriate that both applicant and respondent be notified that the Information Commissioner is satisfied as to jurisdiction, and intends to conduct a review under Part 5. The notification of other parties who may be affected by the decision under review requires no express provision at all in Part 5 of the FOI Act. It can be left to the application of the legal requirements of' procedural fairness to dictate what notice, and what opportunity to be heard, must be given to a party whose interests may be adversely affected by the disclosure under the FOI Act of information which is in issue in a review under Part 5. If this proposal is accepted, it

would require that s.74(1) in its present form be amended in the manner suggested in paragraph 2.2 above, and the present s.74(2), s.83(5) and s.89(4) be repealed.

2.24 All that the agency which sought the 1993 amendments (referred to in paragraph 2.20) was concerned about was, in essence, a mandatory requirement for notice to be given to certain persons, in situations where common sense would dictate that it was preferable that notice not be given, unless and until it was strictly necessary to do so in order to enable those persons to have the opportunity to participate in a review under Part 5 when their interests might be adversely affected. What I am particularly concerned to avoid is to have s.74 perpetuate an onerous and unnecessary? mandatory notice obligation which in many cases will impose unnecessary expense, inconvenience, and delay for participants, and anxiety (of a kind which may not amount to undue distress, or adversely affect a person's physical or mental well-being, which are the only circumstances to which the present s.74(2) is directed) for a range of persons who in many instances need not be troubled at all.

2.25 I note that s.5 1 of the FOI Act does not oblige a person who may be affected by the release of certain information to be consulted where the de&ion-maker does not propose to release the information (i.e. where the decision-maker is satisfied that the information is clearly exempt matter under Part 3 Division 2 of the FOI Act). Why then should s.74 require the Information Commissioner automatically to notify any person who may be affected by the decision under review (thereby causing that person anxiety or at the very least causing them to assess whether they should expend time and perhaps money in seeking to participate in a review by the Information Commissioner), when investigation and review by the Information Commissioner, obtaining evidence and submissions in an informal manner from the applicant and the respondent decision-maker, may result in the Information Commissioner negotiating an informal resolution of the case, or becoming satisfied that the material in issue is clearly exempt, so that there is no necessity to trouble the person(s) who would be affected if the material were to be released. The basic principle of natural justice is that an opportunity to be heard is to be given to a person when it is proposed to make a decision adverse to that person's interests.

2.26 Allowing the Information Commissioner the discretion to notify a person who may be affected by the disclosure of information only when it is apparent that there is a real prospect that the information may be found not to be exempt (i.e. only when natural justice requires that that person be given the opportunity to be heard) would assist in eliminating or reducing unnecessary delay, expense and inconvenience for participants in a Part 5 review. This is consistent with the objects that Parliament was seeking to achieve in enacting the Information Commissioner model of review (in this regard, see chapter 2 and paragraphs 4.23 - 4.38 of my first Annual Report, 1992193).

Attachment B(vii) 1.

Ontario

FRIVOLOUS OR VEXATIOUS REQUESTS

Several provisions of the Act and Regulation are relevant to the issue of whether the request is frivolous or vexatious. The provisions of the Act relating to "frivolous or vexatious" requests were added by the Savings and Restructuring Act. 1996. Regulation 460 (the Regulation), made under the Act, was amended shortly thereafter to add the provision reproduced below.

Section 10(l)(b) of the Act specifies that every person has a right of access to a record or part of a record in the custody or under the control of an institution unless the head of an institution is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Sections 27.1(l)(a) and (b) of the Act indicate that a head who refuses to provide access to a record because the request is frivolous or vexatious must state this position in his or her decision letter and provide reasons to support the opinion.

Sections 5.1(a) and (b) of the Regulation provide some guidelines for defining the terms frivolous and vexatious. They prescribe that a head shall conclude that a request for a record or personal information is frivolous or vexatious if

> (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
>
> (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

British Columbia

Section 43 of *Freedom of Information and Protection of Privacy Act,* R. S.B.C. 1996, c. *165*

> If the head of a public body asks, the commissioner may authorize the public body to disregard requests under Section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body.

Alberta

Bill *37:* Freedom of Information and Protection of Privacy Amendment Act, 1999 (Friedel)

Amends SA 1994 cF-10.5 - the ***Freedom of Information and Protection of Privacy Act***

Power to authorize a public body to disregard requests

53 If the head of a public body asks, the Commissioner may authorize the public body to disregard one or more requests under section 7(*1)* or 35(**1)** if

(a) because of their repetitious or systematic nature, the requests would unreasonably
interfere with theoperations of the public body or amount to an abuse of the right to
make those requests, or

(b) one or more of the requests are frivolous or vexatious.

South African Open Democracy Bill

(v) the results of, or report on, any test or other investigation regarding a public safety or environmental risk.

(5) If a request for access to a record contemplated in subsection (4)(b)(v) is granted, the information officer must at the same time as access to the record is given, direct the requester to the source of the original test or other investigation to enable the requester to obtain an explanation of the methods used in conducting the test or other investigation.

Frivolous or vexatious requests

40. The information officer of a governmental body may refuse a request for access to a record of the body if the request is manifestly frivolous or vexatious.

Records that cannot be found or do not exist

41. (1) The information officer of a governmental body may refuse a request for access to a record of the body if-

(a) a thorough search to find the record has been conducted, but it cannot be found; or

(b) there are reasonable grounds for believing that the record does not exist.

(2) If an information officer refuses a request for access to a record in terms of subsection (1), he or she must, in the notice referred to in section 19(l)(b), give a full account of all steps taken to find the record or to determine whether the record exists, as the case may be, including all communications with every person who conducted the search on behalf of the information officer.

Published records and records to be published

42. (1) Subject to this section, the information officer of a governmental body may refuse a request for access to a record of the body if-

(a) the record is to be published within 60 days after the receipt or transfer of the request or such further period as is reasonably necessary for printing and translating the record for the purpose of publishing it;

(b) the record can be copied at a library to which the public has access at a fee no greater than would be charged for access in terms of this Act;

(c) the record is available for purchase by the public in accordance with arrangements made by or on behalf of a governmental body at a fee no greater than would be charged for access in terms of this Act;

(d) the publication of the record is required by law, within 90 days after the receipt or transfer of the request; or

(e) the record has been prepared for submission to Parliament unless a period of 90 days after such preparation has expired and the record has not been so submitted.

(2) The information officer concerned must, in the notice referred to in section 19(l)(b), in the case of a refusal of a request for access in terms of—

(a) subsection (l)(a) or *(d)*, state the date on which the record concerned is to be published;

(b) subsection (l)(b) and if such information is ordinarily available to the governmental body concerned, identify the title and publisher of the record and the library concerned nearest to the requester concerned;

(c) subsection (l)(c) and if such information is ordinarily available to the governmental body concerned, identify the title and publisher of the record and state where it can be purchased; or

(d) subsection (l)(e), state the date on which the record is to be submitted to Parliament.

(3) If an information officer is considering to refuse a request for access to a record in terms of subsection (l)(a), *(d)* or (e), he or she must notify the requester concerned-

(a) of such consideration:, and

Office of the Information and Privacy Commissioner [British Columbia, Canada]

Decisions Under S. 43 of the Act
(Repetitious or Systematic Requests)

This section contains the text of Section 43 decision letters regarding requests by public bodies to disregard requests for records that are "repetitious or systematic" in nature, and which "would unreasonably interfere with the operation of the public body." The text of each decision, as reproduced below, is identical to the original, except for personal identifiers, which have been removed to protect the privacy of individuals.

1. March31, 1994
2. May 27, 1996
3. August 23, 1996
4. August 30, 1996
5. October 3 1, 1996 (*This section 43 authorisation was the subject of a judicial review)
6. March 7, 1997
7. April 11, 1997
8. August 18, 1997
9. October 16, 1997
10. October 22, 1997
11. December 19, 1997
12. January 29, 1998 (*As a result of a judicial review, a reconsideration of this decision is attached.)

5

March 31, 1994

Ms. Cynthia Bowen
Manager, Communications
British Columbia Lottery Corporation
10760 Shellbridge Way,
Richmond, BC.
V6X 3H1

Dear Ms. Bowen,

RE: SECTION 43 APPLICATION

I have had the opportunity of reviewing your request under section 43 to disregard the section 5 requests made by [the respondent], on the grounds that, because of their repetitious or systematic nature, they would unreasonably interfere with the operations of the public body, in this case the British Columbia Lottery Corporation (BCLC).

As the purpose of the Freedom of Information and Protection of Privacy Act is to make government bodies more accountable to the public by giving the public a right of access to records, authorization to disregard must be given sparingly and only in obviously meritorious cases. Granting section 43 requests must be the exception to the rule, and not a routine option for public bodies to avoid their obligations under the legislation.

With respect to your application, however, I am satisfied that [the respondentl's requests are repetitious and systematic, and unreasonably interfere with the operations of the public body.

I am basing my decision on the following factors:

1. [The respondentl's 1,600 requests for records in a four month period constitute a repetitious request.

2. These requests are part of a systematic attempt by [the respondent] to cause problems for BCLC, as evidenced by [the respondentl's own statements.

3. The history of the relationship between [the respondent] and BCLC supports the argument that [the respondentl's requests are of a systematic nature.

4. The BCLC has spent over 200 hours responding to [the respondentl's requests, and estimates a further 7,000 hours will be needed to respond to the remaining requests.

5. The cost of responding to the remaining requests would likely exceed $200,000 and would unreasonably interfere with the operation of BCLC.

6. That every response given to [the respondent] by BCLC has a multiplying effect in that the responses generate volumes of new requests for records from [the respondent] on the same or related subjects.

7. It is unlikely that [the respondentl's concerns about BCLC, real or imagined, will ever be addressed through the disclosure of the records requested.

8. Of the 21 letters from [the respondent] requesting information, BCLC had responded in good faith to the first 13 before making application under section 43.

6

I do not believe that [the respondent] should have [his/her] access rights under the Act denied permanently. This would be an obvious breach of natural justice and an unreasonable curtailment of [the respondent]'s information rights.

Therefore, I am granting authorization to BCLC to disregard [the respondent]'s outstanding requests and to disregard any other request [the respondent] may make until September 3 1, 1994. Thereafter until March 3 1, 1995, [the respondent] will be restricted to requesting five records at any given time, and shall not request a further five records until such time as BCLC has responded to the outstanding requests. Of course, BCLC will be expected to respond to those requests within the 30 day time period, subject to the extensions as permitted in the Act.

Yours Truly,

David H. Flaherty, Commissioner

c.c. [the respondent]

May 27, 1996

Karen McDonald
Freedom of Information Administrator
BC Hydro
3 3 3 Dunsmuir Street
Vancouver, British Columbia V6B 5R3

Dear Ms. McDonald:

Re: Section 43 Application

I have had the opportunity of reviewing your request under section 43 for authorization to disregard the section 5 requests made by [the respondent]. Section 43 gives me the power to authorize a public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body.

As the purpose of the Freedom of Information and Protection of Privacy Act is to make government bodies more accountable to the public by giving the public a right of access to records, authorization to disregard must be given sparingly and only in obviously meritorious cases. Granting section 43 requests must be the exception to the rule, and not a routine option for public bodies to avoid their obligations under the legislation.

I have carefully considered your submission as well as material provided to this Office by [the respondent]. I am satisfied that [the respondent]'s requests are repetitious and systematic and that responding to those requests unreasonably interfere with the operations of BC Hydro. Therefore, I am granting authorization to BC Hydro to disregard the following requests made by [the respondent]:

- All requests for records in any way relevant to the work [the respondent] performed for BC Hydro in 1993 and [the respondent]'s subsequent small claims action, retroactive to April 24, 1996;

- All requests for records regarding [a company], retroactive to April 24, 1996;

- All requests of any kind until May 27, 1997. I rejected BC Hydro's request for a three-year period, because I consider one year reasonable in the present circumstances.

Sincerely yours,

David H. Flaherty
Commissioner

August 23, 1996

In the Case of an Application for Authorization to Disregard Requests from [a Respondent] under Section 43 of the Freedom of Information and Protection of Privacy Act (the Act) by Joan Hesketh, Assistant Deputy Minister, Ministry of Employment and Investment

I have had the opportunity of reviewing the application under section 43 of the Freedom of Information and Protection of Privacy Act (the Act) for authorization to disregard section 5 requests made by [the respondent].

Section 43 gives me the power to authorize a public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body, in this case the Ministry of Employment and Investment (the Ministry).

Since the purpose of the Act is to make government bodies more accountable to the public by giving the public a right of access to records, authorization to disregard must be given sparingly and only in obviously meritorious cases. Granting section 43 requests should be the exception to the rule and not a routine option for public bodies to avoid their obligations under the legislation.

Based on a detailed review of the submissions and the response of [the respondent], the following factors have led me to decide that [the respondentl's access requests are repetitious, systematic, and unreasonably interfere with the operations of the Ministry:

1. The Reasons for Decision and Determination of the Chief Gold Commissioner in the dispute between [third parties] and [the respondent], dated November 25, 1994.

2. The Supreme Court of British Columbia's dismissal of [the respondentl's petition to judicially review the order of the Chief Gold Commissioner, [date].

3. The evidence that [the respondent] is trying to use the Act to prove that the determination made against [the respondent] by the Chief Gold Commissioner was wrong and that the Chief Gold Commissioner, along with other Ministry staff, were biased and acted improperly and criminally.

4. [The respondent] has made 43 percent of the total number of requests for records to the Ministry over the last 2.5 years for a total of 145 up to July 25, 1996. This includes 40 requests between June 13, 1996 and July 25, 1996.

5. The Ministry conservatively estimates that it has spent 500 hours responding to [the respondent]'s requests and that to answer [the respondentl's outstanding requests would require an additional 120 hours.

6. The evidence that [the respondent] is habitually, persistently, and in bad faith making excessive and irrational requests and demands on the Ministry.

7. The evidence that responding to [the respondentl's requests has dramatically limited the time that the Ministry's staff can devote to requests from other applicants.

8. The evidence that [the respondent] is not using the Act for the purpose for which it was intended and that any further continuations of these actions could place the Act in great disrepute.

9. The evidence that the Ministry has exercised considerable restraint and has made every effort to assist [the respondent] and to respond without delay to [the respondent] openly, accurately, and completely.

10. Finally, I reject the submission of [the respondent] that my Office is biased against [the respondent] in any way or in some kind of conflict of interest.

Therefore, I authorize the Ministry to disregard the following:

1. All outstanding requests for records by [the respondent].

2. All future requests for records which relate to mineral claims of [the respondent], the dispute with [third parties], and the allegations of wrongdoing by the Ministry.

3. All requests for any kind for a period of one year by [the respondent].

The above apply to requests for records made by [the respondent], [four named parties associated with the respondent], or any other request in which [the respondent] is the "directing mind."

August 23, 1996

David H. Flaherty Commissioner

August 30, 1996

In the Case of an Application for Authorization to Disregard Requests from [a Respondent] under Section 43 of the Freedom of Information and Protection of Privacy Act (the Act) by the Vancouver School Board (VSB)

I have had the opportunity of reviewing the application of the Vancouver School Board under section 43 of the Freedom of Information and Protection of Privacy Act (the Act) for authorization to disregard section 5 requests made by [the respondent].

Section 43 gives me the power to authorize a public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body, in this case the Vancouver School Board.

Since the purpose of the Act is to make government bodies more accountable to the public by giving the public a right of access to records, authorization to disregard must be given sparingly and only in obviously meritorious cases. Granting section 43 requests should be the exception to the rule and not a routine option for public bodies to avoid their obligations under the legislation.

Based on a review of the submissions of the Vancouver School Board, its documentation of each access request made by [the respondent], and [the respondentl's extensive response to the Vancouver School Board's submissions, the following factors have led me to decide that [the respondentl's access requests are repetitious, systematic, and unreasonably interfere with the operations of the School Board:

1. The Vancouver School Board spent well over 100 hours responding to [the respondent]% 21 requests in 1995, plus hours spent on mediation, and over 90 hours of staff time in participating in Order No. 110-1996, June 5-1996.

2. [The respondentl's access requests comprised over 60 percent (21 of 34) of the formal requests to the Vancouver School Board in 1995 and 75 percent (9 of 12) of the requests received so far in 1996. The Vancouver School Board has already responded to 6 of the latter. Overall, [the respondent] has made 65 percent (30 out of 46) of the access requests to the Vancouver School Board in 1995-96. [The respondent] submitted another request on July 24, 1996.

3. My conclusion based on the evidence submitted by the Vancouver School Board and [the respondent] is that [the respondent] is not using the Act for the purposes for which it was intended and that [the respondent] is not, indeed, acting in good faith. (See Order No. 110-1996, June 5-1996, pp. 5-6)

4. My conclusion based on the evidence submitted by the Vancouver School Board and [the respondent] is that [the respondent] is using the Act as a weapon against the Vancouver School Board after an episode in the workplace that has left [the respondent] unhappy and preparing to arbitrate a claim of unjust dismissal.

5. The evidence submitted by the Vancouver School Board is that the systematic and repetitious nature of [the respondentl's requests to the Vancouver School Board and of [the respondentl's appeals at its responses is unreasonably interfering with the operations of the Vancouver School Board.

6. My conclusion based on the evidence submitted by the Vancouver School Board is that [the respondent] is habitually, persistently, and in bad faith making excessive and irrational requests and demands on the Vancouver School Board. For purposes of this conclusion, I have adopted the tests of reasonableness and abuse of process set out by Ontario Information and Privacy Commissioner, Tom Wright, in Order M-618, October 18-1995, involving the London Police Services Board.

7. The evidence submitted by the Vancouver School Board that responding to [the respondent]'s requests has dramatically limited the time that the Vancouver School Board's staff can devote to requests from other applicants under the Act.

8. My conclusion based on. the evidence submitted by the Vancouver School Board and [the respondent] is that [the respondent] is not using the Act for the purpose for which it was intended and that any further continuation of these actions could place the Act in disrepute. The Act must not become a weapon for disgruntled individuals to use against a public body for reasons that have nothing to do with the Act.

9. The evidence submitted by the Vancouver School Board is that it has exercised considerable restraint and has made every effort to assist [the respondent] and to respond without delay to [the respondent] openly, accurately, and completely.

10. Finally, I reject the submission of [the respondent] that my Office has treated [the respondent] unfairly. On the basis of the materials submitted by [the respondent], I have concluded that my staff has acted appropriately and fairly in its administration of the application.

Therefore, I authorize the Vancouver School Board to disregard the following:

1. All outstanding requests for records by [the respondent].

2. All future requests for records which relate to the Carnegie Community Centre and the Carnegie Adult Learning Centre.

3. All requests of any kind by [the respondent] for a period of one year.

August 30, 1996

David H. Flaherty
Commissioner

October 31, 1996

In the Case of an Application for Authorization to Disregard Requests from [two Respondents] under Section 43 of the Freedom of Information and Protection of Privacy Act (the Act) by B.C. Transit Corporation

I have had the opportunity of reviewing this application under section 43 of the Freedom of Information and Protection of Privacy Act (the Act) for authorization to disregard section 5 requests made by [two respondents], who are both employees of B.C. Transit Corporation.

Section 43 gives me the power to authorize a public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body, in this case the B.C. Transit Corporation.

Since the purpose of the Act is to make government bodies more accountable to the public by giving the public a right of access to records, authorization to disregard requests must be given sparingly and only in obviously meritorious cases. Granting section 43 requests should be the exception to the rule and not a routine option for public bodies to avoid their obligations under the legislation.

Based on a detailed review of the submissions of B.C. Transit and the reply submission of [the two respondents], the following factors have led me to decide that [the two respondents]'s access requests are repetitious, systematic, and unreasonably interfere with the operations of B.C. Transit in relation to both its Information and Privacy Office and its Customer Service operations:

1. B.C. Transit received 227 formal access requests under the Act between October 4, 1993 and June 13, 1996. [The two respondents] have been responsible for over one quarter of this total (58 requests). Seventeen of these requests were received during the sixty day period before June 13, 1996, when the head of B.C. Transit formally applied for a section. 43 ruling. [The two respondents] accounted for 63 percent of all access requests to B.C. Transit during this sixty-day period.

2. The evidence submitted by B.C. Transit that [the two respondents] act in concert with respect to their access requests.

3. The evidence submitted by B.C. Transit that its Director of Information and Privacy is the only full-time employee dedicated to access and privacy activities, including promoting openness, applying fair information practices, and actively participating in ongoing policy development related to access and privacy matters.

4. The evidence submitted by B.C. Transit that the requests made by [the two respondents] have had a significant negative impact on the operations of its Information and Privacy Office and significantly and unreasonably interfered with its Director’s discharge of his access and privacy duties under the Act.

5. The evidence submitted by B.C. Transit that the requests made by [the two respondents] have had a significant negative impact on the operations of its Customer Service Department, which is responsible for running buses and other transit operations, the core of B.C. Transit’s public mandate.

6. The submission of B.C. Transit that the requests made by [the two respondents] have the effect of using the Act as a weapon of information warfare, which has the consequence of undermining its legitimacy amongst the managers and other employees whose cooperation is required in order for its access and privacy regime to work properly.

7. The submission of B.C. Transit that the intention of the powers conferred upon the Commissioner under section 43 of the Act is remedial: “they are intended to allow the Commissioner considerable discretion in ensuring the access rights granted by the Act are not abused to the detriment of other

13

access requesters or in a way that unreasonably interferes with the public interest in efficient public body administration."

Therefore, I authorize B.C. Transit to disregard all requests for access from either [of the two respondents] for a period of one year from and after June 13, 1996. After the year has elapsed, B.C. Transit is required to deal with only one request at any given time from, or on behalf of, each of the aforementioned persons for the period ending June 13, 1998.

October 31, 1996
David H. Flaherty
Commissioner

14

Date: 19971202

Docket: A970544
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE JUDICIAL REVIEW PROCEDURE ACT,
R.S.B.C. 1979, c. 209

BETWEEN:

MICHAEL E. CROCKER and
ROBERT W. FREEMAN

PETITIONERS

AND:

THE INFORMATION AND PRIVACY COMMISSIONER
OF BRITISH COLUMBIA

RESPONDENT

AND:

BC TRANSIT

RESPONDENT

REASONS FOR JUDGMENT

OF THE HONOURABLE MR. JUSTICE COULTAS

(IN CHAMBERS)

Counsel for the Petitioners: Leo McGrady and
Jasbir Parmar

Counsel for the Respondent: Susan E. Ross
The Information and Privacy Commissioner

Counsel for the Respondent: David Loukidelis
B.C. Transit

Counsel for the Attorney General
of British Columbia (Intervener) Jeffrey M. Loenen

Place and Date of Hearing: Vancouver, B.C.
May 5, 6, and 16, 1997

Written Submissions Received: August 13, 1997
September 23, 1997
October 3 and 6, 1997

15

[1] This is a judicial review of an Authorization of October 3 1, 1996 issued by the Information and Privacy Commissioner of British Columbia (the "Commissioner") to the Respondent, B.C. Transit, under s. 43 of the Freedom of Information and Protection of Privacy Act R.S.B.C. 1996, c. 165 ("the Act") with respect to the Petitioners Crocker and Freeman.

[2] The Authorization reads:

> *I authorize B.C. Transit to disregard all requests for access from either Robert W. Freeman and/or Michael E. Crocker for a period of one year from and after June* 13, 1996. *After the year has elapsed, B.C. Transit is required to deal with only one request* ***at*** *any given time from, or on behalf of each of the aforementioned persons for the period ending June 13, 1998.*

[3] "Access" referred to access to information pursuant to Part 2 of the Act.

[4] Section 43 of the Act reads:

> *Power to authorize* ***a*** *public body to disregard requests*
>
> *If the head of* ***a*** *public body asks, the commissioner may authorize the public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body.*

[5] B.C. Transit is an agent of the Crown in right of the Province and is a public body as defined by the Act.

[6] This is the first s. *43* authorization of the Commissioner to come before the court for judicial review.

THE PETITIONERS

[7] Michael Crocker and Robert Freeman are employed as transit operators by B.C. Transit. They are members of the Independent Canadian Transit Union ("ICTU"), the certified bargaining agent for employees of B.C. Transit. Both Petitioners are active members of the Union and have held the position of job stewards for many years.

[8] In their role as job stewards, the Petitioners have made requests to B.C. Transit to obtain information relating to public safety and job concerns of their own and of other employees. They say the information sought has been used to fulfill their responsibility as job stewards in the pursuit of collective agreement grievances and in the publishing of articles in Progress, the Union newspaper.

BACKGROUND

[9] On June 13, 1996, B.C. Transit made an application pursuant to s. 43 of the Act seeking the following relief:

> *(a) B. C. Transit be authorized to disregard for a period of 18 months any further requests received after this date from either of the Petitioners; and*
>
> *(b) that after the eighteen month period has elapsed, B.C. Transit be required to deal with only one request at any given time from each of them.*

[10] In August 1996, the Commissioner called for submissions. Evidence by way of affidavit and written submissions were filed. The Petitioners took the position that they exercised their rights for information in compliance with the Act and for the purposes of and in the spirit of the Act. On October 31, *1996,* the Commissioner handed down his decision and gave the authorization. He did not accede to B.C. Transit's request that the prohibitions be for eighteen month periods; he did so for periods of twelve months, one to follow the other.

THE COMMISSIONER'S DECISION

[11] In his October 31, 1996 decision leading to the authorization, the Commissioner said, in part:

> *Section* 43 *gives me the power to authorize a public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body, in this case the B.C. Transit Corporation.*
>
> *Since the purpose of the Act is to make government bodies more accountable to the public by giving the public a right of access to records, authorization to disregard requests must be given sparingly and only in obviously meritorious cases. Granting section 43 requests should be the exception to the rule and not a routine option for public bodies to avoid their obligations under the legislation.*
>
> *Based on a detailed review of the submissions of B.C. Transit and the reply submission of Robert W. Freeman and Michael E. Crocker, the following factors have led me to decide that Messrs. Freeman and Crocker's access requests are repetitious, systematic, and unreasonably interfere with the operations of B. C. Transit in relation to both its Information and Privacy Office and its Customer Service Operations:*
>
> *1. B. C. Transit received 227 formal access requests under the Act between October 4, 1993 and June 13, 1996. Messrs. Freeman and Crocker have been responsible for over one quarter of this total (58 requests). Seventeen of these requests were received during the sixty day period before June 13, 1996, when the head of B. C. Transit formally applied for a section 43 ruling. Messrs. Freeman and Crocker accounted for 63 percent of all access requests to B.C. Transit during this sixty-day period.*
>
> *2. The evidence submitted by B.C. Transit that Messrs. Freeman and Crocker act in concert with respect to their access requests.*
>
> *3. The evidence submitted by B.C. Transit that its Director of Information and Privacy is the only full- time employee dedicated to access and privacy activities, including promoting openness, applying fair information practices, and actively participating in ongoing policy development related to access and privacy matters.*
>
> *4. The evidence submitted by B.C. Transit that the requests made by Messrs. Freeman and Crocker have had a significant negative impact on the operations of its Information and Privacy Office and significantly and unreasonably interfered with its Director's discharge of his access* ***and*** *privacy duties under the Act.*
>
> *5. The evidence submitted by B.C. Transit that the requests made by Messrs. Freeman and Crocker have had a significant negative impact on the operations of its Customer Service Department, which is responsible for running buses and other transit operations, the core of BC Transit's public mandate.*

17

6. The submission of B.C. Transit that the requests made by Messrs. Freeman and Crocker have the effect of using the Act as a weapon of information warfare, which has the consequence of undermining its legitimacy amongst the managers and other employees whose cooperation is required in order for its access and privacy regime to work properly. .

7. The submission of B.C. Transit that the intention of the powers conferred upon the Commissioner under section 43 of the Act is remedial: "they are intended to allow the Commissioner considerable discretion in ensuring the access rights granted by the Act are not abused to the detriment of other access requesters or in a way that unreasonably interferes with the public interest in efficient public body administration. "

and consequently, gave his authorization.

THE RELIEF SOUGHT BY THE PETITIONERS

[12] The Petitioners seek the following orders in the nature of declarations:

(a) that the Commissioner acted without jurisdiction and/or exceeded his jurisdiction in giving the authorization;

(b) that he acted without jurisdiction and/or exceeded his jurisdiction when reaching his patently unreasonable conclusions that the Petitioners' requests were repetitious and systematic and they would unreasonably interfere with the operation of B.C. Transit;

(c) an order in the nature of certiorari quashing the Commissioner's authorization to B.C. Transit.

In their Petition, the applicants seek a declaration that the process by which the Commissioner's decision arose did not comply with the principles of natural justice. This submission was not advanced at the Hearing and I have not considered it.

THE ISSUES

I. The standard of review of the Commissioner's interpretation of s. 43 - "repetitious, systematic and unreasonable interference"; his application of that interpretation to the facts; and his exercise of discretion in fashioning the prospective remedial authorization.

II Was the authorization "reasonable"? Was it made in the absence of evidence? Was it made taking into account irrelevant considerations?

III. Does s. 43 authorize the Commissioner to make a prospective remedial authorization?

IV. Should the remedy stand having regard to the appropriate standard of review?

THE ACT AND THE COMMISSIONER

[13] The Act was enacted by the Province in October 1993 for the purpose of making public bodies more accountable to the public and protecting personal privacy. Its purposes are contained in s. 2(1) of the Act:

Purposes of this Act

2.(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

(a) giving the public a right of access to records,

(b) giving individuals a right of access to, and a right to request correction of personal information about themselves,

(c) specifying limited exceptions to the right of access,

(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

(e) providing for an independent review of decisions made under this Act.

(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

[14] "Record", "personal information" and "public body" are defined in Schedule 1 of the Act.

[15] Section 4 of the Act refers to information rights and reads, in part:

Information rights

4.(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant...

[16] The Act does not contain a privative clause but it does not provide a right of appeal which would allow an appellate tribunal to substitute its opinion for that of the Commissioner.

[17] The Commissioner is appointed by Order-In-Council upon the unanimous recommendation of a Special Committee of the Legislative Assembly. He is an officer of the Legislature.

[18] The present Commissioner is the first to be appointed under the legislation. At the time he made the authorization complained of, he had held the position for three years.

[19] In Order #11, 1994, British Columbia (Ministry of Health) given June 16, 1994, the Commissioner spoke of his approach when interpreting the Act:

> *I wish to adopt an approach to interpreting the Act that encourages citizens to use it. The spirit and the underlying purposes of the Act may be thwarted by a narrow interpretation. Information rights must be accessible to all citizens in this Province. As Commissioner, I must ensure that the door to the Act is held open and not closed prematurely on technical grounds.*
>
> *I find support for this approach through a review of the legislative history of the Act. The government intended this legislation to be open to citizens and that it not be thwarted by public bodies administering the Act.*

THE COMMISSIONER'S EXPERTISE

[20] This court has commented on the expertise of the Commissioner. In Fletcher Challenge v. British Columbia (Information and Privacy Commissioner) (1996), 20 B.C.L.R. (3d) 280 (S.C.) Lowry J. at page 287, cited with approval a decision of the Divisional Court of Ontario (General Division) John Doe v. Ontario (Information and Privacy Commissioner) (1993), 106 D.L.R. (4th) 140 in which Campbell and Dunnet JJ. said at pages 155 and 156:

> *To the extent that information has become a commodity, the management of information by the Commissioner is similar to the management of other commodities by other specialized tribunals which have attracted curial deference by reason of the specialized nature of their work.*
>
> *Accordingly, the Commissioner is required to develop and apply expertise in the management of many kinds of government information, thereby acquiring a unique range of expertise not shared by the courts. The wide range of the Commissioner's mandate is beyond areas typically associated with the court's expertise. To paraphrase the language used by Dickson J., as he then was, in C.U.P.E., Local 963 v. New Brunswick Liquor Corp., supra, at pp. 423-4, the commission is a specialized agency which administer a comprehensive statute regulating the release and retention of government information. In the administration of that regime; the Commissioner is called upon not only to find facts and decide questions of law, but also to exercise an understanding of the body of specialized expertise that is beginning to develop around systems for access to government information and the protection ofpersonal data. The statute calls for a delicate balance between the need to provide access to government records and the right to the protection of personal privacy. Sensitivity and expertise on the part of the Commissioner is all the more required if the twin purposes of the legislation are to be met.*
>
> *The Commission has issued over 500 orders in the five years since its creation, resulting in an expertise acquired on a daily basis in the management of government information.*
>
> *Faced with the task of developing and applying the new statutory concept of unjustified invasion of privacy, one of the touchstones of its unique regulatory scheme, the Commission is performing the same task begun years ago by labour tribunals in the development of then novel concepts, such as unfair labour practices. Central to its task, and at the heart of its specialized expertise, is the Commissioners interpretation and application of its statute and, in particular, the sections under consideration, being ss. 21, 22 and 23, which regulate the core function of information management.*
>
> *We therefore conclude the Commissioners decisions, already protected by the lack of any right of appeal, ought to be accorded a strong measure of curial deference even where the legislation has not insulated the tribunal by means of a privative clause.*

At page 288, Lowry J. said:

> *While the legislation in this province cannot be characterized as a carbon copy of the Ontario statute, the stated purposes of the two statutes are the same, and the role of commissioner as well as the expertise to be employed by the person holding that office in the two jurisdictions appear to me to be entirely comparable.*
>
> *In this province, as in Ontario, in addition to his powers and duties associated with reviewing requests for access to records which include an expressed statutory mandate (s.56) to decide all questions of fact and law arising, the Commissioner is generally*

responsible for monitoring how the Act is administered to ensure its purposes are achieved...

I consider that what was said in the quoted passages from John Doe can be said with equal force about the role of the Commissioner appointed under the legislation in this province. Significance was attached to the experience actually achieved by the Commissioner in the five years the Ontario legislation had been in force, but I do not consider that renders what I have quoted any less applicable. Here as in Ontario, the legislation contemplates the appointment of a person having sufficient expertise to undertake what is a most novel and specialized function in the management of information. The legislative intention appears to me to have been to vest in the office of the Commissioner a broad mandate to oversee all aspects of achieving the stated purposes of the Act.

I find the decisions of the Ontario Divisional Court to be, a persuasive, principled approach to the determination of the standard of review applicable in this case and I am of the view that they should be followed. I consider the Commissioners decisions on questions of the interpretation and applicability of the provisions of the legislation that fall within his area of expertise are to be accorded substantial deference, precluding interference, unless it can be said he has made a determination which is not reasonable.

The questions of what "similar information" means - how the term is to be interpreted and what information is to be included - is one that I regard as being germane to the management of information generally. Like the questions raised in the three Ontario decisions, it is the kind of question that falls within the sphere of expertise of the person charged with the responsibility for the administration of the legislation. His interpretation must then be permitted to stand unless it falls short of what is reasonable.

STANDARDS OF REVIEW

[21] Determining the standard of review is primarily a matter of statutory interpretation. The court must determine the legislative intent with respect to the degree of deference the court ought to accord the tribunal's decision. Numerous cases were cited to me on this issue. I have read those cases but shall refer to only a few. In Fletcher Challenge, supra, Lowry J. reviewed a decision of the Commissioner ordering the Ministry of Environment, Lands and Parks to give a preservation society access to technical information supplied to the Ministry by Fletcher Challenge, in confidence. At page *285*, Lowry J. said: The issue which the Commissioner had to decide turned on the interpretation and applicability of s. 21(1)(c)(ii). It is primarily a question of law and the standard of review which is now to be employed must be considered in that context.

The Supreme Court of Canada considered the standard of review applicable in respect of questions of law before an administrative tribunal recently in Pezim v. British Columbia (Superintendent of Brokers) (1994), 114 D.L.R. (4th) 385 [92 B.C.L.R. (2d) 145]. At issue was the interpretation given by a securities commission to the provisions of its governing statute. In reviewing the authorities and discussing the principles of judicial review the court said (pp. 404-05):

From the outset, it is important to set forth certain principles of judicial review. There exist various standards of review with respect to the myriad of administrative agencies that exist in our country. The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this question, the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function.

21

At page 286, Lowry J. said:

> *Fletcher Challenge and the Ministry contend that the standard of review here with respect to questions of law in particular must be one of correctness. They attach particular significance to there being no privative clause and they maintain the legal question is not one that requires any special expertise that could be attributed to the Commissioner who is not legally trained. The Society and the Commissioner argue for a lower standard. They say the court must afford the Commissioner's decision substantial deference and refuse to interfere unless it can be said that the way he interpreted and applied the legislation was not reasonable. There is no privative clause but there is also no right of appeal which would allow an appellant tribunal to substitute its opinion for that of the Commissioner.*

STANDARDS OF REVIEW ON QUESTIONS OF LAW OR MIXED LAW AND FACT

[22] In Pezim v. British Columbia (Superintendent of Brokers) (1994), 92 B.C.L.R. (2d) 145 (S.C.C.), Iacobucci J. delivering the judgment of the court said at page 168:

> *In my view, the pragmatic or functional approach articulated in Bibeault is also helpful in determining the standard of review applicable in this case. At p. 1088 of that decision, Beetz J., writing for the Court, stated the following:*
>
> > *. ..the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.*

[23] He spoke of the spectrum of standards of review at pages 166 and 167:

> *Having regard to the large number offactors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal. See C.U.P.E., Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, Syndicate national des employes de la commission scolaire regionale de l'Outaoais c. U.E.S. local 298, (sub. nom. U.E.S., local 298 v. Bibeault, [1988] 2 S.C.R. 1048, at p. 1089 ("Bibeault"), and Domtar Inc. v. Quebec (Commission d'appel en matiere de lesions professionnelles), [1993] 2 S. C.R. 7.56.*
>
> *At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in question, as for example in the area of human rights. See for example Zurich Insurance Co. v. Ontario (Human Rights Commission), [1992] 2 S.C.R. 321, Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554, and Berg v. University of British Columbia, [1993] 2 S.C.R. 353 [79 B.C.L.R. (2d) 273]...*
>
> *Consequently, even where there is no privative clause and where there is a statutory right of appeal the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal 's expertise.*

[24] Subsequent to Lowry J.'s decision in Fletcher Challenge, the Supreme Court of Canada revisited the issue of standard of review. In Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748, Mr. Justice Iacobucci gave the unanimous judgment of the court. Appeals from orders of the Competition Tribunal were before the court. The issues were: first, whether the Federal Court of Appeal erred in concluding that it owed no deference to the Tribunal's findings about the dimensions of the relevant market and in subsequently substituting that for findings of its own; second, whether the Court of Appeal erred in refusing to set aside the Tribunal's remedial order.

[25] In Southam, the court found that the questions before the Tribunal were ones of mixed fact and law. The court spoke of the standard of review at page 2775:

> *F. The Standard*
>
> *In my view, considering all of the factors I have canvassed, what is dictated is a standard more deferential than correctness but less deferential than "not patently unreasonable". Several considerations counsel deference: the fact that the dispute is over a question of mixed law and fact; the fact that the purpose of the Competition Act is broadly economic, and so is better served by the exercise of economic judgment; and the fact that the application ofprinciples of competition law falls squarely within the area of the Tribunal's expertise. Other considerations counsel a more exacting form of review: the existence of an unfettered statutory right of appeal from decisions of the Tribunal and the presence of judges on the Tribunal. Because there are indications both ways, the proper standard of review falls somewhere between the ends of the spectrum. Because the expertise of the Tribunal, which is the most important consideration, suggests deference, a posture more deferential than exacting is warranted.*
>
> *I wish to emphasize that the need to find a middle ground in cases like this one is almost a necessary consequence of our standard-of-review jurisprudence. Because appeal lies by statutory right from the Tribunal's decisions on questions of mixed law and fact, the reviewing court need not confine itself to the search for errors that are patently unreasonable. The standard of patent unreasonableness is principally a jurisdictional test, and, as I have said, the statutory right of appeal puts the jurisdictional question to rest. See Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979]* 2 S. *CR. 227, at p. 23 7. But on the other hand, appeal from a decision of an expert tribunal is not exactly like appeal from a decision of a trial court. Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, it is because the tribunal enjoys some advantage that judges do not. For that reason alone, review of the decision of a tribunal should often be on a standard more deferential than correctness. Accordingly, a third standard is needed.*

[26] The court adopted the standard of reasonableness simpliciter, saying at page 778:

> *The standard of reasonableness simpliciter is also closely akin to the standard that this Court has said should be applied in reviewing findings of fact by trial judges. In Stein v. "Kathy K" (The Ship), [1976] 2 S.C.R. 802, at p. 806, Ritchie J. described the standard in the following terms:*
>
> > *. ..the accepted approach of a court of appeal is to test the findings [of fact] made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view on the balance ofprobability. [Emphasis added by Iacobucci J.]*

[27] Speaking of that standard, at page 779, Iacobucci J. said;

> *...It bears noting, however, that the standard I have chosen permits recourse to the courts for judicial intervention in cases in which the Tribunal has been shown to have acted unreasonably.*
>
> *In the final result, the standard of reasonableness simply instructs reviewing courts to accord considerable weight to the views of tribunals about matters with respect to which they have significant expertise. While a policy of deference to expertise may take the form of a particular standard of review, at bottom the issue is the weight that should be accorded to expert opinions. In' other words, deference in terms of a "standard of reasonableness" and deference in terms of "weight" are two sides of the same coin.*

[28] Although his decision was given before Southam, I find that in Fletcher Challenge, Lowry J. took into account all the relevant considerations spoken of in Southam. He considered the wording of the Act. He noted the Act did not include a privative clause but it did not contain, either, a statutory right of appeal. He considered the expertise of the Commissioner to interpret and administer the Act and found he had expertise. He found that the question the Commissioner decided was a question of law. He found that the Commissioner's decision was reasonable and the court should pay substantial deference to it. In my opinion, Judge Lowry's decision did not offend the principles spoken of in Southam.

STANDARD OF REVIEW ON QUESTIONS AND FINDINGS OF FACT

[29] In Aquasource Ltd. v. The Information and Privacy Commissioner for the Province of British Columbia (5 November 1996), Vancouver A952695 (B.C.S.C.), Vickers J. engaged in a judicial review of a decision of the Commissioner and said at page 7:

> *The findings of facts will only take on a jurisdictional dimension when the finding is both instrumental to the decision in question and was reached on the basis of no evidence. There is ample authority for the proposition that if there is any evidence upon which a factual conclusion could have been reasonably reached, it would not be within the authority of the court to interfere. The test is set out in Douglas Aircraft Co. of Canada v. McConnell, [1980] 1 S.C.R. 245 at 277, where Estey J. said:*

... a decision without any evidence whatever in support is reviewable as being arbitrary; but on the other hand, insufficiency of evidence in the sense of appellate review is not jurisdictional, and while it may at one time have amounted to an error reviewable on the face of the record, in present day law and practice such error falls within the operational area of the statutory board, is included in the cryptic statement that the board has the right to be wrong within its jurisdiction, and hence is free from judicial review.

[30] The same conclusion was reached by Gow J. in TSE v. The British Columbia Council of Human Rights (11 February 1991), Vancouver A902171 (B.C.S.C.) where he said at page 21:

> *But even where the empowering statute does not contain a privative clause, the judicial trend (still proceeding) has been and is away from exuberant intervention to restrained intervention. If the empowering statute contains a provision suggesting privation or finality, the immunity of a privative clause will be accorded to it. Even without a quasi-privative clause, the current trend more and more restricts the scope of review based upon error on the face of the record to, at the very least, error which assumes significant jurisdictional dimensions. The gap is narrowing and may be closed at the discretion of the supervising court.*

and at pages 22 and 23, Gow J. continued:

> *A finding of fact is unreasonable and jurisdictional error if either there is no evidence before the tribunal to justify its finding, or in the light of that evidence it appears to be wholly unreasonable. On the other hand, if there be evidence before the tribunal which permitted it to reach rationally its conclusion, there is no jurisdictional error: Wylie v. B.C. Police Commissioner (1988),* 18 *B.C.L.R. (2d) 192per Carrothers, J.A. atp. 204.*

THE NATURE OF THE QUESTIONS POSED BY SECTION 43 AND DECIDED BY THE COMMISSIONER

[31] I find:

- the interpretation of s. 43: the meaning of "repetitious, systematic and unreasonable interference with the operations of the public body is a question of law;

- his application of that interpretation to the facts is a question of mixed law and fact;

- the exercise of his discretion in fashioning his remedy is a question of law.

THE APPROPRIATE STANDARD OF REVIEW

[32] The appropriate standard of review will depend on the circumstances of the case, the section of the Act in question and the expertise of the Commissioner to interpret the questions of law before him.

[33] In this Province, courts have ruled that some orders of the Commissioner were not entitled to deference and have set them aside. In Fletcher Challenge, supra, Lowry J. held that the decision of the Commissioner pursuant to s. 21 of the Act was to be accorded substantial deference. However, in Legal Services Society v. The Information and Privacy Commissioner (25 September 1996), Vancouver 960275 (B.C.S.C.), Lowry J. found that the Commissioner's interpretation of s. 14 of the Act was not a matter that fell within the purview of the Commissioner's expertise and that deference should not be accorded. The court set aside the Commissioners order for it constituted an error of law. In Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner) (1994), 1 B.C.L.R. (3d) 180 (S.C.), Vickers J. set aside an order of the Commissioner made under s. 58(2)(b) of the Act as being beyond his jurisdiction. In British Columbia (Ministry of Environment, Lands & Parks v. British Columbia (Information and Privacy Commissioner) (1995), 16 B.C.L.R. (3d) 64 (SC.). Thackray J. found that a standard of correctness should be applied to the Commissioner's interpretation that s. 14, dealing with solicitor/client privilege, should be interpreted narrowly.

APPLICATION OF STANDARDS OF REVIEW IN THE SUBJECT CASE

[34] The parties disagree on the standard of review of the Commissioner's interpretation of s. 43. The Petitioners submit the appropriate standard is one of correctness. They say his interpretation of s. 43 was incorrect or, in the alternative, patently unreasonable.

[35] The Attorney-General submits the interpretation of s. 43 is a general question of law and there is no basis for reasons of relative expertise to accord any deference to the Commissioner's interpretation. The Commissioner does not fall within the select group of tribunals to whom the court ought to accord deference in the absence of a privative clause. The Attorney-General submits that the Commissioner's responsibilities under the Act and his expertise cannot be compared to the degree of expertise courts have found exist in the fields of communication and financial markets; that it is implausible to characterize the proper interpretation of the terms "repetitious, systematic and unreasonably interfere" as matters falling squarely within the specialized expertise of the Commissioner. The Attorney-

General submits the standard of review on this issue is one of correctness, but submits also that the Commissioner's interpretation of s. 43 was correct.

[36] The Commissioner and BC Transit submit the Commissioner has expertise in the management of information and his decisions on questions of the interpretation and application of the Act which fall within his area of expertise should be accorded deference if they are found to be reasonable as that term was interpreted and applied in Southarn.

[37] I conclude that the standard of review of the Commissioner's interpretation of s. 43 is reasonableness simpliciter. The Commissioner's expertise is determined by taking into account the factors spoken of by Beetz J. in Bibeault, approved in Pezim. The Act confers specialized jurisdiction to the Commissioner. He has expertise is the field of information management which includes the interpretation and administration of the Act: Lowry J. in Fletcher Challenge, supra, Section 43 is an integral part of the Act and one of his functions is to analyze and interpret the meaning of the words found in s. 43 within the context of the Act; that function falls squarely within his specialized jurisdiction.

[38] Right of access forms part of the comprehensive scheme of access to information and protection of privacy in which the Legislature has struck a balance between the right of access and the public interest in an efficient, reasonable administration of the scheme for access, which in part, ensures that the operation of a public body is not unreasonably interfered with by requests for information that are repetitious or systematic in nature.

[39] The standard of review in respect of the Commissioner's application of his interpretation to the facts is one of reasonableness. A finding of mixed fact and law is unreasonable and a jurisdictional error if there is no evidence before the Tribunal to justify its finding, or in the light of that evidence it appears to be wholly unreasonable: (Gow J. in TSE).) The Commissioner's application of s. 43 to the facts should be accorded some deference.

[40] The standard of review of the Commissioner's authorization to BC Transit to disregard future requests of the Petitioners is that of correctness.

THE COMMISSIONER'S AUTHORIZATION

[41] Section 43 of the Act is remedial, not punitive in nature. The Petitioners submit that if the right of access is to be interpreted broadly as the Commissioner said in Order #1 **I-I** 994, supra, s. 43, which limits that right, must be interpreted strictly. Further they submit the effect of the section being in direct contradiction with the expressed purposes of the Act, there is a high onus cast on a public body seeking to invoke it.

[42] I do not agree with either submission. Section 43 is an important remedial tool in the Commissioner's armory to curb abuse of the right of access. That section and the rest of the Act are to be construed by examining it in its entire context bearing in mind the purpose of the Legislation. The section is an important part of a comprehensive scheme of access and privacy rights and it should not be interpreted into insignificance. The legislative purposes of public accountability and openness contained in s. 2 of the Act are not a warrant to restrict the meaning of s. 43. The section must be given the "remedial and fair, large and liberal construction and interpretation as best ensures the attainment of its objects", that is required by s. 8 of the Interpretation Act.

[43] The Commissioner has issued only four s. 43 authorizations since the Act came into force in 1993. The Commissioner has expressed an intention to approach s. 43 applications cautiously and to use it sparingly, but that does not imply that s. 43 should be read restrictively.

[44] The Petitioners submit that the Commissioner either without jurisdiction or exceeding his jurisdiction, improperly considered irrelevant information. That information was BC Transit's submission that the Petitioners' requests had the effect of using the Act as a "weapon of information welfare". In his decision, the Commissioner repeated that phrase, correctly attributing it to BC Transit's submission. There is no evidence that conclusion was based on any considerations other than the evidence before him. Courts frequently adopt the language of counsel given orally or in submissions, in Reasons. Counsel will well recognize their language in these Reasons. It is not an objectionable custom.

CONCLUSIONS WITH RESPECT TO THE COMMISSIONER'S AUTHORIZATION

[45] I find the Commissioner's interpretation of s. 43 was reasonable and deference should be extended to it. Had I found that "correctness" was the appropriate standard of review. I would have found the Commissioner was correct in his interpretation. The terms "repetitious and systematic and unreasonably interfere" are not defined in the Act and the Commissioner did not expressly define them in his decision. However, his interpretation of those terms may be inferred from his decision when he recited the facts that prompted the authorization, and from the authorization itself.

[46] With respect to his findings of fact, there was evidence before him to support those findings. BC Transit submitted a considerable body of evidence about the nature and number of requests submitted by the Petitioners and the effect of those requests on its operation. The evidence demonstrated that a significant portion of the company's Information and Privacy resources were being expended responding to the Petitioners' requests and that their demands were also affecting the Customer Service department's ability to perform its other duties and responsibilities. The determination of what constitutes an unreasonable interference in the operation of a public body rests on an objective assessment of the facts. What constitutes an unreasonable interference will vary depending on the size and nature of the operation. A public body should not be able to defeat the public access objectives of the Act by providing insufficient resources to its freedom of information officers. However, it is the Commissioner, with his specialized knowledge, who is best able to make an objective assessment of what is an unreasonable interference. In this instance, the Commissioner had sufficient evidence to make an informed assessment of the negative impact of the Petitioner's requests on BC Transit.

[47] I find the Petitioners have failed to demonstrate that there was "no evidence" before the tribunal that justified the authorization, and they have failed to demonstrate that the authorization was wholly unreasonable based on the evidence.

[48] The authorization given was not intended to punish the Petitioners for any wrongful conduct. Rather, it was issued to alleviate a continuing burden on BC Transit which the Commissioner determined to be excessive.

[49] The question of whether the Commissioner had jurisdiction to authorize BC Transit to disregard the Petitioners' future requests is a matter of statutory interpretation properly characterized as jurisdictional. In my opinion, the language of s. 43 imports a remedial power to make prospective orders. I agree with the submissions of counsel for BC Transit that the Legislature did not intend the section to apply only to requests that have been made to, but not yet considered by, a public body, at the time it applies for a s. 43 authorization. Section 43 would be rendered useless if a public body, which is being unduly burdened by a number of repetitious or systemic requests, had to make separate applications to the Commissioner every time it received a new request from that person. Section 43 could not have been intended to increase the administrative burden on public bodies which would likely occur if the Commissioner did not have the power to make authorizations that extend to future requests.

[50] I agree with the submissions of counsel for BC Transit, the Attorney-General and the Commissioner that the words "would reasonably interfere" in s. 43 supports the forward looking nature of the remedial power to make prospective orders.

[51] In Bell Canada v. Canada (Canadian Radio-Television and Communications Commission), [1989] 1 S.C.R. 1722, Gonthier J., delivering the judgment of the court said at page 1756: The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

[52] I conclude the ability of the Commissioner to restrain an abuse of the information access scheme would be largely frustrated ifs. 43 could only be applied to pending access requests.

[53] I do not accept that the Commissioner was in error by issuing his authority without making a determination that BC Transit may have eased the burden of the requests by imposing fees upon the Petitioners provided for under s. 75 of the Act. Sections 43 and 75 are independent provisions. The wording of both sections does not suggest that a s. 43 authorization can only be issued after a s. 75 fee requirement has been tried and found wanting. Section 75, while having a possible deterrent effect appears to be concerned with alleviation of financial burdens on a public body while s. 43 is designed to alleviate administrative hardship.

[ ] The Commissioner fashioned two discretionary remedies. His discretion is not completely unfettered. The remedy must redress the harm to the public body seeking the authorization. If the remedy is wholly disproportionate to the harm inflicted, it may be set aside. In my respectful opinion, the authorization to BC Transit to disregard all requests for information by these Petitioners for one year was wholly disproportionate and clearly wrong. That authorization prevents the Petitioners themselves from accessing personal information. The Act contemplates that individuals will have free and full access to their own personal information, subject only to the express limitation in s. 19 of the Act.

[55] That said, I can conceive of circumstances where requests for information, including personal information, should be prevented by invoking s. 43, because the requests are made habitually, persistently and in bad faith, or are clearly frivolous and vexatious. The Commissioner has not so characterized these Petitioners' requests. He has done so, however, in other cases in which he has invoked s. 43.

[56] In Order #1 1 O-1996, made on June 5, 1996, the Commissioner authorized the head of the Vancouver School Board to refuse access to Board records, saying at p. 5: I agree with the School Board in the present matter that this applicant is not using the Act for the purposes for which it was intended and that he is not, indeed, acting in good faith...

A statutory scheme of access to general and personal information is only going to work for innumerable public bodies and applicants if common sense and responsible behaviour prevail on both sides. This is not the first applicant whom I have come to regard as making excessive, indeed almost irrational, demands on a public body.

[57] In an Application for Authorization to Disregard Requests under s. 43 by Joan Hesketh, Assistant Deputy Minister, Ministry of Employment and Investment, on August 23, 1996 the Commissioner gave authority under s. 43 based on his conclusion that the respondent habitually, persistently and in bad faith, was making excessive and irrational requests and demands on the Ministry. On August 30, 1996, he gave a s. 43 authorization based on identical conclusions, in an application brought by the Vancouver School Board.

[58] The Commissioner has not found that the Petitioners in this case were acting in bad faith.

[59] The absolute prohibition against the Petitioners has now expired. Were it not so, I would have remitted that part of the authorization to the Commissioner for reconsideration.

[60] With respect to the second remedy he fashioned - that BC Transit is required to deal with only one request of the Petitioners at a time, in my respectful opinion, the Commissioner was correct. That authorization will permit BC Transit to deal with the Petitioners' requests seasonably and it should prevent unreasonable interference with its operations which the authorization was designed to prevent. Had the Commissioner imparted that limitation into the first year as well as the second, there would be no quarrel with it.

THE DAGG DECISION

[61] In August, counsel for the Commissioner brought to my attention the decision of the Supreme Court of Canada in Dagg v. Canada (Minister of Finance) (1997), 148 D.L.R. (4th) 385 (S.C.C.), which was released following the conclusion of argument in this case. The Dagg case was concerned with an appeal regarding the Access to Information Act R.S.C. 1985, c. A-l. I invited counsel to submit on the impact of the Dagg decision on the case at bar, to which all counsel responded.

[62] I conclude that Dagg does not change my conclusions regarding either the standard of review by which I have assessed the Commissioner's authorization or the merits of that assessment.

[63] I note that the Access to Information Act contains a statutory right of appeal to the Federal Court. Our Act does not contain a similar provision. The Dagg case was concerned with the refusal by the Ministry of Finance to disclose records of'when employees signed in or out of a government building. Those records were considered personal information and thus, excluded under s. 19(2)(c) of the Access to Information Act and s. 8(2)(m)(i) of the Privacy Act. Section 43 of this Act deals with different considerations: whether information requests pose an unreasonable hardship on a public body.

COSTS

[64] The Intervener, the Attorney-General, does not seek costs. There will be no order for costs for or against any party. Success has been divided. Counsel have agreed to share the cost of transcripts of submissions.

[65] I wish to express my gratitude to counsel for their submissions, both written and oral. They were excellent and very helpful.

"Coultas, J."
The Honourable Mr. Justice Coultas

March 7, 1997

In the case of an Application for Authorization to Disregard Requests from [the respondent] under Section 43 of the Freedom of Information and Protection of Privacy Act by the Ministry of Agriculture, Fisheries and Food

I have had the opportunity of reviewing the application of the Ministry of Agriculture, Fisheries and Food under section 43 of the Freedom of Information and Protection of Privacy Act (the Act) for authorization to disregard requests made under section 5 of the Act by [the respondent].

Section 43 gives me the power to authorize a public body to disregard requests made under section 5 that, because of their repetitious or systematic nature, unreasonably interfere with the operations of the public body, in this case the Ministry of Agriculture, Fisheries and Food.

Since the purpose of the Act is to make government bodies more accountable to the public by giving the public a right of access to records, authorization to disregard requests must be given sparingly and only in obviously meritorious cases. Granting section 43 requests should be the exception to the rule and not a routine option for public bodies in meeting their obligations under the legislation.

Based on a review of the submissions of the Ministry of Agriculture, Fisheries and Food (the Ministry), its documentation of each access request made by [the respondent], and [the respondent's] response to the Ministry's submissions, the following factors have led me to decide that [the respondent's] access requests are repetitious, systematic, and unreasonably interfere with the operations of the Ministry:

1. During 1996 the Ministry received 68 formal requests for access under the Act, 44 of which were from [the respondent] (65 percent). Ten of these were outstanding on January 16, 1997, the date of the Ministry's application for a section 43 ruling. The Ministry's conservative estimate is that in 1996 it spent more than 400 hours responding to these particular requests. (Submission of the Ministry, para. 2.16) I agree with the Ministry that [the respondent] is making excessive demands on the resources that it has decided that it can devote to implementation of the Act. (Submission of the Ministry, para. 2.16 to 2.18)

2. Since August 1994 [the respondent] has made a total of 62 requests to the Ministry. They deal with [the respondent's] perception of [the respondent's] unfair treatment, harassment, or discrimination by the Ministry. I accept the Ministry's judgment that [the respondent] "clearly appears to be fishing for records in an attempt to confirm [the respondent's] allegations or suspicions of wrongdoing." (Submission of the Ministry, para. 2.07) I further agree that these requests are repetitious in nature. See Order No. 137-1996, December 17, 1996, p. 10.

3. The Ministry has worked extensively with portfolio officers from my Office in mediation with [the respondent]. These have largely proven unsuccessful. [The respondent] has apparently requested reviews or made complaints to my Office on 14 occasions, 7 of the issues which have resulted in Orders by me and 3 of which remain open.

4. After January 16, 1997 mediation efforts of the application for the section 43 ruling involving my Office, [the respondent], and the Ministry failed.

5. On February 7, 1997 [the respondent] requested the Ministry to freeze all e-mail backup tapes and any other form of record pending an investigation [the respondent] has requested into the e-mail system. I have previously issued several Orders on this type of issue, one of them involving [the respondent]. See Order No. 121-1996, September 3, 1996.

6. The evidence submitted by the Ministry that [the respondent] has made systematic requests, including directing requests be submitted under a variety of names.

7. The evidence that [the respondent] is trying to use the Act as a weapon against the Ministry in retaliation for decisions that it has made involving [the respondent]. (Submission of the Ministry, para. 2.10) See Order No. 110-1996, June 5, 1996, pp. 3, 4; Order No. 137-1996, December 17, 1996, pp.10, 13.

8. I agree with the submission of the Ministry that it should not be required to carry out the tedious, time-consuming, and costly task of responding to [the respondent] under the Act, when it is clear that [the respondent] is habitually and persistently making excessive and irrational requests and demands on the Ministry. (Submission of the Ministry, para. 2.15)

9. I agree with the Ministry's submission that [the respondent] is not using the Act for the purposes for which it was intended and that any further continuation of these actions by [the respondent] places the Act, unequivocally, in great disrepute. (Submission of the Ministry, para. 2.10).

10. In summary, I find that the access requests of [the respondent] are repetitious, systematic, and unreasonably interfere with the operations of the Ministry.

Therefore, I authorize the Ministry to disregard the following with respect to [the respondent]:

1. All outstanding requests for records.

2. All future requests for records which relate in any way to past supervisors, co-workers, and the Personnel Branch of the Ministry.

3. All requests of any kind for a period of one year to end one year after the date of this decision.

Procedural Objection

[The respondent] sought a postponement of this inquiry. I refused to do so after considering [the respondent's] reasons and the objections of the Ministry. Upon request, I expanded on my reasons for this decision in a letter to [the respondent] dated February 18, 1997. [The respondent's] view is that my decision on this matter was not fair and impartial. I disagree.

March 7, 1997

David H. Flaherty
Commissioner

April 11, 1997

In the Case of an Application from the Ministry of Attorney General for Authorization to Disregard Requests from [the respondent] under Section 43 of the Freedom of Information and Protection of Privacy Act (the Act)

I have had the opportunity of reviewing the application under section 43 of the Freedom of Information and Protection of Privacy Act (the Act) for authorization to disregard requests made by [the respondent] under section 5 of the Act.

Section 43 gives me the power to authorize a public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body, in this case the Ministry of Attorney General.

Since the purpose of the Act is to make government bodies more accountable to the public by giving the public a right of access to records, authorization to disregard must be given sparingly and only in obviously meritorious cases. Granting section 43 requests should be the exception to the rule and not a routine option for public bodies to avoid their obligations under the legislation.

Based on a detailed review of the submissions of the Ministry of Attorney General and not having received a reply submission from the respondent, the following factors have led me to decide that [the respondent's] access requests are repetitious, systematic, and unreasonably interfere with the operations of the Ministry:

1. Since August, 1995, [the respondent] has made 21 requests for access to records under the Act from the Ministry of Attorney General, 20 of them since January, 1996. The Ministry has now in fact responded to all of them. The Ministry submits&that these requests placed unreasonable demands on it and are repetitive and systematic. Indeed, they are also a continuation of the repetitive requests previously made to the Ministry of Employment and Investment, which I treated in a section 43 Order dated August 23, 1996. The Ministry submits that these requests are not being made in good faith.

2. The Ministry conservatively estimates that it has spent at least 110 hours responding to requests made by [the respondent]. This has had a significant impact on the workload of staff in both the Information and Privacy Program Office and the Management and Administrative Services Division of the Legal Services branch of the Ministry.

3. The Ministry submits that to devote such time and effort to a single applicant under the Act unreasonably interferes with the operations of the Ministry and is unfair to other applicants and to taxpayers, especially since the requests for access are not being made in good faith and responding to them will never address the applicant's real concerns. To continue to incur the costs of responding to these requests would offend public policy, particularly in these times of fiscal restraint, and would bring the Act into disrepute.

4. The Ministry of Attorney General's submission that [the respondent] is irresponsibly using the Act as a weapon against the Ministry of Attorney General because [the respondent] is unhappy with government's response to the dispute over [the respondent's] mineral claims.

5. Background information, including the reasons for decision and determination of the Chief Gold Commissioner in the dispute between [third parties] and [the respondent] over mineral claims, dated November 25, 1994, and the Supreme Court of British Columbia's dismissal on [the date] of [the respondent's] petition to judicially review the order of the Chief Gold Commissioner.

32

In summary, I find that the access requests of [the respondent] to the Ministry of Attorney General are repetitious, systematic, and unreasonably interfere with the operations of the Ministry.

Therefore, I authorize the Ministry to disregard the following:

1. All requests for records which relate to the following categories of information:

   a) Records relating to court actions involving the Chief Gold Commissioner and/or the Mineral Tenures Branch or relating to the Mineral Tenures Act; or

   b) Records relating to allegations of fraud or other wrongdoing made to the Attorney General against the Chief Gold Commissioner or other employees of the Mineral Tenures Branch; or

   c) Records relating to expenses incurred in providing legal services in connection with items a) and b); or

   d) Records relating to audits conducted on the Mineral Tenures Branch and the travel expenses of a named Ministry of Finance employee who is an auditor,

for a period of one year.

2. All other requests to the Ministry for records of any kind for a period of one year.

The above apply to requests for records made by [the respondent], [four named parties associated with the respondent] or any other request in which [the respondent] is the "directing mind."

April 11, 1997

David H. Flaherty
Commissioner

August 18, 1997

In the Case of an Application by the Public Service Employee Relations Commission (PSERC) for Authorization to Disregard Requests from [the respondent] under Section 43 of the Freedom of Information and Protection of Privacy Act (the Act)

I have reviewed the application of the Public Service Employee Relations Commission under section 43 of the Freedom of Information and Protection of Privacy Act (the Act) for authorization to disregard requests made by [the respondent] under section 5 of the Act.

Section 43 gives me the power to authorize a public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body, in this case the Public Service Employee Relations Commission.

Since the purpose of the Act is to make government bodies more accountable to the public by giving the public a right of access to records, authorization to disregard should be given sparingly and only in obviously meritorious cases. Authorizations under section 43 should not be seen as a routine option for public bodies to avoid their obligations under the legislation.

I have carefully reviewed the submissions of the Public Service Employee Relations Commission and the response of [the respondent], as well as the series of requests which led PSERC to make the application, and find as follows:

1. The Commissioner of PSERC wrote to me on May 15, 1997 requesting the application of section 43 of the Act to [the respondent]. He provided copies of a series of requests from the applicant to the Minister of Finance and PSERC, and commented specifically about one dated April 26, 1997:

Since the beginning of 1996, this Commission has received eight similarly lengthy letters from [the respondent], within which [the respondent] makes obscure references to the Act and its potential remedies for present and past crimes [he/she] alleges have been committed by various public bodies against [him/her]. The applicant appears unable to accept the responses provided to [him/her] by this public body and each subsequent correspondence or telephone call from the applicant merely reiterates the same accusations of fraud and allegations of wrongdoing by this public body.

The letters referred to by the Commissioner for PSERC comprise over 400 separate pages and reinforce for me the accuracy of his observation.

2. The Commissioner of PSERC further submitted that:

I am aware of no deliberate attempts by public servants, in the ethical conduct of their duties, to cause [the respondent] harm or deny [him/her] **any** due process. Our agency has been working with representatives of the B.C. Government and Service Employees' Union (BCGEU) to resolve [the respondent]'s grievances humanely and responsibly.

PSERC advises that these efforts at resolution are continuing and I note, from my review of its letters of response to the [respondent], that PSERC has gone out of its way to provide the [respondent] with information as well as copies of records.

3. PSERC advises that since the Commissioner's May 15, 1997 letter to me, it has received another 2 18 pages of correspondence in four (separate) letters from [the respondent]: "The [respondent] is unable to accept the forthright responses that have been provided to [him/her], despite the considerable efforts of staff to decipher what specific records actually exist."

Based on my own review of this recent correspondence and of [the respondent]'s submissions to me, I find that [the respondentl's requests are "repetitious" in the sense that the same information has been requested again and again.

4. I have reviewed a submission from [the respondent] in connection with this section 43 application, approximately 50 pages of which were sumitted in camera. Whatever the merits of an argument that additional records must exist or that statutory exceptions should not be used to withhold information, the reality is that [the respondentl's multiple problems cannot be solved on the basis of repetitive requests for access to information under the Act. I find also that the requests are "systematic" in the sense that they focus methodically, indeed obsessively, on certain labour relations issues between the [respondent] and PSERC.

5. PSERC submits that the "[respondent] is seeking to redress a perceived injustice, not [to correct] records. For the most part, communication with [the respondent] is beyond the scope of the Act." Based on my review of the correspondence and submissions of PSERC and [the respondent], I concur in this judgment. In my view, [the respondent] is seeking redress under the Act for a labour relations issue (which began on November **21,** 1991) that should be settled elsewhere (if at all possible) in accordance with existing procedures for unionized government staff. It is clear to me that PSERC cannot address [his/her] various grievances under the Freedom of Information and Protection of Privacy Act.

6. I also agree that the considerable time and effort needed to identify requests for access which might be contained within hundreds of pages of correspondence is not reasonable, especially when such additional access requests appear to duplicate those previously made. I accept that even though PSERC is a significant public body, it is relatively small and has only one staff person to deal half-time with all access and privacy matters. I find that the time and effort which would be required to analyze and respond to [the respondentl's voluminous, repetitious and systematic requests would, in all the circumstances, unreasonably interfere with PSERC's operations.

Therefore, I authorize the Public Service Employee Relations Commission to disregard requests from [the respondent] for records dealing with [his/her] labour relations issues since 1991.

August 18, 1997

David H. Flaherty
Commissioner

October 16, 1997

In the Case of an Application by the Ministry of Human Resources for Authorization to Disregard Requests from [the respondent] under Section 43 of the Freedom of Information and Protection of Privacy Act (the Act)

I have had the opportunity of reviewing the application of the Ministry of Human Resources under section 43 of the Freedom of Information and Protection of Privacy Act (the Act) for authorization to disregard requests made by [the respondent] under section 5 of the Act.

Section 43 gives me the power to authorize a public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body, in this case the Ministry of Human Resources.

Since the purpose of the Act is to make government bodies more accountable to the public by giving the public a right of access to records, authorization to disregard requests must be done sparingly and only in obviously meritorious cases. Granting section 43 requests should be the exception to the rule and not a routine option for public bodies to avoid their obligations under the legislation.

Based on a detailed review of the submissions of the Ministry of Human Resources and the response of the respondent, the following factors have led me to decide that [the respondentl's access requests are repetitious, systematic, and unreasonably interfere with the operations of the Ministry:

1. The Ministry states that [the respondent] is its [client]. Since 1994 the Ministry, and its predecessor, the Ministry of Social Services, has received a total of 23 requests from [the respondent]: "The number can be said to be higher because the Public Body often treats as single requests faxed from [the respondent] that really contain more than one distinct request." (Submission of the Ministry, paragraph 3.02) This number of requests from one individual is "high" from one individual. (Submission of the Ministry, paragraph 3.07) Most of these requests ask for personal information about [the respondent] in all parts of the Ministry. (Submission of the Ministry, paragraphs 3.03, 3.04) The Ministry describes [the respondentl's methods of communicating with it about [his/her] requests is to apply a "pattern of bombardment by correspondence to almost every request [he/she] makes. In short, [the respondent] has an enormous capacity for creating paper and flooding the Public Body with it." (Submission of the Ministry, paragraph 3.05)

2. The Ministry submitted the reasons for decision [in a court matter] involving [the respondent], which reviews some of the history and nature of [his/her] relationship with the Ministry (and its predecessor, the Ministry of Social Services). In particular, the [court] commented on [the respondentl's tendency and capacity, by piling proceeding upon proceeding, to create confusion, as well as waste of time and resources, all of which must be met from the hard pressed public purse. (Submission of the Ministry, paragraph 2.02)

3. The Information and Privacy Office of the Ministry estimates on the basis of "good records" that it has spent at least 123 hours responding to only the last eight requests of [the respondent]. (Submission of the Ministry, paragraph 3.08) The coordinator who has handled these specific requests estimates that "due to the volume and confusing nature of the requests and associated correspondence, it takes him approximatelv 3 times as long to process a request from [the respondent] as it does to process requests from other applicants." (Submission of the Ministry, paragraph 3.13) Other staff outside this Office also "spend a considerable amount of time" dealing with these requests. (Submission of the Ministry, paragraph 3.09) In terms of measuring and evaluating the significance of this time commitment, the Ministry relies on my discussion in Order 110-1996, June 5, 1996, p. 5. (Submission of the Ministry, pp. 3, 12)

36

I agree with the submission of the Ministry that [the respondent] has made, and continues to make, "unreasonable" demands on staff of the Ministry to process [his/her] repetitious and systematic access requests. (Submission of the Ministry, paragraph 3.13)

4. Based on my decision in Order No. 110-1996, I also agree with the submission of the Ministry that "[The respondent] is not using the Act for the purpose for which it was intended, and is not using the Act in good faith. [The respondent] is using the Act as a weapon against the Public Body because [he/she] is unhappy with the Public Body's decisions about [his/her] entitlement to income assistance benefits. The demands placed on the Public Body by [the respondent] are excessive. The Public Body's efforts to help [the respondent] have been excessive in light of its responsibilities to other clients and the taxpayers." (Submission of the Ministry, paragraphs 3.14, 3.17) (See also Order No. 137-1996, December 17, 1996, p. 10.)

5. I also agree with the Ministry that it is unfair for it to devote so much time and effort to responding to a single applicant under the Act. This unreasonably interferes with the operations of the Ministry and is unfair to other applicants and the taxpayers. I further agree that "to require the Public Body to continue to incur the costs of responding to [the respondent]'s requests would offend public policy, particularly in these times of fiscal restraint, and would bring the Act into disrepute." (Submission to the Ministry, paragraph 3.17)

Therefore, I authorize the Ministry to disregard all requests from [the respondent], in particular the following:

1. all requests that were outstanding at July 23, 1997;
2. all requests received between July 23, 1997 and September 12, 1997;
3. all future requests that may be received between September 12, 1997 and the date of issuance of this authorization; and
4. all future requests for a period of two years from the date of issuance of this authorization.

October 16, 1997

David H. Flaherty
Commissioner

[Section 43 decision of October 22, 1997; severed to remove all third party identifying information.]

In the Case of an Application by the City of Vancouver for Authorization to Disregard Requests from [the respondent] under Section 43 of the Freedom of Information and Protection of Privacy Act (the Act)

I have reviewed the application of the City of Vancouver under section 43 of the Freedom of Information and Protection of Privacy Act (the Act) for authorization to disregard requests made by [the respondent] under section 5 of the Act.

Section 43 gives me the power to authorize a public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body, in this case the City of Vancouver.

Since the purpose of the Act is to make government bodies more accountable to the public by giving the public a right of access to records, authorization to disregard should be given sparingly and only in obviously meritorious cases. Authorizations under section 43 should not be seen as a routine option for public bodies to avoid their obligations under the legislation.

I have carefully reviewed the submissions of the City of Vancouver and the response of [the respondent], and find, on the basis of the following, that [his/her] requests are repetitious in nature and unreasonably interfere with the operations of the City:

1. The City of Vancouver states that [the respondent] is its employee. Between 1988 and 1994 the City made all reasonable efforts to reply to [his/her] requests for access to information under its Freedom of Information By-law for records related to the City's employment and hiring practices. It has provided me with a detailed chronology of these efforts and estimates that this involved "hundreds of hours." See the affidavits of Dennis Back and Tom Zworski.

2. The City submits that [the respondent] "is using the Act to harass the City in retaliation for decisions related to several job competitions" in which [he/she] was a candidate. (See Order No. 110-1996, June 5, 1996, pp. 5, 6)

3. The [respondent] has made six requests for access to the City under the Freedom of Inforrnation and Protection of Privacy Act. These again concerned its employment and hiring practices. The City estimates that it has spent in excess of two hundred hours responding to these requests, because of the size of the requests and their complexity. Three requests, for example, dealing with the City's employment and hiring practices, included 202 individual queries. The burden of dealing with this particular respondent includes "the heavy workload associated with . . . the steady stream of correspondence from the [respondent] and [his/her] repeated requests for review [to my Office] on even the most trivial and obvious issues."

I agree with the City's submission that [the respondent] has abused [his/her] rights under the Act. See Order No. 98-1996, April 19, 1996. The City even suggests that [he/she] may now be attempting to circumvent this Order against [him/her] by splitting [his/her] access requests into parts in order to avoid fees that I previously decided were appropriate.

4. The City makes the appropriate point that its one manager devoted to Information and Privacy issues has had to devote a disproportionate amount of time to dealing with [the respondent], which has unreasonably interfered with this person's performance of related duties and responsibilities under the Act, including providing advice regarding access and privacy issues, ensuring compliance with the Act, the development of access and privacy policies and training, and responding to public inquiries.

5. I further agree with the City's submission that [the respondent]'s actions "are bringing the Act into disrepute and that requiring the City to respond to [his/her] requests and appeals undermines the legitimacy of the Act in the eyes of the staff in departments affected by the [respondent]'s requests."

6. The City states that it has responded to other access requests from [the respondent] and is not trying to limit [his/her] ability to exercise such rights under the Act, except in relation to the issue of employment and hiring practices, which have been dealt with exhaustively and repeatedly since 1988.

Therefore, I authorize the City of Vancouver to disregard all past, present, and future requests from [the respondent] for records related to the City's hiring or employment practices, including records related to specific employment competitions.

October 22, 1997

David H. Flaherty
Commissioner

[This section 43 decision was issued December 19, 1997. It has been severed to remove all third party identifying information.]
****

In the Case of an Application for Authorization to Disregard Requests from [the Respondent] under Section 43 of the Freedom of Information and Protection of Privacy Act (the Act) by the Law Society of British Columbia

I have had the opportunity of reviewing the application by the Law Society of British Columbia under section 43 of the Freedom of Information and Protection of Privacy Act (the Act) for authorization to disregard section 5 requests made by [the respondent] (hereafter referred to as the respondent).

Section 43 gives me the power to authorize a public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body, in this case the Law Society of British Columbia.

Since the purpose of the Act is to make public bodies more accountable to the public by giving them a right of access to records, authorization to disregard must be given sparingly and only in obviously meritorious cases. Granting section 43 requests should be the exception to the rule and not a routine option for public bodies to avoid their obligations under the legislation.

Based on a detailed review of the submissions of the Law Society of British Columbia and the response of, and the procedural objections raised by, the respondent, the following factors have led me to decide that:

1. The Law Society submits that the respondent's requests, due to their nature and frequency, are unreasonably interfering with its operations and duties to uphold and protect the public interest in the administration of justice.

2. The Law Society submits that the comprehensive nature and the increasing frequency of the respondent's requests are placing an unreasonable burden on the Law Society and, in particular, impinging upon its ability to deal with other applicants' information requests and to fulfill its other statutory duties to the public.

3. The Law Society submits that the increasing frequency and the nature of the respondent's requests have made it apparent that [the respondent] is not using the Act for the purpose for which it was intended.

4. The Law Society submits that the respondent has submitted eleven access to information requests to it since September 1996, mostly in connection with [the respondent's] various complaints against twelve lawyers. This incidence of requests comprises 26 percent of the total number of requests received by the Law Society during this time period. The respondent has made five requests since September 11, 1997: "The fact supports the Law Society's view that the respondent is employing the Act as a tool of harassment."

5. The Law Society further submits that the broad scope of the respondent's requests has generated a substantial amount of work, involving the review of voluminous files and detailed attention to time-consuming line-by-line severing.

In the course of processing the Respondent's requests, and during reviews [involving my Office], the Law Society has consulted eighteen third parties and written approximately 90 letters and faxes to third parties, the Respondent, and other parties relevant to the requests. This number of letters does not include those written to or by the Law Society's counsel.

40

6. The Law Society submits that until it indicated that it would apply for a section 43 authorization, the respondent had, without exception, requested reviews by my Office of all of the Law Society's responses to [the respondent's] requests:

One request for review, indicative of the Respondent's unreasonable use of the Act, was for a review of the Law Society's decision to take a time extension under section 10. This demonstrates the manner in which the Respondent uses the Act to harass and interfere with the Law Society.

The Law Society is thus continually responding to the respondent's requests for review of its decisions under the Act. It questions [the respondent's] motives and notes the financial and logistical burden that the respondent has placed on the Law Society because of [the respondent's] persistence in claiming that all information in its records should be released.

7. The Law Society estimates, conservatively, that it has exceeded approximately 145 hours in responding to the respondent's requests, excluding time involved consulting with Law Society counsel or counsel's time.

8. The Law Society submits that the respondent has consistently, habitually, systematically, and predictably requested access to the records concerning complaints that [the respondent] has raised with it about specific members. [The respondent] has now begun to request records from its Professional Liability Insurance Department and information concerning staff remuneration in the Complaints and Insurance departments.

In summary, I find that the access requests of the respondent to the Law Society are repetitious, systematic, and unreasonably interfere with the operations of the public body.

Therefore, having carefully considered the submissions of the Law Society and the reply submission of the respondent, including its in camera portions, I authorize the Law Society to disregard the following:

a) All outstanding requests for records by [the respondent].

b) All requests of any kind by [the respondent] for a period of one year.

December 19, 1997

David H. Flaherty
Commissioner

[This section 43 decision was issued January 29, 1998. It has been severed to remove all third party identifying information.]
****

In the Case of an Application for Authorization to Disregard Requests from [the Respondent] under Section 43 of the Freedom of Information and Protection of Privacy Act (the Act) by the City of Vancouver

I have had the opportunity of reviewing the application by the City of Vancouver under section 43 of the Freedom of Information and Protection of Privacy Act (the Act) for authorization to disregard section 5 requests made by [the respondent] (hereafter referred to as the respondent).

Section 43 gives me the power to authorize a public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body, in this case the City of Vancouver.

Since the purpose of the Act is to make government bodies more accountable to the public by giving the public a right of access to records, authorization to disregard must be given sparingly and only in obviously meritorious cases. Granting section 43 requests should be the exception to the rule and not a routine option for public bodies to avoid their obligations under the legislation.

The respondent raised several procedural and other objections. I have carefully considered everything submitted, along with the City's responses. I have decided to proceed to consider the City's request for an authorization under section 43 on the basis of all evidence presented to me.

Based on a detailed review of the submissions of the City of Vancouver and the respondent, the following factors have led me to decide that the respondent's access requests are repetitious, systematic, and unreasonably interfere with the operations of the City of Vancouver:

1. The respondent is a former City employee who was terminated for cause in May, 1995. In March, 1997 [the respondent's] union withdrew [the respondent's] grievance for wrongful dismissal prior to the scheduled arbitration hearing. The City submits that [the respondent] is using the Act as a weapon against the City in retaliation for the decision to terminate [the respondent's] employment, which is contrary to the purpose of the Act and amounts to an abuse of access rights under the Act. (See Order No. 110-1996, June 5).

2. I accept the evidence provided by the City that the respondent's requests are systematic in nature. The City informs me that between June 16 and October 22, 1997, the respondent made numerous access requests, seventeen of which were opened as formal freedom of information request files. These comprised 40 percent of the requests to the City in that time period. Thirteen were for records related to the handling of [the respondent's] grievance or about persons connected with [the respondent's] grievance. The City has responded to 15 of these requests, releasing numerous records, including over 400 pages in response to one request alone, without charging fees. It made fee estimates in the other instances. The City indicates that over 100 hours of staff time have been devoted to responding to the respondent's requests already, and that an additional 100 hours may be required to respond to the remaining requests.

3 I accept the evidence provided to me by the City that a response to one request by this respondent frequently leads to additional requests for more records and information relating to the same topic.

4. The City has only one person dedicated to all access and privacy issues, and these requests from the respondent have interfered with that person's ability to perform his various duties.

42

5. The City submits that its long history of dealing with the respondent since May, 1995 suggests that [the respondent's] concerns, real or imagined, cannot be addressed through disclosures under the Act. The respondent has been provided with records [the respondent] is entitled to under the Act and under the grievance procedures. The City submits that the respondent has failed to show any wrongdoing on the part of the City, and there is no evidence to suggest that responding to any future requests would change that.

6. The City submits that there is no possibility of satisfying this respondent under the Act and that [the respondent's] requests for access continue to grow in size and complexity. It argues that "this is indeed an exceptional case which warrants the application of the section 43 remedy."

7. The City submits that the respondent is not using the Act for the purposes for which it was intended and that [the respondent] is not acting in good faith. The City further submits that [the respondent's] actions are bringing the Act into disrepute in the eyes of the staff in departments affected by the respondent's requests.

8. I accept the evidence provided to me by the City that the respondent's requests are repetitious in nature. I find that the respondent makes requests relating to the same subject matter and has on several occasions asked specifically for the same records [the respondent] had already received from the City.

9. I find on the evidence that the respondent's access requests are unreasonably interfering with the operations of the City.

In summary, I find that the access requests of [the respondent] to the City of Vancouver are repetitious, systematic, and unreasonably interfere with the operations of the City.

Therefore, I authorize the City of Vancouver to:

1. Disregard all past and present requests from [the respondent] for records related to the handling of the respondent's wrongful dismissal grievance against the City, or about any individuals connected with the respondent's grievance, as well as for records of, or related to, the Carnegie Centre.

2. Disregard all future requests from [the respondent] for records related to the handling of the respondent's wrongful dismissal grievance against the City, or about any individuals connected with the respondent's grievance, as well as for records of, or related to, the Carnegie Centre.

January 29, 1998

David H. Flaherty
Commissioner

****

In the matter of a reconsideration of an authorization to disregard requests from an applicant issued to the City of Vancouver under Section 43 of the Freedom of Information and Protection of Privacy Act

1. Description of the reconsideration

This decision reconsiders an authorization which I issued to the City of Vancouver (the City) against the applicant on January 29, 1998 under Section 43 of the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165 (the Act). Section 43 provides as follows:

> *If the head of a public body asks, the commissioner may authorize the public body to disregard requests under Section* 5 *that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body.*

The applicant is a former City employee who was terminated for cause in 1995 after working for approximately six months at the Carnegie Centre. Through his union the applicant unsuccessfully grieved the termination, then in 1997 he commenced making access to information requests to the City. Most of the requests related in some way to his termination and grievance. Whether and why the grievance was withdrawn or "settled" by the union became a central focus of the applicant's efforts to obtain information from the City. He came to believe that the City, his union, and the arbitrator had conspired to prevent the grievance from being dealt with justly, and that the City was inadequately and dishonestly processing his access requests in order to cover the tracks of this previous misbehaviour.

Over time, the City concluded that the applicant's requests met the parameters for an authorization under Section 43 of the Act and finally applied to me for such permission in November 1997. I received extensive submissions from the parties. The applicant's submissions included allegations of wrongdoing by the City and its representatives, which the City regarded as reckless and unsupported by evidence. On January 29, 1998 I issued an authorization which permitted the City:

(a) to disregard all past and present requests from the applicant for records related to the handling of his wrongful dismissal grievance against the City, or about any individuals connected with his grievance, as well as for records of, or related to, the Carnegie Centre.

(b) to disregard all future requests from the applicant for records related to the handling of his wrongful dismissal grievance against the City, or about any individuals connected with his grievance, as well as for the records of, or related to, the Carnegie Centre.

The applicant petitioned the Supreme Court of-British Columbia for judicial review of the Section 43 authorization. This resulted in a judgement of the Court dated June 24, 1998, which upheld the authorization in relation to existing requests. However, the Court set the authorization aside in relation to future requests and remitted that issue back to me for reconsideration.

Following the Court's decision, my Office and one of my counsel were informed by counsel for the City and counsel for applicant that its clients were engaging in discussions with a view to agreeing on what authorization, if any, should be made to restrain future requests. As a result, and with the parties' consent, I decided to allow those discussions to take their course before embarking on the reconsideration.

In early November 1998, my Office received an extensive submission from the applicant requesting rescission of the Section 43 authorization issued on January 29, 1998. Almost simultaneously, my Office also received a letter from counsel for the City which attached a joint submission signed by counsel for both parties. The joint submission requested a Section 43 authorization permitting the City of Vancouver to:

> *[d]isregard all requests made by the [applicant] except a request for a single record or a collection of records within a file that is made by the [applicant] when another request is not pending. A request is pending until the 30 day period provided for in Section 53(2)(a) of the Freedom of Information and Protection of Privacy Act has expired, or all proceedings before the Commissioner or a Court of law relating to the request has been completed, whichever be later.*

I asked the parties to clarify these seemingly inconsistent submissions. Shortly thereafter, the applicant withdrew from the joint submission signed by his counsel (who henceforth ceased to act on the matter), because in the applicant's estimation the City had not lived up to terms of a settlement between the

parties. Following this development, I informed the City and the applicant that I would proceed to reconsider the future requests issue, which had been sent back to me by the Court, and also to decide the applicant's request for rescission of the Section 43 authorization altogether. To that end, I received further submissions from both parties.

2. The Section 43 authorization issued on January 29, 1998

The evidence before me on the City's initial request for a Section 43 authorization against the applicant established that, between June 16 and October 22, 1997, he made numerous access requests, seventeen of which were opened as formal freedom of information request files. These comprised 40 percent of the requests to the City over that time period. Thirteen requests were for records related to the handling of the applicant's grievance or about persons connected to it. The City had responded to 15 of the requests, releasing numerous records, including over 400 pages in response to one request alone, without charging fees. For the other requests, the City had given fee estimates. The City had *only* one staff person dedicated to access to information and privacy issues. He estimated that he had spent 100 hours dealing with the applicant's requests and that he would have to spend an additional 100 hours to respond to the remaining requests. Other City staff had also spent time locating and retrieving records but did not keep track of their time.

In the Section 43 authorization that I issued on January 29, 1998, I found that the applicant's requests were systematic. I accepted that a response to one request from the applicant frequently led to additional requests for more records and information concerning the same topic. I further found that the applicant's requests were repetitious in that he made requests relating to the same subject matter and had sometimes requested the same records he had already received from the City. I also found that the applicant's requests were unreasonably interfering with the City's operations within the meaning of Section 43 of the Act.

The Section 43 authorization addressed access requests initiated before and after the authorization was issued. It did not apply, however, to all requests by the applicant to the City, just those requests relating to the grievance, individuals connected to the grievance, or the Carnegie Centre.

3. The judgement of the Supreme Court of British Columbia

The judgement of the Court, issued on June 24, 1998, confirmed that Section 43 of the Act empowers me to make prospective orders, a proposition previously accepted in the case of Crocker v. British Columbia (Information and Privacy Commissioner), [1997] B.C.J. No. 2691 (S.C.). The judgement also found that:

> *The prerequisites for the Commissioner exercising his discretion under s. 43 are found in the section. There must have been requests for information of a repetitive or systematic nature which have unreasonably interfered or would unreasonably interfere with the operations of the public body. There is no prerequisite that the requests be made in bad faith or be frivolous and vexatious.*

In upholding the authorization in relation to requests initiated before the authorization was issued, the Court accepted that there was a sufficient factual and legal supporting foundation:

> *. ..the Commissioner concluded that the access requests made by [the applicant] were repetitious, systematic and unreasonably interfered with the operations of the City. It was reasonable for the Commissioner to have authorized the City to disregard all pending requests from [the applicant] and there is no basis for setting aside the authorization as it pertains to pending requests.*

In setting aside the authorization in relation to future requests, the Court noted the distinction made in Crocker between requests for access to an applicant's own personal information versus general information. The conclusion in Crocker that, in the absence of extenuating circumstances, it was wholly disproportionate to authorize a public body to disregard all future requests for information was also noted and considered to mostly reflect concerns about access to one's own personal information. The Court went on to observe that, because one cannot predict with certainty that a future request will unreasonably interfere with the operations of a public body, it would be inappropriate to deprive an applicant of a right to make a request. It nonetheless found that circumstances could exist which would warrant an authorization to disregard future requests for general or personal information:

> *. . . there will be situations where it would be appropriate for the Commissioner to authorize a public body to disregard all future requests for general information where the applicant has so abused his or her right of access to records that the Commissioner is able to conclude with reasonable certainty from the nature of the previous requests that any future request by the applicant would unreasonably interfere with the operations of the public body. Coultas J. gave potential examples of such situations in Crocker when he referred to applicants making repeated requests in bad faith or making frivolous and vexatious requests. But only in very exceptional circumstances would it be appropriate, in my view, for the Commissioner to authorize a public body to disregard all future requests for personal information (or a type of personal information).*

The Court also accepted the proposition from Crocker that the remedy under Section 43 for restraining requests must redress and be proportionate to the harm to the public body involved:

> *In attempting to minimize such harm, it is too drastic to authorize the public body to disregard all future requests for records (or a type of records) when it is not known whether any such requests will cause unreasonable interference with the operations of the public body. This is especially so when the requests relate to personal information for two reasons. First, personal information is more restricted by its nature and it is less likely that a request for personal information will unreasonably interfere with the operations of the public body. Second, the applicant has a stronger claim to have access to records of a personal nature than to general records.*

The Court stated that:

> *An appropriate remedy in respect of future requests would be to authorize the public body to disregard such requests in specified circumstances. An example of such a remedy is the one which Coultas J. found acceptable in Crocker, namely, that the public body was required to deal with only one request at a time. Another example would be to authorize the public body to disregard a request for records if it would take the staff of the public body more than a specified number of hours to comply with the request. I have no doubt that there are other ways to describe circumstances that would allow the public body to disregard future requests which would be likely to unreasonably interfere with its operations. It should also be borne in mind that if the authorization is not adequate in describing circumstances which would permit the public body to disregard a future request which it believes will unreasonably interfere with its operations, the public body may again apply under s. 43 for an authorization to disregard that request.*

The Court concluded that I had erred by permitting the City to disregard future requests from the applicant without regard to whether they would unreasonably interfere with its operations. I consider that the task remitted back to me is to decide the future requests issue with specific regard to the logic and factors first explained in Crocker and expanded upon by the Court in this case. This will involve examining whether there is evidence from which I can conclude with reasonable certainty that future requests from the applicant would unreasonably interfere with the City's operations. If such evidence

exists, I should analyze the harm involved and craft a remedy which is proportionate to it. An authorization to disregard all future requests for information relating to the applicant's termination and grievance, such as the one which Court set aside, will only be justified in very exceptional circumstances.

4. The applicant's request for rescission of the Section 43 authorization

The applicant has provided voluminous submissions in support of his request for rescission of the Section 43 authorization, but they distil down to two reasons: **1)** bad faith and dishonesty by the City, and 2) conflict of interest and bias by me and my Office.

(1) Bad faith and dishonesty by the City

The applicant argues that information not previously known to him shows that the City was untruthful in responding to his requests for information about the grievance and in its dealings with my Office. Under the following headings, he offers a detailed breakdown of the evidence that he believes shows the City's "willfully perjurious, false and misleading statements:"

(a) documents in the custody of the City's outside lawyer were withheld in breach of a settlement agreement between the applicant and the City;

(b) information in the file of the City's outside lawyer shows that the City "lied" in 1997 correspondence to the applicant;

(c) the City "lied" in some of its communications to the Commissioner's Office, thereby obtaining the Section 43 authorization "by fraudulent means";

(d) information in the file of the City's outside lawyer shows that the City "lied" in the judicial review proceedings;

(e) information in the file of the City's outside lawyer shows that the City had an understanding with the union to "derail" the grievance through a "devious scheme."

The heart of the applicant's attack is described in the "Final Summary" of his initial submission for rescission of the Section 43 authorization:

> *In this case, the City of Vancouver made false statements to me, the Commissioner and the B.C. Supreme Court about my access requests and my grievance. By stating under oath that my access requests were repetitious and systematic when it knew that was not the case, the City obtained authorization from the Information and Privacy Commissioner to disregard my requests for information by fraudulent means. The City and the Union used their lawyers to set up and perpetuate a fraud.*
>
> *By stating under oath in proceedings under the Freedom of Information and Protection of Privacy Act and the Judicial Review Procedure Act that my grievance was withdrawn by the Union, when it had been settled, the City committed perjury. In short, the City knowingly made false statements to the Commissioner and Mr. Justice Tysoe. This is the stuff of which perjury and criminal prosecutions are made.*
>
> *These acts, and others, were part of a pattern that began as an effort to derail my grievance by settling it secretly, and continued as an effort to prevent the information being disclosed in response to my access requests for information under the FOI Act, and in its submissions in legal proceedings under Freedom of Information Act [sic] and the Judicial Review Procedure Act.*

> *Finally, by withholding documents in contravention of the Freedom of Information Act [sic] in 1997, lodging an application for authorization to disregard all past, present, and future requests for information from me under Section 43 of the Freedom of Information Act [sic], obtaining authorization from the Information and Privacy Commissioner to effectively extinguish my right of access to my personal information in its custody for life, thereby forcing me to file a petition for judicial review of the lifetime ban, the City caused a substantial delay in the filing of my fair representation complaint against my union with the B.C. Labour Relations Board.*
>
> *As well, the City further delayed the review of my application for reconsideration of the Labour Relations Board decision in BCLRB No. B315/98, when it breached its agreement (stemming from the judicial review) to release to me all the documents in the [H.] file not covered by solicitor and client privilege in a timely manner. The Court tendered its decision in the judicial review on June 24, 1998, but the City did not produce the records at issue until three months later, on September 25, 1998.*
>
> *In my view, this submission represents substantial information that may constitute grounds for rescinding the Section 43 authorization granted to the City of Vancouver by the Information and Privacy Commissioner of British Columbia on January 29, 1998.*

(2) Conflict of interest and bias by the Commissioner and his Office

The applicant argues in his reply submission that I lack jurisdiction to deal with the Section 43 authorization, because of bias and conflict of interest arising from my Office's involvement as a party in his application to judicially review the Section 43 authorization, because I am being asked to reconsider evidence from the City which I previously relied upon in granting the Section 43 authorization, and because the applicant was not granted as much time as he wanted to prepare his reply submission.

5. The City's request for authorization to disregard future requests

The City continues its position that the applicant's requests and accompanying demands and accusations have unreasonably interfered with the operations of its information and privacy staff. It argues that a main cause of the interference has been the volume and frequency of requests and correspondence, and that an appropriate remedy to redress the harm to the City, without unnecessarily depriving the applicant of his rights under the Act, would be to restrict him to making one access request at a time. The specific terms requested are the same as those in the joint submission from which the applicant withdrew in November 1998:

> *. ..to disregard all future requests made by [the applicant], except for a request for a single record or a collection of records within a single file that is made by [the applicant] when another request is not pending. A request is pending until the 30 day period provided for in Section 52(2)(a) of the Act has expired, or all proceedings before the Commissioner or a Court of law relating to the request have been completed, whichever be later.*

6. Analysis

For the reasons explained below, I reject the applicant's request for a rescission of the January 29, 1998 Section 43 authorization, and I grant the City's request for a Section 43 authorization to disregard future requests from the applicant, but not in terms as broad as those requested by the City.

48 A. Applicant's request for rescission of the Section 43 authorization

(1) Bad faith and dishonesty by the City

(a) documents in the custody of the City's outside lawyer were withheld in breach of a settlement agreement between the applicant and the City

My role under Section 43 of the Act is to decide whether the applicant's requests are repetitious or systematic in nature and for that reason would unreasonably interfere with the City's operations. Section 43 also gives me discretion with respect to granting or crafting a remedy. I am not in a position in this inquiry to judge whether a contract for settlement existed and was breached by the City. I also fail to see how it is relevant here to explore the propriety or effectiveness of the settlement discussions between the City and the applicant, which followed the Court's decision on the judicial review, or to sort out whether the applicant was justified in withdrawing from the joint submission for settlement, which was put to me by the parties in early November. If I were required to formulate a conclusion in this area, I would find no more than that the applicant's settlement discussions with the City apparently did not work out as he hoped for or expected and that this does not undermine the grounds for the Section 43 authorization that I issued on January 28, 1998.

(b) information in the file of the City's outside lawyer shows that the City "lied" in 199'7 correspondence to the applicant

This allegation has several aspects. Firstly, the applicant alleges that the City "lied" in correspondence which stated that the file of the City's outside lawyer contained only three records responsive to an access request by the applicant. I accept the City's explanation that the correspondence in question was not written in relation to the file of the City's outside lawyer. It was written in relation to the City's grievance file and the Carnegie Centre files.

Secondly, the applicant alleges that the City "lied" in correspondence which stated that records in the custody of the City's outside lawyer were records of the arbitrator and thus were not in the custody or control of the City under the Act. I accept the City's submission that it did its best to comprehend the intent behind the applicant's access requests. I find that on a fair reading of the tangled correspondence between the parties, the City was asserting that the arbitrator's file was outside its custody and control, not the file of the City's outside lawyer.

Thirdly, the applicant alleges that the City "lied" in correspondence which stated that the grievance had been withdrawn. It is not for me to determine whether the grievance was "withdrawn" or "settled." However, I can and do accept the City's submission that the only references to the matter having been "settled" in the records involved in the applicant's access requests are in two documents created by the arbitrator:

> *The [applicant's] assertion that his grievance has been settled, rather than withdrawn, appears to be based on two documents created by [the arbitrator] or his office. [He] was the arbitrator selected by the parties to hear the grievance. The two documents in question are a brief letter confirming that the grievance will not be proceeding and a statement of account, both dated March 11, 1997. Both documents indicate that the "matter has been settled." The [applicant] assigns great significance to these statements and quotes a labour law text definitions of "settled" and "withdrawn."*

For the [applicant] to now allege, on a basis of a remark in a letter confirming that the matter was not proceeding, that the grievance was "settled" reveals either a total lack of understanding on the issues or an intentional desire to mislead. [The arbitrator], whose letter and invoice are the only documents using the word "settled", has been quoted in The Georgia Straight, December 3-10, 1998, (Exhibit 'D') to the effect that all he knew about this matter was that it would not be proceeding to arbitration:

> *!I know nothing about this case. It was in front of me and, sometime before the hearing started, the city told me that it had settled, or that it had gone away. I don't know... The city could have told me that the union has withdrawn, or the union could have told me the union has withdrawn. I just take it that there is no longer an issue,* and *I close my file.'*

Thus [the arbitrator], the author of the documents relied on by the [applicant], clearly made no distinction as to how the matter was resolved and was merely confirming that it would not be proceeding to arbitration. This is hardly evidence on which to base a serious case. Yet this off-hand reference is the basis upon which the [applicant] has made outrageous accusations against the City.

The applicant asks me to conclude that the City was part of a conspiracy to improperly resolve the grievance and that this motivated it to process his requests for access to information about the grievance in inadequate or misleading ways. These accusations are very serious and would require cogent and convincing evidence. From the material before me, I am quite unable to draw the inferences of wrongdoing envisioned by the applicant. The City's information and privacy staff were not required to adopt the applicant's perspective on his termination or grievance or to divine more than what was reasonably apparent from his access requests. In my view, the City made significant and reasonable efforts to assist and be responsive to the applicant. I also find no evidence which establishes or suggests that the City's application for the Section 43 authorization against the applicant was tainted by mala fides or other improper purposes.

(c) the City "lied" in some of its communications to the Commissioner's Office thereby obtaining the Section 43 authorization "by fraudulent means"

(d) information in the file of the City's outside lawyer shows that the City "lied" in the judicial review proceedings

(e) information in the file of the City's outside lawyer shows that the City had an understanding with the union to "derail" the grievance through a "devious scheme"

The applicant's arguments under headings (c), (d) and (e) are essentially reformulations of his arguments under headings (a) and (b). I therefore reject them for the same reasons.

(2) Conflict of interest and bias by the Commissioner and his Office

My Office has been joined as a respondent in two judicial review proceedings brought by the applicant. This is normal. Under Section 15 of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, the decision-maker affected by an application for judicial review must be notified and may choose to participate as a party. Section 5 empowers the Supreme Court to remit the matter for reconsideration and that is what it did in this case with the future requests issue. I find there is no impropriety in me or my Office dealing with this matter. Indeed, I find that my dealing with it is entirely appropriate, given the decision of the Supreme Court issued on June 24, 1998, and the fact that Section 49(l)(c) of the Act precludes my powers under Section 43 from being delegated.

B. City's request for authorization to disregard future requests

The applicant has in the past made repetitious and systematic access requests in relation to his termination and grievance, and those associated with it, which unreasonably interfered with the operations of the City. The applicant is also presently convinced that the City has deliberately processed his access requests improperly and inadequately, though the evidence he relies upon, in my judgement, neither supports nor sustains that conclusion. Indeed, in my judgement it indicates that the City has been entirely reasonable in assisting the applicant and processing his requests for information.

The totality of the evidence leads me to conclude that the applicant is a person who tends to find unacceptable any answers other than those which he seeks and to conclude that unacceptable answers must be motivated by animus against him. Skepticism can be a healthy trait, no doubt, but the applicant's beliefs and conduct in relation to the City have been unreasonable and are likely to continue to be so. In these circumstances, I conclude that the applicant's rights under the Act should be restrained with respect to future access requests to the City, but not so severely as the City proposes.

An authorization under Section 43 of the Act which limits the applicant to one request at a time makes sense in terms of the harm to be addressed. My concerns about the terms put forth by the City are threefold. Firstly, the authorization should be restricted to requests relating to the applicant's termination and grievance and those connected to them. Secondly, the City's proposal that a pending access request should extend to the disposition of any proceeding relating to it under the Act or before a court seems broader than necessary to protect the functioning of the City's information and privacy staff. Though the City's staff may be involved in inquiries under the Act and in judicial reviews and appeals therefrom, its primary duties under the Act are to process and to respond to access requests. For this reason, I think the harm to the City will be addressed, if the applicant is confined to making one access request at a time. As soon as a response to a request is provided by the City or the deadline under the Act for doing so expires, then the applicant should not be restrained from making another request. Thirdly, I question whether a Section 43 authorization of indefinite duration should be made when an authorization of one year's duration may adequately relieve the burden the City has been labouring under and break the cycle of repetitious and systematic requests. If this does not turn out to be so, the City can re-apply for another when this authorization expires.

7. Conclusion

The applicant's request for rescission of the Section 43 authorization dated January 29, 1998, is denied.

The City of Vancouver's request for an authorization under Section 43 relating to future access requests from the applicant is granted, in part, on the following terms:

> The City of Vancouver is authorized under Section 43 of the Freedom of Information and Protection of Privacy Act to disregard the applicant's future requests for records related to his employment or termination by the City, including any individuals connected with those matters and the grievance of the applicant's termination, except for a request for a single record or a collection of records within a single file that is made by the applicant when another request is not pending. A request is no longer pending when it is withdrawn, when the City issues a response or when the time expires within which the City is required by the Act to issue a response. This authorization expires one year after the date of this decision.

February 23, 1999

David H. Flaherty
Commissioner

Date: 19980624

Docket: A98073 **1**
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE JUDICIAL REVIEW
PROCEDURE ACT, R.S.B.C. 1996, C. 241

BETWEEN:

FRANCIS MAZHERO
(PETITIONER)

AND:

THE INFORMATION AND PRIVACY COMMISSIONER
OF BRITISH COLUMBIA and CITY OF VANCOUVER
(RESPONDENTS)

REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE TYSOE

Counsel for the Petitioner: Gerald Fahey

Counsel for the Respondent, The Information and
Privacy Commissioner of British Columbia: Susan E. Ross

Counsel for the Respondent, City of Vancouver: Patsy J. Scheer

Counsel for the Intervenor, Attorney General
of British Columbia: Neena Sharma

Dates and place of hearing: June 4 and 5, 1998
Vancouver, B.C.

[1] The Petitioner, Francis Mazhero, applies for judicial review of two decisions of The Information and Privacy Commissioner of British Columbia (the "Commissioner"). City of Vancouver (the "City") was joined as a Respondent by a consent order at the commencement of the hearing. The Attorney General of British Columbia intervened pursuant to section 8 of the Constitutional Question Act with respect to the Petitioner's argument based on section 7 of the Canadian Charter of Rights and Freedoms.

52

BACKGROUND FACTS

[2] Dr. Mazhero, who is an educational consultant, was hired by the City in November 1994 to work at the Carnegie Community Centre. His employment was terminated in May 1995 in circumstances which I gather were somewhat controversial.

[3] Dr. Mazhero's union filed a grievance in respect of his termination. The grievance was scheduled for an arbitration hearing but it was withdrawn by the union shortly before the hearing was scheduled to take place. I am advised by counsel that Dr. Mazhero has lodged a complaint against his union with the Labour Relations Board and that he requires documents in the possession of the City for the purpose of this complaint.

[4] In 1995 Dr. Mazhero made certain requests of the City for information pursuant to the Freedom of Information and Protection of Privacy Act (the "Act"). The City obtained an order from the Commissioner authorizing it to withhold certain third party information from Dr. Mazhero.

[5] Dr. Mazhero made a further 17 requests for information from the City from June 16, 1997 to October 22, 1997. Some of the requests related specifically to Dr. Mazhero's grievance (e.g., copies of the City's correspondence with the union and the arbitrator). Some of the requests related to arbitrations involving the City generally (e.g., statistical information on all grievances between 1992 and 1996 involving Dr. Mazhero's union). Some of the requests related to people who were related to Dr. Mazhero's employment (e.g., a list of all payments made by the City to the person who was the Director of Carnegie Community Centre at the time Dr. Mazhero was employed at the Centre). Some of the requests were frivolous (e.g., one of the documents disclosed to Dr. Mazhero was a fax cover sheet from the Director of Carnegie Centre to the City Manager which, in an apparent attempt to be humorous, was signed by the Director with the notation "Love and kisses". Dr. Mazhero requested all documents sent by any City employee to the City Manager during the previous five years which contained the words "Love and kisses").

[6] By letter dated November 10, 1997, at a time when the City had responded to 13 of the 17 requests, the City made an application to the Commissioner for an authorization under section 43 of the Act permitting the City to disregard all past, present and future requests from Dr. Mazhero related to his grievance or to any individuals connected with his grievance, as well as records of the Carnegie Centre. Section 43 reads as follows:

> *If the head of a public body asks, the commissioner may authorize the public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body.*

[7] The City's submission to the Commissioner in support of its application was accompanied by an affidavit sworn by the City's Manager of Information and Privacy. The affidavit detailed Dr. Mazhero's requests made in 1997 and the effort required to be expended by City employees in dealing with the requests. The Manager of Information and Privacy estimated that he had spent 100 hours dealing with the requests up to that time and that he would have to spend another 100 hours responding to Dr. Mazhero's remaining requests. Other City employees spent time locating and retrieving records, but they did not keep a record of their time. In the submission itself, the City asserted that Dr. Mazhero was not acting in good faith and that his actions were bringing the Act into disrepute. Dr. Mazhero was notified of the City's application and he made extensive written submissions to the Commissioner.

[8] During the period of time the Commissioner was dealing with the City's application, Dr. Mazhero wrote a letter dated December 15, 1997 to the City taking the position that it had withheld a number of records, including information in a file in the custody of the lawyer who acted for the City in connection with Dr. Mazhero's grievance. The City responded to Dr. Mazhero stating that it had not

withheld records from him and that it would treat his letter as a new freedom of information request. The City did not respond to this request within the 30-day time period prescribed by the Act. By letter dated January 16, 1998, Dr. Mazhero requested the Commissioner to look into the matter.

[9] On January 29, 1998 the Commissioner issued his decision on the City's application. He found that the access requests of Dr. Mazhero to the City were repetitious, systematic, and unreasonably interfered with the operations of the City. The Commissioner noted the City's position that Dr. Mazhero was not acting in good faith but he did not make any finding in that regard. The Commissioner authorized the City to disregard all past, present and future requests from Dr. Mazhero for records related to the handling of his grievance, or about any individuals connected with the grievance, as well as for records of, or related to, the Carnegie Centre.

[10] On February 2, 1998 an officer in the Commissioner's office wrote Dr. Mazhero to advise him that no file would be opened with respect to his January 16, 1998 letter because there was no issue to review in light of the Commissioner's authorization permitting the City to disregard all requests from him.

ISSUES

[11] In this judicial review Dr. Mazhero challenges the Commissioner's authorization dated January 29, 1998 and the decision of the Commissioner's office dated February 2, 1998 declining to undertake a review of the City's failure to respond to the request contained in Dr. Mazhero's letter dated December 15, 1997.

[12] The issues raised by counsels' submissions are as follows:

(a) What is the appropriate standard of review applicable to a decision of the Commissioner under section 43 of the Act?
(b) Did the Commissioner exceed his jurisdiction in his interpretation and application of section 43 of the Act in making the authorization?
(c) Was the Commissioner required to give Dr. Mazhero an oral hearing with respect to the City's application for the authorization?
(d) Did the authorization violate Dr. Mazhero's rights under section 7 of the Charter?
(e) Was the Commissioner required to conduct an inquiry into the City's failure to respond to the request contained in Dr. Mazhero's letter dated December 15, 1997?

DISCUSSION

(a) Standard of Review

[13] Section 43 of the Act has recently received its first judicial consideration in Crocker v. The Information and Privacy Commissioner of British Columbia. In that case, two job stewards working for B.C. Transit made 58 requests for information relating to public safety and job concerns of themselves and other employees. The Commissioner issued an authorization permitting B.C. Transit to disregard all requests for access from the two job stewards for a period of one year and to deal with only one request from them at a time during the following year.

[14] Coultas J. made the following holdings with respect to the standard of review applicable to authorizations under s. 43:

(a) the standard of review of the Commissioner's interpretation of s. 43 is reasonableness simpliciter;
(b) the standard of review of the Commissioner's interpretation of the facts is reasonableness;

54

(c) the standard of review of the Commissioner's authorization to disregard future requests for information is correctness.

Under the long-standing authority of In re Hansard Spruce Mills Limited (in Bankruptcy), I am bound by these holdings and I must follow them.

(b) Application of Standard of Review

[15] In Crocker, Coultas J. made another holding which I consider to be binding on me; namely, that the language of s. 43 imports a remedial power to make prospective orders.

[16] Coultas J. said the following about the remedies encompassed in the Commissioner's authorization:

> *The Commissioner fashioned two discretionary remedies. His discretion is not completely unfettered. The remedy must redress the harm to the public body seeking the authorization. If the remedy is wholly disproportionate to the harm inflicted, it may be set aside. In my respectful opinion, the authorization to BC Transit to disregard all requests for information by these Petitioners for one year was wholly disproportionate and clearly wrong. That authorization prevents the Petitioners themselves from accessing personal information. The Act contemplates that individuals will have free and full access to their own personal information, subject only to the express limitation in s. 19 of the Act.*
>
> *That said, I can conceive of circumstances where requests for information, including personal information, should be prevented by invoking s. 43, because the requests are made habitually, persistently and in bad faith, or are clearly frivolous and vexatious. The Commissioner has not so characterized these Petitioners' requests. He has done so, however, in other cases in which he has invoked s.43. (pp. 31-2)*

[17] Counsel for Dr. Mazhero stressed the distinction between requests for personal information and requests for general information. He argued that Crocker stands for the proposition that a prerequisite for a s. 43 authorization allowing a public body to disregard requests for personal information is a finding that the requests were made habitually, persistently and in bad faith or that the requests are clearly frivolous and vexatious. While I concur that there is an important distinction between requests for personal information and requests for general information, I do not agree that Crocker stands for such a broad proposition. Coultas J. was not purporting to stipulate the criteria which must exist before an authorization relating to requests for personal information may be made. Rather, he was merely giving examples of circumstances where an authorization for the public body to disregard future requests for information may be warranted.

[18] The prerequisites for the Commissioner exercising his discretion under s. 43 are found in the section. There must have been requests for information of a repetitive or systematic nature which have unreasonably interfered or would unreasonably interfere with the operations of the public body. There is no prerequisite that the requests be made in bad faith or be frivolous and vexatious.

[19] Once the prerequisites under s. 43 have been found to exist, the Commissioner may fashion a remedy. In Crocker, Coultas J. stated that the remedy must not be wholly disproportionate to the harm inflicted and he held that an authorization for the public body to disregard all requests for information, including requests for personal information, for a period of one year was wholly disproportionate. He stated that he would have remitted the matter back to the Commissioner had the first year not already expired by the time of his decision. Coultas J. also held that the remedy fashioned by the Commissioner for the second year of the authorization was appropriate.

[20] I have alluded to the distinction between requests for personal information and requests for general information. The distinction is first made in section 2 of the Act which lists the purposes of the Act:

> *The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*
>
> *(a) giving the public a right of access to records,*
>
> *(b) giving individuals a right of access to, and a right to request correction of personal information about themselves,*
>
> *(c) specifying limited exceptions to the rights of access,*
>
> *(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and*
>
> *(e) providing for an independent review of decisions made under the Act.*

Division 2 of Part 2 of the Act contains ten sections setting out the exceptions to the rights of access. Most of these sections relate to general information, and not personal information. The principal section dealing with personal information is s. 19 which authorizes a public body to refuse disclosure of personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.

[21] It makes imminent sense to have more restrictions on access to general information than on access to personal information. In dealing with general information, the Act must balance the objective of giving the public access to records of public bodies against other legitimate objectives, such as the privacy of personal information of other persons and confidentiality of governmental or business interests. These latter objectives do not generally apply to personal information about the applicant because there are no privacy or confidentiality concerns in releasing to an applicant personal information of that applicant.

[22] In addition, an applicant has a right akin to an ownership right in personal information about himself or herself, but no such right can be asserted in general information. This was recognized by the Supreme Court of Canada in R. v. Dyment:

> *Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p.13): "This notice of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." (p. 429)*

[23] Special recognition is also given to personal information in other sections of the Act. For example, s. **31** requires a public body using an individual's personal information to make a decision affecting the person to retain the information for at least one year so that he or she can obtain access to it.

[24] I believe that Coultas J. gave effect in Crocker to the distinction between requests for personal information and requests for general information. He held that, in the absence of extenuating circumstances, it was wholly disproportionate for the Commissioner to authorize the public body to disregard all future requests for information. In so holding, it appears that he was mostly concerned about personal information.

[25] There is another distinction which is very important to a consideration of s. 43; namely, whether the request is pending or is one which has not yet been made. In Crocker, Coultas J. held that s. 43 empowers the Commissioner to make prospective authorizations. However, in making a prospective authorization, the Commissioner must bear in mind the objective of s. 43, which is to avoid requests that constitute an unreasonable interference with the operations of the public body.

[26] When the Commissioner is dealing with a pending request for information, he is in a position to determine that the pending request and the previous requests of the applicant are repetitive or systematic in nature and unreasonably interfere with the operations of the public body. If he concludes that these criteria of s. 43 have been met, it would be entirely appropriate for him to authorize the public body to disregard the pending request.

[27] The situation is different, however, when the Commissioner is dealing with future requests. One cannot predict with any certainty that a request which has not yet been made will unreasonably interfere with the operations of the public body. It would not be appropriate to effectively deprive an applicant from the right to make future requests which would not unreasonably interfere with the operations of the public body.

[28] However, in my view, there will be situations where it would- be appropriate for the Commissioner to authorize a public body to disregard all future requests for general information where the applicant has so abused his or her right of access to records that the Commissioner is able to conclude with reasonable certainty from the nature of the previpus requests that any future request by the applicant would unreasonably interfere with the operations of the public body. Coultas J. gave potential examples of such situations in Crocker when he referred to applicants making repeated requests in bad faith or making frivolous and vexatious requests. But only in very exceptional circumstances would it be appropriate, in my view, for the Commissioner to authorize a public body to disregard all future requests for personal information (or a type of personal information).

[29] As a general rule, even though the Commissioner has determined that the repetitive or systematic nature of past and pending requests represents an unreasonable interference with the operations of the public body, he should not generally authorize a public body to disregard all future requests for records (or a type of records) without regard to whether any such requests will unreasonably interfere with the operations of the public body. As stated by Coultas J. in Crocker, the remedy fashioned by the Commissioner must redress the harm to the public body seeking the authorization. In attempting to minimize such harm, it is too drastic to authorize the public body to disregard all future requests for records (or a type of records) when it is not known whether any such requests will cause unreasonable interference with the operations of the public body. This is especially so when the requests relate to personal information for two reasons. First, personal information is more restricted by its nature and it is less likely that a request for personal information will unreasonably interfere with the operations of the public body. Second, the applicant has a stronger claim to have access to records of a personal nature than to general records.

[30] An appropriate remedy in respect of future requests would be to authorize the public body to disregard such requests in specified circumstances. An example of such a remedy is the one which Coultas J. found acceptable in Crocker; namely, that the public body was required to deal with only one request at a time. Another example would be to authorize the public body to disregard a request for records if it would take the staff of the public body more than a specified number of hours to comply with the request. I have no doubt that there are other ways to describe circumstances that would allow the public body to disregard future requests which would be likely to unreasonably interfere with its operations. It should also be borne in mind that if the authorization is not adequate in describing circumstances which would permit the public body to disregard a future request which it believes will unreasonably interfere with its operations, the public body may again apply under s. 43 for an authorization to disregard that request.

[31] In the present case, the Commissioner concluded that the access requests made by Dr. Mazhero were repetitious, systematic and unreasonably interfered with the operations of the City. It was reasonable for the Commissioner to have authorized the City to disregard all pending requests from Dr. Mazhero and there is no basis for setting aside the authorization as it pertains to pending requests. However, the Commissioner exceeded his jurisdiction by authorizing the City to generally disregard future requests from Dr. Mazhero without regard to whether any such future requests would unreasonably interfere with the operations of the public body.

[32] In the result, I set aside the portion of the Commissioner's authorization permitting the City to disregard future requests for records from Dr. Mazhero and I remit the matter back to the Commissioner in this regard. I should add that I am not foreclosing the Commissioner from concluding that Dr. Mazhero has so abused his right of access to records that any future request by Dr. Mazhero for general information would unreasonably interfere with the operations of the City.

(c) Right to an Oral Hearing

[33] Counsel for Dr. Mazhero argued that to the extent that the Commissioner made a finding of bad faith against Dr. Mazhero, such a finding was not made in accordance with the principles of natural justice because he was not afforded an opportunity to make oral submissions.

[34] It is not necessary to deal with this argument because the Commissioner did not make a finding of bad faith against Dr. Mazhero.

(d) Section 7 of the Charter

[35] Counsel for Dr. Mazhero argued that s. 7 of the Charter gives a constitutional right of privacy and that one aspect of the right is the ability to know what information is possessed by a public body in order to check the accuracy, relevance and uses made of the information.

[36] In view of the fact that I have remitted back to the Commissioner the matter of future requests for personal information, I do not propose to deal with this argument because I believe that the issue is moot. There is liberty to apply if any of the parties do not think that it is moot.

(e) The December 15, 1997 Letter

[37] Although it was not expressly stated to me, I infer that the City did not respond to Dr. Mazhero's letter dated December 15, 1997 because its s. 43 application was pending. As the letter was written after the s. 43 application was made by the City, it falls within the prospective aspect of the s. 43 authorization and I have remitted that aspect back to the Commissioner. Hence, this issue may also be rendered moot. In addition, even if there has been a breach of the procedures required by the Act, this may be an appropriate case for the Court to refuse relief pursuant to s. 9 of the Judicial Review Procedure Act on the basis that no substantial wrong or miscarriage of justice has occurred, and none of the parties made submissions in that regard. Accordingly, I do not propose to deal with this issue but I grant liberty to apply to have the issue determined after further submissions.

CONCLUSION

[38] I set aside the s. 43 authorization as it relates to future requests by Dr. Mazhero and I remit the issue back to the Commissioner.

"D. Tysoe, J."
D. Tysoe, J.

Attachment B(vi)1

Queensland Specialist Review Bodies

Summary of filing fee charges
April 1999

Name of Review Body	Filing fee charge: Yes/No	If yes, how much
Children's Services Appeals Tribunal	No	
Mental Health Tribunal	No	
Liquor Appeals Tribunal	No	
Land Court	No	
Land Appeals Court	Yes	$105.00
Racing Appeals Authority	Yes	$250.00 refunded in whole or part if appeal successful
Queensland Building Tribunal	Yes	$200.00
Queensland Community Corrections Board	No	
Auctioneers and Agents Act Committee	No	
Fishing Industry Appeals Tribunal	Yes	$57.00
Anti-Discrimination Commission	No	
Anti-Discrimination Tribunal	No	
Health Rights Commission	No	

Attachment B(iii)2.

Extract from the Information Commissioner's Annual Report 1997/98

Contracting out of government services

Although it has not yet become a significant issue in cases that have worked their way through to external review under Part 5 of the FOI Act, a subject that is generating considerable interest and concern in other FOI jurisdictions is that of how FOI legislation should accommodate the escalating trend of governments seeking to 'contract out' the performance/delivery of government services.

The issue is thoroughly canvassed in two publications by the Commonwealth Administrative Review Council ("The Contracting Out of Government Services", Issues Paper, February 1997, and "The Contracting Out of Government Services - Access to Information", Discussion Paper, December 1997) and in the Second Report by the Senate Finance and Public Administration References Committee on its inquiry into the contracting out of government services, presented on 14 May 1998. Eoth the Administrative Review Council and the Senate Committee have endorsed the view that accountability, through rights of access to information relating to the performance of government services, should not be lost or diminished because of the contracting out process. They favour an amendment to the *Freedom of Information Act 1982* Cth deeming documents in the possession of the contractor, that relate directly to the performance of the contractor's contractual obligations, to be in the possession of the government agency, and therefore accessible under the FOI Act by application to the government agency, subject to the current exemption provisions. The success of this approach would be dependent on all such contracts imposing obligations on the contractors to create appropriate records and to provide them to the government agency, with periodic auditing of the contractor's adherence to its record-keeping obligations.

It appears that any amendments to the Queensland FOI Act to meet this problem must be co-ordinated with corresponding adjustments to the standard conditions of contract employed by all agencies subject to the Queensland FOI Act which contract out, or may in future contract out, the performance/delivery of some government services. This appears to be an issue which requires early attention to the development of appropriate solutions.