

No 7

RECEIVED

17 JUL 2006

LEGAL, CONSTITUTIONAL AND  
ADMINISTRATIVE REVIEW  
COMMITTEE

14<sup>th</sup> July 2006.

The Research Director  
Legal, Constitutional and Administrative Review Committee  
Parliament House  
George Street  
BRISBANE QLD 4000.

In response to the Committee's invitation, I enclose a submission with respect to a "Report of the Strategic Management Review – Office of the Information Commissioner."

I respectfully request that the Committee give me the opportunity to appear before it at a time suitable to the Committee; give sworn evidence and answer any questions.

I submit that evidence of how the present Legislation contains loopholes which enables it to be subverted or abused (current practice) is a serious aspect of Freedom of Information. There is need for urgent action by the Committee to recommend amendments to the Minister for Justice and Attorney General. As there will be a 5 year time frame until the next review, considerable problems will no doubt arise in that period unless remedial action is taken.

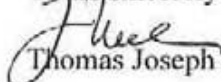
The submission contains three (3) parts, namely:-

- A. List of Recommendations for which I have no comment;
- B. Recommendations upon which I wish to comment; and eight (8) new recommendations for consideration by the Committee.
- C. A Case Study. *How FOI can be used to protect the Guilty.*

Whilst Part "B" contains observations, opinions and suggestions, please let it be recorded that Part "C" – (A Case Study) - is totally supported by Documentary Proof.

Additional material of historical time line is contained in Appendices A, B & C.

Yours sincerely

  
Thomas Joseph Mahon.

REPORT OF STRATEGIC MANAGEMENT REVIEW  
OFFICE OF THE INFORMATION COMMISSIONER  
SUBMISSION – PART “A”

Following upon a reading of the Report, I list herewith the numbered Recommendations upon which I have no comment.

Those Recommendations appear to be ‘machinery’ and some appear to have already been adopted and implemented.

**SECTION A**

**EXECUTIVE SUMMARY**

<u>RECOMMENDATION</u>	<u>NUMBER</u>
External Review Task	1 & 2
Independence of the Office	3
Security and Confidentiality	4 & 5
Conduct of External Reviews	6
Informal Resolution	7, 8, 9 & 10
Decisions of the Information Commissioner	11 & <b>(12 Conditional)</b>
Demand Management	<b>13 only</b>
Timelines	15, 16 & 17
Structure	18 & 19
Workloads	20 & 21
Recruitment and Composition	22 & 23
Staff Training and Development	24 & 25
Strategic Planning and Risk Management	28
Annual Report and other Financial Statements	29 & 30
Relationship to the Ombudsman	31 & 32
Accommodation	33
Applicant surveys	34
Agency Surveys	35
Staff	36
Relationship with JAG	<b>38 (Conditional)</b>

REPORT OF STRATEGIC MANAGEMENT REVIEW  
OFFICE OF THE INFORMATION COMMISSIONER  
SUBMISSION – PART “B”

**SECTION B**

**INTRODUCTION**

**Terms of Reference**

The terms of Reference appear to concern the Operational functions and Efficiency of the “Office of the Information Commissioner” only, with perhaps as well, its “*relationship with public sector entities*” (Relevant Ministers, Parliamentary Committees and the Legislative Assembly accepted)

Whilst the Terms of Reference may not have made provision for such examination, I see little or nothing in the way of examination of the Operational Functions and Efficiency of the various Agencies over which the Information Commissioner is required to exercise Supervision by way of External Review of the Decisions of those very Agencies. There is no indication as to whether or not any Agency is failing in its responsibilities to comply with all aspects of the FOI Act, not only in the Legal aspect but also in the spirit of the Act.

For example, Table 11 – (Page 53) Agency Survey Participation revealed that for the 3 year period 2002-3 to 2004-5 – two (2) Agencies failed to participate in the each of the years ended 03 and 04 and eleven (11) Agencies failed to participate in the year ended 05.

No explanation was given for this failure to participate. Were the 2 Agencies who failed to respond in 03 and 04 repeat offenders in the year ended 05? Why was there an increase from 4% to 16% of Non Responding Agencies in the year ended 2005?

It may have been helpful to the Committee if the identity of the Agencies which failed to respond were listed in the Report. This information could have been cross referenced with the reason for External Review to establish whether such Agencies were performing as required by the Act or due to their probable failure to satisfy Applicants, were causing the increase in External Reviews contrary to the spirit of the Legislation.

If the Department of JAG, the responsible lead Agency for FOI matters, has established a special Unit to train and support FOI Officers Queensland Network and 16% of Agencies fail to respond, what action is being taken to cause compliance by those errant Agencies? Will those Agencies be permitted to “thumb their nose” at authority and the intention of the Legislation?

This aspect will be further discussed later in this submission and in particular in the Case Study.



**RECOMMENDATION – A**

“The Government conduct a Strategic Management Review of Agencies subject to FOI Legislation on a yearly basis. It is noted that a review of the Office of the Information Commissioner is only required to be conducted by the Act every five (5) years. This latter time frame is too long and has the potential to permit deterioration of service, as witnessed in the present report. Further, the FOI Act should be amended to permit a Review of the Office of the Information Commissioner every two years.

**RECOMMENDATION – B.**

“That the Office of the Information Commissioner examine the reason for Applicants requesting External Reviews and that such examination disclose the number of Personal and Non Personal Applications; such information to be conveyed to LCARC on a 6 monthly or yearly basis.”

**RECOMMENDATION – C**

“That the Office of the Information Commissioner record the identity of the Non Responding Agencies and report same to the relevant Minister (Justice and Attorney General) for compulsory compliance. If the present Legislation does not allow for Compulsory Compliance, then the Minister could take an appropriate amendment to the Parliament.

\*\*

It is important not to lose sight of the genesis of the “Freedom of Information Act 1992”

The Second Reading Speech of the Hon D M Wells – Attorney General – Hansard – 5<sup>th</sup> December 1991 – contains the following paragraph:-

*“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.”*

Section 5 (1) of the Act, well known to Member of this Committee, enshrines Parliament’s recognition that, inter alia, *in a free and democratic society, (a) the public interest is served by promoting OPEN discussion of public affairs and enhancing government’s ACCOUNTABILITY; 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.

NB I must presume that the Parliament intended that members of the community would not be defamed by Agencies and Crown employees hiding behind anonymity or the much used “privacy provisions” of the Act.

I submit that the Organizational Structure which should be foremost in the Committee's consideration is set out in the following Diagram. The reason for such structure will become clearer as this submission unfolds.

**DIAGRAM – A.**



**Strategic Review Process**

The review covered the period 2000-2005.

The report provides an example for the year 2003-04 (SEE PAGE 30)

Applications made to Agencies	-	12,288
Referred for Internal Review	-	368 (3%)
Referred for External Review	-	287 (2.3%)

It is somewhat disappointing that a sample of only twenty (20) files – **(0.16% of total) or (6.96% of External Review Files)** was examined. Further, there is no report of what the sample disclosed. A thorough examination could have revealed the reason why an External Review was requested and this information would have been beneficial to this Committee when considering other relevant and serious issues.

At page 20, third last paragraph, it was stated that “A client survey was not conducted as the Office surveys most clients once a file is closed.”

There appears to be some contradiction to this statement at Page 52, Paragraph 1, wherein it is stated that post 2000, “the Office introduced a practice whereby each applicant was surveyed”

Notwithstanding the typographical error in Table 10 – the figure “193” should read “93,” it is noted that in the year 2003-2004 only 149 Applicants were invited to participate in a Survey. Table 7 at Page 41 indicates that there were 256 Applications finalized during that year.

It would appear that the methodology used in the preparation of Tables needs to be reviewed as the figures in the Tables cannot be reconciled.

**RECOMMENDATION – D**

“That the Information Commissioner give favourable consideration to reviewing the methodology used in the preparation of Tables for the information of the Minister and Committee to reflect a clearer position of facts disclosed in the Report”.

I would also ask that the Committee keep in mind the following statistical information when considering Recommendation 14 – Introduction of a Fee for Internal Reviews.

Year 2003-2004: Table 3. (Page30)	Applications made to Agencies – 12,288
	Personal 5,238 (42.6%)
	Non Personal 7,050 (57.4%)

The report did not disclose the identity of Non Personal Applicants. For example, did the Non Personal Applicants consist of Print/TV media; Organizations such as Firms and Companies; Legal Practitioners, Political Parties etc. This issue will be discussed further in this submission.

**SECTION – C****EXTERNAL REVIEW TASK****Conduct of External Reviews.**

I submit that it is frustrating to the average person to be treated as some have been treated by various Agencies.

The average citizen will suffer any inconvenience or problem rather than challenge a Government entity even if they believe they have been seriously wronged. In most cases the average person has no comprehension of Legal – quasi legal matters and balks at the suggestion that they might like to consider a Freedom of Information Application let alone attempt to fill out necessary Forms or Applications and offer a clear and concise outline of what they are seeking (I would suggest that a survey of the average woman and man in the street would support the proposition)

If an Applicant experienced an Application for FOI which failed to satisfy the request and had the ability to then seek an Internal Review which likewise failed to satisfy the request, then it is quite rational for the Applicant to hold the view that the Agency has failed in its duty and thus seek an External Review.

My own experience has shown that the first written response usually supplies some form of information with the usual rider that some of the material is protected by Section 46 (1) (b). Whilst this section is supposed to protect “the privacy of the informant” who supplied “information in confidence” it does nothing to protect the original Complainant/Applicant – against BEING DEFAMED BY FALSE INFORMATION.

Mention is made that this provision may be over ridden if “its disclosure would, on balance, be in the public interest.” In my experience, this latter proviso was not acted upon even though I provided ample evidence to clearly show that the “information provided by the Agency’s



informants was FALSE AND DEFAMATORY. All aspects of the proof supplied by me are readily able to be confirmed by competent inquiry.

When the Internal Reviewer's written response was discussed with that person, it was tacitly agreed that the information supplied to her was NOT LOGICAL and COULD NOT BE SUSTAINED. She indicated that she, having made a Decision, could not reconsider and it was suggested that I apply for an External Review.

Never at any time was I consulted to arrange a face to face meeting with the other parties to this matter. Informal Resolution was never suggested. The Committee in its wisdom may well wish to call parties before it to ascertain the FACTS of this matter.

I await the outcome of the External Review. That Application was submitted on 22<sup>nd</sup> May 2006. An Additional Request for External Review was forwarded by me on 1<sup>st</sup> July 2006. This Application is inseparable from the first Application of 22<sup>nd</sup> May 2006. Notwithstanding that the Application of the 1<sup>st</sup> July 2006 has been denied on the basis of "No jurisdiction" the concluding "Case Study" to this submission will clearly show the relevance of both Applications and the reasons for my **Non Acceptance** of the Decisions relating to the Internal and External Reviews.

I find it somewhat disappointing to find at page 26 the statement, "*The external review process can sometimes generate applicants who are sometimes referred to as vexatious*" and at Page 31 in discussion of possible charges (\$) for Internal Review Applications, the following statement: - "*It may also deter applicants from making frivolous and vexatious applications or simply taking the opportunity for review because the option is there and it is free to the Applicant*"

I would submit that these statements show little or no experience of the initial frustration and anger of Applicants or the time and effort expended in the making of the Original Application followed by Applications for Internal Review and External Review let alone the excessive time taken to achieve resolution.

Nowhere in the report is there any evidence of **frivolous or vexatious** Applications or the number thereof. Of the 1,475 Applications received by the Office of the Information Commissioner in the period 2000-2005 (TABLE 7- Page 41) how many were recorded as **frivolous or vexatious** by the Information Commissioner.

I trust that the Committee will not be swayed by unsubstantiated comment which I submit should be excised from the Report.

### **Informal Resolution**

A further comment at Page 27, namely – "For some applicants mediation is not feasible or appropriate." Unless this statement has a rational explanation, I would suggest it should also be disregarded and the further suggestion of "mediation" fully supported in all cases. Whilst we are familiar with the expression relating to Jury lunches, "please bring 10 lunches and 2 bales of straw." I submit that even the dull witted and or enraged Applicant is entitled to compassionate

understanding and every attempt should be made by those well trained Staff to mediate an acceptable outcome.

### **Decisions of the Information Commissioner**

It is noted at Table 2 – Page 29 – that during the period 2001-2005, a total of 186 Applications for External Review were not determined as the notation indicates that ‘the Information Commissioner “does not have jurisdiction”’

No explanation was forthcoming for the ‘lack of jurisdiction’ or the explicit nature of the Applications. How can any Committee give appropriate consideration to such issues contained in the report if they are not made privy to the facts of the matter?

### **RECOMMENDATION – E**

“That the Information Commissioner give consideration to advising the Minister for Justice and Attorney General of the circumstances which denied the Office jurisdiction in these matters. The denial of jurisdiction leads to the perception of a lack of Justice which must be seen to be done. Perhaps an amendment to current Legislation may overcome the problem.”

### **Demand Management**

The statistical data at Page 30 of the Report has been referred to at Pages 6 and 7 of this submission with a request that the Committee keep such statistics in mind when coming to a decision regarding the Report Recommendation No 14 ‘to consider the introduction of a fee for Internal Review Applications.’”

Similarly, the issue of **frivolous and vexatious** complainants has been challenged at Page 7.

I believe it desirable to firstly remind ourselves why the Freedom of Information Act 1992 was introduced in the first place and to re-examine the suggested Organizational Structure at Page 5 of this Submission.

It is proper to assert that the FOI Act 1992 was brought into existence because of the real or perceived complaints that the public interest in open discussion of public affairs and government accountability was not being recognized in our free and democratic society. (Section 5(1) (2) and (3) of the Act.

Upon the constructive operation of the Act, various persons sought documents from various Agencies to ascertain if they had been treated fairly.

The system is not perfect. I would suggest that it is not improbable that some Agency employees at various levels, junior to senior, have ensured that some of the material in question is not recorded in documents but is conveyed from one person to another by telephone; such a system known colloquially as “the old boys network or club.” I am sure that Committee members are familiar with the Television series “Yes Minister” and “Yes Prime Minister”. Hence the



Applicant is justifiably annoyed when told that even though some event or issue has affected them personally, there is no written record available. This leads to SUSPICION AND THE REQUEST FOR INTERNAL REVIEW AND FINALLY AN EXTERNAL REVIEW.

The fact that three (3) Government instrumentalities out of nine (9) in Australia charge a fee – (Table 5 – Page 32) is no justification for this State to introduce a fee.

The oft touted expression, “user pays” is already causing Applicants to pay an Initial Fee of \$35.25

Based on the figures of 12,288 Applications for FOI in 2003-04, the income for that year alone was \$433,152.00. It is more than possible that the income for the years ended 05 and 06 would be in excess of \$500,000 per year. These figures relate only to the initial Application fee and do not include time and photo copy charges at \$20.80 per hour and 20 cents per A4 photo-copy respectively.

If the initial cause of a problem, perceived or real, is caused by a Government Agency, why is the Applicant required to pay to have the matter clarified or rectified. If the “user pays” proposition is the basis for the recommendation, why are the various Agencies not paying the Department of Justice and Attorney General for its provision of services to the FOI Officers Network and the Office of the Information Commissioner for resolving issued which the Agencies failed to resolve in the first place. Perhaps they are already paying a fee. This information is not disclosed in the Report.

Nowhere in the Report have I found a record of how many Applications for FOI were satisfied in the first instance by the simple provision of documentary material as requested; how many Internal Reviews were brought to a satisfactory conclusion and how many Applications for External Review were upheld by the Information Commissioner.

If the Government wants to stifle the public’s rights to openness, fairness, and government accountability, then by all means increase the present fees to a level where only the financially strong (Print media/Television – Companies – Political parties etc) will be able to benefit.

I recall an elderly friend telling me some many years ago, “When the Revolution comes, citizen, you will have the responsibility and the right, to do as you’re told.” May that day never come to Australia?

I trust that the Committee will reject outright Recommendation No 14 contained in the Report.

#### **RECOMMENDATION – F**

That Agencies be directed to keep records as to the number of Applications for FOI satisfied by first response to the Applicant and number of Internal Reviews satisfied in each financial year. Further, a record be kept by the Office of the Information Commissioner of the number of Applications for External Review upheld in each financial year.

That such statistical information be provided to the Minister and recorded in Annual Reports.

### RECOMMENDATION – G

“That the FOI Act be amended to provide that where any person employed under the provisions of the *Public Service Act 1996* communicates information which may be subject to an FOI application by means other than by writing, that a written record of such communication be retained on the appropriate file. Further, that the person making the communication identify him/her self and the identity of the person to whom the information is communicated, on the appropriate file.

(This recommendation would ensure that individuals accept greater responsibility for their actions and not hide behind a cloak of anonymity)

### TIMELINES

Page 33 of the Report attempts to clarify several issues regarding the inordinate time taken to finalize Applications. E.g. Internal Guidelines should be tightened; Applicant Surveys 2003-04 indicated only 57% of respondents were satisfied with time taken to finalize reviews; targets were rarely met; quality of data was questionable; work volumes contributed to delays; ‘sitting on files’ to avoid judicial review; the Acronym – KPIs in the ultimate paragraph at page 34 is apparently ‘office speak’ and is not defined; a suggestion that failure to meet targets should incur some form of sanction.

I would suggest that most of the criteria relates to the past era which was a time of trial and error for staff of both the Office of the Information Commissioner (Ombudsman-Information Commissioner structure) and staff deployed to be responsible for FOI matters at Agency Level.

Further disruption was caused by loss of staff – 8 out of 14 – on the break up of the former structure and the introduction of the new structure. (See Page 42 of the Report)

Further, it would not be unknown for newly appointed FOI personnel in Agencies, unsure of their duties and responsibilities to “flick pass” the Applications ‘upstairs’ to the experts rather than resolve the issues at Agency Level. This is another possible scenario for the build up of back log Applications for External Review.

However, the REALITY is clearly disclosed in Section D – D.2.5 – (Page 46 of the Report)  
**Flexible Working Arrangements.**

The report does not provide the actual numbers of staff who were employed FULL TIME and the numbers of staff working PART TIME. Did the part time component represent 5, 10 or 50% of the total staff complement?

**Table 7: Workload** at Page 41 of the Report disclosed a decreasing number of staff from 10.6 at 2000-2001 to 8 at 2004-2005. The \*\* below the table advises that “some of these officers worked various part-time arrangements.



Paragraph 1 of Section D.2.5 states inter alia, "the effect of these arrangements was that the only time in the week that all staff of the new Office of the Information Commissioner (post 24 February 2005) were in the Office was Monday mornings.

Section D.1.2 – (Page 40 of the Report) **Workloads** refers to the capacity of full time professional officers completing 35 to 40 files per annum. The operative words are "FULL TIME."

Is it any wonder that excessive time is taken to resolve Applications for External Review and clear backlogs when staff is not available FULL time to carry out the duties and responsibilities of the Office of the Information Commissioner?

A small Office of 14 cannot be managed effectively on a Part Time basis. This Office should not be used as a cast off area for those persons wishing to avail themselves of Part time work. It would be more effective if Part Time staff were placed in a Public Service Staff Pool from where they could be distributed throughout the Service without causing disruption of essential work of a sensitive nature. The person/s who allowed this situation to deteriorate, have much to answer for.

There are ample types of "Leave" available to staff to cover most family commitments.

Whilst the Report's Recommendation 27 is supported in Principle, stronger action is required and if not taken, the next Review will be reporting the same problems.

#### SECTION – D.

#### ORGANIZATION AND MANAGEMENT ISSUES

##### **SECONDMENTS D.2.4**

The Report's Recommendation 26 (Page 46) should be **opposed** by the Committee.

In fact, the recommendation is diametrically opposed to the Report's Recommendation No 3. I would respectfully suggest that Committee Members should refresh their memory by re-reading Page 6 of the Executive Summary and Page 23 EXTERNAL REVIEW TASK – Sec C.2 – at Pages 22 and 23. Independence of the Office of the Information Commissioner

The Office of the Information Commissioner is, *prima facie*, a legally constituted body under the provisions of the FOI Act 1992 which acts in the capacity of a "House of Review" of decisions made by subordinate Agencies.

The independence, duties and responsibilities of the Office of the Information Commissioner should not be contaminated or be perceived to have surrendered its independence by the introduction of Staff from Agencies.

The possible conflict of interest was the paramount reason for dissolving the Office of the Information Commissioner from the Office of the Ombudsman. If it was so essential to dissolve that arrangement, even to the separation of Staff of the Ombudsman from Staff of the



Information Commissioner, how can it now be seriously suggested that Agency Staff should be seconded to the Office and Office Staff to an Agency.

The report does not provide any examples of secondment in any of the Jurisdictions in Australia or New Zealand. The proposition lacks logical explanation and is accurately contradicted by the Third and Fourth paragraphs of Page 23 of the Report which states:-

*“Applicants in external reviews conducted by the Office of the Information Commissioner need to be confident that the Information Commissioner and Office staff are independent and not able to be influenced by any Minister of chief executive of an agency subject to the FOI Act.*

No doubt, this statement would preclude the secondment of Agency Staff apart from CEOs.

*“The fact that the Ombudsman’s Office is subject to FOI and hence external review does lend support to the need to have a clearly independent body undertake this process when it is required. No matter what steps might be taken to minimize perceived and actual conflicts, the potential for conflict was always there while the two offices were within the one organization.”*

The underlining in this latter paragraph is used for emphasis. Surely the same proposition would be involved in the case of Office/Agency secondments.

In any case, where is the necessity for such proposed learning curve by Agency employees when the Office of the Minister for Justice and Attorney General (JAG) is the lead organization and provides training for the FOI Officers Network?

#### **ROLE OF LIAISON OFFICER – E.4 – Page 54**

In view of the role played by JAG in training and support of the FOI Officers Network, no clear benefits have been demonstrated to justify Liaison Officer/Agency Officer associations.


The report indicates a “risk” factor. I suggest that the same principles applying to the non employment of Agency Staff on Secondment are equally valid to the proposition of Liaison Officers.

Staff of the Office of the Information Commissioner should be at ‘arms length’ from those persons whose Decision making processes are to be the subject of independent External Review. Failure to maintain the appearance of and factual Independence will eventually lead to the downfall of public confidence.

I submit that the Reports Recommendation No. 37 should be **opposed** by the Committee.

#### **RELATIONSHIP WITH DEPARTMENT OF JUSTICE AND ATTORNEY GENERAL**

I suggest that Recommendation 38 has merit, conditional on the Information Commissioner retaining total observable Independence.

  
THOMAS J. MITHON

## A CASE STUDY

*A tale of two Agencies*

*Or*

*How FOI can be used to protect the Guilty*

Agency No 1 Caboolture Shire Council

Agency No 2 Department of Housing

### THE FACTS:

Appendix A at Page 18 contains a record of correspondence to and from Agency No 1 and Agency No 2 during the period 13<sup>th</sup> January 2005 to 13<sup>th</sup> February 2006.

What started as a simple request for both Agencies to take appropriate action in relation to a Barking Dog Nuisance occurring between 10pm and 6am on a consistent basis has resulted in instances of concealed multiple Defamation (if not Criminal Defamation) brought to light as a consequence of seeking explanations by virtue of the provisions of the Freedom of Information Act.

The initial information supplied by both Agencies (apart from revealing Defamatory matter) made the usual claims that part of the required material was "Exempt" under the provision of Section 46(1) (b) of the Act.

In the case of Agency No 1 (Caboolture Shire Council) I was informed that I would be required to pay for 150 photo-copies. When the Agency was advised I was exempt from payment, the number dwindled to 88 photo-copies. Of those pages, 23 were duplicate copies. Seventy-one (71) pages were copies of letters to and from Caboolture Shire Council/Minister for Housing which I already had in my possession. Fourteen (14) pages were copies of Internal Caboolture Shire Council documents.

None of those documents were relevant to the Application which sought to obtain a maximum of 9 documents.

Two (2) pages of an internal memo from Mr Cotton to Mr Myatt appear to be comprised from several sources and (1) page purports to be a copy of handwritten notes taken at the time of interview by Mr Cotton of witnesses. There is a discrepancy between the internal memo and the hand written notes.

This response to my FOI Application lead to a request for an Internal Review. After the usual 28 day period, I received a reply that the request for Internal Review was refused on the ground that the Application was "out of time". I had phoned a few days before the receipt of this correspondence as I had not received an acknowledgement of the Application. I spoke with the FOI Officer who advised verbally of his decision. When questioned as to what period of time

was involved in the Application being out of time, he advised "the application was out of time by ONE DAY"

My subsequent Application for External Review has clearly debunked the aforementioned reason for refusal to conduct an Internal Review. Should the Committee wish to be advised of the facts and time factors involved, I will be only too happy to supply such facts.

*The Committee may wish to examine this particular set of circumstances as a classic example of why matters are being referred to the Office of the Information Commissioner for External Review.*

\* \*

In the case of Agency No 2 (Department of Housing) response, it was not surprising to read that "there are no written communications from the Caboolture Shire Council to the Department of Housing or Minister's Office or vice versa." (please see earlier comment at ultimate paragraph of Page 8 and first paragraph of Page 9 re "old boys' network or club" and Recommendation G at Page 10).

The response contained advice as to the release of Briefing Notes with the usual exemptions.

At last, I thought, there might finally be some reasonable explanation for non action by the Department of Housing.

It is extremely difficult to express my absolute shock and utter disgust to read that in the Ministerial Briefing Note Ref 01005/05 dated 2<sup>nd</sup> March 2005 the Minister had been informed by his ANONYMOUS BRIEFING NOTE author that I was responsible for (1) ABUSIVE LANGUAGE (2) THREATENING LANGUAGE and WILFUL DESTRUCTION OF PROPERTY.

Was this defamatory material dreamed up by the Briefing Note Author? Did the author check his facts; ask for proof; check to see if damage to Housing property was recorded or repaired. Obviously not. It is logical to assume that this person was informed of these so called facts by another person.

Who was the person responsible for conveying such allegations? Was it a member of the Housing Commission or a member of the Caboolture Shire Council?

I can provide other examples of downright lies perpetrated throughout this whole disgusting saga and have one signed Statement from a witness and notes and writings from another witness. I am quite prepared to disclose these facts, not lies, to the Committee.

As this information was read by me late on a Friday afternoon, I immediately telephoned the Bribie Island Police Station and made an appointment to see the Officer in Charge at 8am on Monday 10<sup>th</sup> April 2006.



On that date, I showed the Briefing Note to the Officer in Charge and informed him that I was presenting myself for investigation of these offences. I supplied my full and correct name; date of birth and residential address. That Officer informed me that the Police Service records were held on computer and dated back to approximately 1996. He asked me when these alleged offences were committed. I informed him that I could not supply any date but presumed that as I had made complaints to the Caboolture Shire Council and the Office and Minister for Housing, in early January 2005 and the Briefing Note was dated 2<sup>nd</sup> March 2005, then such alleged offences must have occurred between January and March 2005.

The Officer operated a computer and then informed me that there was no record of me as a complainant, suspect or convicted person.

I then outlined these and other matters in an Application for Internal Review. Please refer to ultimate paragraph of Page 6 and the first 3 paragraphs of Page 7 of my submission.

Upon receipt of that Response, I had a telephone conversation with the author and subsequently furnished an Application for External Review.

Having now furnished two Applications for External Review, am I to be considered **frivolous and vexatious**? Will it be considered that I made the Applications because they were **free of charge**? **Should I have been charged another two fees for Internal reviews?**

"He, who steals my purse, steals trash. He, who steals my reputation, steals all."

The second Briefing Note Ref H00383/06 dated 7<sup>th</sup> February 2006 contains equally obnoxious and false statements. If the Committee is interested, I can provide reasonable proof of such assertion.

The Committee might also be interested, (from the aspect of why Applications for External Review are referred to the Office of the Information Commissioner) to examine the Briefing Note of 7<sup>th</sup> February 2006.

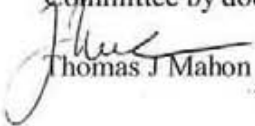
The Briefing Note consists of 2 pages of A4 material. The First Page is not numbered. The second page bears the Page No "3"

When this issue was raised in the Application for Internal Review, the responsible FOI Officer attempted to explain why there was no page "2" based on "information provided to her". She later tacitly agreed that the "explanation provided to her" was not logical.

I await the result of the External Reviews.

\* \* \*

Please note that all matters raised in this Case Study can be proved to the satisfaction of the Committee by documentary and other proof.

  
Thomas J Mahon

ADDENDUM TO A CASE STUDY

With respect to the FOI Application made to Caboolture Shire Council and the charade of 88 pages of documents (less two of some substance), as previously reported herein, an Application was made to the Council for an Internal Review which was refused, based on the assertion that the "the application was out of time by one (1) day.

An application was made for External Review. I have clearly shown in that Application that the "Decision" by a Mr Tytherleigh allegedly made on 3<sup>rd</sup> May, 2006 and sent to me by email on 4<sup>th</sup> May 2006 was not in fact a "Decision" but merely advice that certain documents described by numbers would be released.

Similarly, the hard copy letter of the "Decision" dated 4<sup>th</sup> May 2006 was merely a repetition of the information contained in the email of the 4<sup>th</sup> May 2006.

I would ask the Committee to question the logic of the assertion that "this material was a Decision"

**A Decision must not only state the contents of what is decided but it must set out the material on which the Decision is made and provide that material to the person seeking a Decision.**

**Can the Committee members, in all good faith, imagine a Justice of any Court in the land providing a Decision consisting of a description of documents and numbers and not outline and provide the documents (evidence). Would any Justice say, I made a decision on the 3<sup>rd</sup> May. I wont tell you about it or on what basis or release any documents to you until the 11<sup>th</sup> May.** Such a situation would be ludicrous in the extreme.

I submit that the real Decision was "received by the Applicant by receipt of a letter dated 23<sup>rd</sup> June 2006 and not posted until the 28<sup>th</sup> June 2006- received in the residential letter box on Thursday, 29<sup>th</sup> June 2006."

Although advice was received from External Reviewer, Ms Banks on the 5<sup>th</sup> July 2006 to the effect that an "External Review" could not be conducted due to the Application for Internal Review being "one day late" why would Mr Tytherleigh in his letter of rejection dated 23<sup>rd</sup> June 2006 advise that "if you are not satisfied with my decision ...you may be able to obtain an External Review ...etc." Ms Banks suggested that Mr Tytherleigh could have "exercised a discretion" and conducted the Internal Review. One must wonder why such discretion was not exercised in the first place.

I would also direct the Committees attention to the Queensland Ombudsman's publication "An Easy Guide to Good Administrative Decision Making." – 1, A need to seek Legal Advice – 3, Common Law Principles eg *natural justice* -6, Taken relevant considerations in account - 9, Don't be too rigid ....and the intended practical application of the relevant legislation .. - 15,

weigh of evidence and balance of probabilities.16, Consider the impact of your decisions; the issues have been considered rationally; good reasoning behind the decision and their concerns have not been unfairly dismissed or treated as unimportant.

To be fair to Ms Banks, I understand from our conversation that her superior or superiors were cognizant of the issues and concurred with the advice she had tended to me. It would be interesting to establish what if any Legal Advice was depended upon – apart from the alleged “Out of time” allegation by Mr Tytherleigh.

Should the practice (issuing “A Decision” of the type referred to above and then delaying the issue of material which the applicant requires to enable him/her to make Applications for Internal and External Review) become standard throughout Agencies, then Applicants may as well give up all hope of settling any outstanding objection to the treatment meted out to them.

**RECOMMENDATION – H**

Should the Committee uphold the “Decisions” taken by Mr Tytherleigh of Caboolture Shire Council and Mr B White, Assistant Information Commissioner, then the FOI Act should be amended to clearly establish that the “Date of Decision” is the date upon which the Reasons for Decision (and in appropriate Applications) and any released accompanying Documents are provided to the Applicant.

  
JIJM



APPENDIX –A  
CORRESPONDENCE RECORD

<u>Queensland Department of Housing</u>		<u>Caboolture Shire Council</u>	
13 Jan 05	Formal Complaint lodged <b>NO RESPONSE</b>		
24	Letter to Caboolture Office	24 Jan 05	Identical letter to Council <b>NO RESPONSE</b>
21 Feb	Letter to Minister Swarten	02 Feb	Letter from R Johnson Diary – Mediation
24	{2 letters from Cab Office	04	Letter to CEO
25	{1 “ “ “ “ Respect privacy etc.	21	<b>NO RESPONSE</b> Letter to Mayor Leishman
22	Letter from Peter Johnstone	23	Letter from “
<b><i>NB. Defamatory Briefing Note to Minister dated 2<sup>nd</sup> March 2005</i></b>			
11 Mar05	Letter from Peter Johnstone Council advises no action will be taken against tenant	03 Mar 05	Letter from K Myatt - “Council will continue to investigate”
13 Apr	Letter to Min Swarten	11Apr	Letter to G Parsons Div 1 Councillor – Bribie Is
14	Letter from Peter Johnstone	27 Oct 05	Conference with Parsons
12 May	Letter from Peter Johnstone	02 Nov	<b>11 Months Late Reply to letter of 11 Apr 05 by D Cotton. Irrelevant.</b>
		04 Nov	Letter to Cotton
		24	Letter from Cotton Matter closed
		05 Dec	Letter to Cotton – Hr of duty – Infringement Prosecutions
		09 Jan 06	Letter from Cotton 7am – 4:42 M-F only
		16 Jan	Letter to Cotton – copy Mayor + Councillors. Deceit by Council
20 Jan 06	Letter to Min Swarten – Deceit by Council		
23 Jan	Letter from Bruce Pickard	27 Jan	Visit from D Cotton Declined tape evidence
13 Feb	Letter from Pickard.	31 Jan	Letter from Cotton

Telephoned him later.

Finalised. No action will be taken

**Commenced FOI Applications**

**APPENDIX – B**

**History of FOI Applications – Caboolture Shire Council**

**Date of Postage**

14.02.06}	First Application for Information
16.02.06}	Second Application
21.02.06	Letter from G Milles (FOI Decision Maker) – Application Fee etc
23.02.06	Money Order \$35.25 posted from Bribie Is Post Office
03.03.06}	Letter from G Milles – Raised 9 questions re requested information.
08.03.06}	Date received at letter box (DRALB)
08.03.06	Letter to G Milles answering above questions.
07.04.06}	Letter from G Milles - Notice of Preliminary Assessment of Charges \$154.80
}	for processing and <b>150 photocopies</b> . Note the statement “as it has been decided
}	that you are liable to pay the above charge.”
10.04.06}	DRALB
11.04.06	Telephoned FOI Office, 9.15am – able to sort out unwanted material – applied for 9 documents only – am holder of Pension Card - Offer not accepted – then suggested 150 copies be forwarded to me – advised “there may not be 150 copies”
11.04.06	E mail to Milles with scan of Pension Concession Card – acknowledged by Milles
12.04.06	E mail to Milles with scan of Applicants Response form
04.05.06	E mail from Milles stating “Enclosed is a copy of my Decision - A hard copy will be forwarded in the mail – attached was 4 page letter dated 04.05.06 which stated inter alia, under the heading of <b>Decision - made on 3<sup>rd</sup> May 2006 – “I have identified the following files which relate to your application being:-</b> and then followed a list of Item numbers; Department; File Reference and Description – a similar list of names and numbers followed under the heading of “Documents that are releasable” etc. <b>NO ACTUAL DOCUMENT WERE PROVIDED.</b>

**NB. This letter advised that if I was dissatisfied with the Decision, I could make Application for Internal Review which must be lodged with Council within Twenty eight (28) after the day on which notice of the decision was given to the applicant.**

The question now arises:- what is the date of decision?

Was the “day of decision” the 3<sup>rd</sup> or 4<sup>th</sup> May 2006 or the day on which the released documents were received by the Applicant.

Perhaps FOI Officers can send letters claiming a Decision date and then withhold documents for 28 days to prevent any Internal Review being made by an aggrieved Applicant.

**How could I, the applicant determine whether I wished to apply for an Internal Review of a Decision until I had received and examined the ‘released documents’**

- 05.05.06 Email to Milles acknowledging his email of May 04 2006 and requested released Documents be forwarded to my home as offered in his letter.
- ? Hard copy of letter dated 4<sup>th</sup> May 2006 referred to in email from Milles received. **NO DOCUMENTS INCLUDED**
- 09.05.06** Letter bearing this date from Milles in envelope bearing date posted stamp **11<sup>th</sup> May 2006** received in letter box by mail delivery of **12<sup>th</sup> May 2006**.
- THIS LETTER ENCLOSED 88 PHOTO COPIES OF RELEASED DOCUMENTS AS REFERRED TO IN LETTER OF 4<sup>TH</sup> MAY 2006**
- 01.06.06** (Incorrectly dated 1<sup>st</sup> June 2007) My letter to Principal Officer, FOI, Caboolture Shire Council posted at Bribie Is. As no acknowledgement received Inquiry from Caboolture Shire Staff on 28<sup>th</sup> June 2006 revealed that letter had been received at that Office on 2<sup>nd</sup> June 2006.
- NB. This application was received by Caboolture Shire Council on the twenty first (21<sup>st</sup>) day after receipt of released documents on 12<sup>th</sup> May 2006 and well within the 28 days allowed for Applications for Internal Review.**
- 28.06.06 Telephone inquiry from Caboolture Shire Council and Principal Officer FOI Mr Tytherleigh. Advised Application refused “Out of time.”
- 23.06.06** Letter bearing this date from Tytherleigh in envelope bearing date posted stamp 28<sup>th</sup> June 2006 **received** in letter box by mail delivery **29<sup>th</sup> June 2006**
- 01.07.06 Letter to Office of Information Commissioner – Application for External Review (as suggested in letter from Tytherleigh dated 23<sup>rd</sup> June 2006.)
- 05.07.06 Phone call from Ms Banks, Office of Information Commissioner to advise that External Review could not be conducted of Tytherleigh Decision refusing Application for Internal Review. **LEGISLATION DID NOT PERMIT EXTERNAL REVIEW IF INTERNAL REVIEW APPLICATION WAS OUT OF TIME.** (Lengthy discussion ensued about date of Decision of Milles) Also advised that Review of Qld Housing Internal Review etc was proceeding.



APPENDIX – CHistory of FOI Applications – Hon R Schwarten  
Minister for HousingDate of Postage

14.02.06	Letter of Application for information under FOI provisions.
24.02.06	Letter from Dept Housing FOI acknowledging receipt of Application
01.03.06	Letter from Dept Housing FOI – identity of Deptmental tenant
07.03.06	Phoned FOI office – advised identity not known to me.
05.04.06	Letter from FOI ( <b>outlining Decision including 2 Documents being Ministerial Briefing Notes</b> ) Deleted Matter, etc
NB	This material was received by Registered Post at Bribie Post Office on Friday 7 <sup>th</sup> April 2006
07-10-11- and 12 <sup>th</sup> April 2006. Phone calls to FOI Officer. No Contact.	
13.04.06	Letter to FOI – Application for Internal Review.
24.04.06	Phone call to FOI Office to ascertain if Application received –Advised yes
17.05.06	Letter from FOI Officer C Trickett . Decision .Upheld prior decision.
?	Telephoned Ms Trickett. Discussed explanation re documents. Ms Trickett tacitly acknowledged that explanation was not logical.
22.05.06	Letter of Application for External Review to Office of Information Commissioner
23.05.06	Letter from Information Commissioner Office acknowledgement of Application.
05.07.06	Telephone call from Ms Banks – Advice that matter still under investigation (also advised that Application for External Review – Caboolture Internal Review refused – was not able to be conducted due to provisions of FOI Act. - I requested a formal letter to that effect – advised letter would be posted as soon as possible, probably today.
07.07.06	Letter dated 06.07.06 from B White, Assistant Information Commissioner, Received in post.

## ADDENDUM:

I note with concern that the practice of including an Executive Summary to reports is still current. It has been my experience that to depend on the Executive Summary of any Report (which records the salient points and Recommendations) has the potential to lead the reader to a false sense of security and acceptance.

I note that the Reviewer at Section A - Executive Summary – Page 5 of his April 2006 Report of the Strategic Management Review of the Office of the Queensland Ombudsman warns the reader:-

*"The following summary of the report and associated recommendations represent a précis only of what has been a detailed process of evaluation of the issues. It needs to be read in conjunction with the relevant sections of the report proper."*

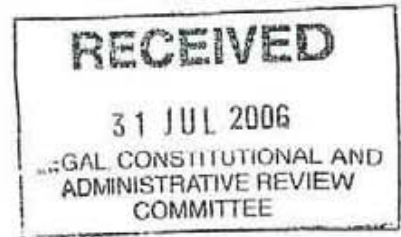
The underlining is used by me for emphasis.

No such warning was tendered in relation to the report concerning the Information Commissioner.

I am of the opinion that "Executive Summaries" should not be used in any instance on behalf of Government Investigations, Reviews or Reports.

Handwritten signature in black ink, appearing to be 'J. M. J. M.' with a stylized flourish above the letters.

No 7 (addition)



28<sup>th</sup> July 2006.

The Research Director  
Legal, Constitutional and Administrative Review Committee  
Parliament House  
George Street  
BRISBANE QLD 4000.

Further to my letter of the 14<sup>th</sup> July 2006 and enclosed submission, I wish to advise that page 16 – “Addendum to a Case Study” contains three (3) date errors.

Please have that page amended by the insertion of the following paragraph in lieu of the 3<sup>rd</sup> last paragraph of that page.

“I submit that the real Decision was “received by the Applicant by receipt of a letter dated 9<sup>th</sup> May 2006 – not posted until the 11<sup>th</sup> May 2006 - received in the residential letter box on Thursday 12<sup>th</sup> May 2006.”

\* \* \*

Additional material for consideration by the Committee.

I enclose a copy of a letter dated 6<sup>th</sup> July 2006 from the Assistant Information Commissioner B White.

The second paragraph of that letter contains the statement “.. for technical legal reasons, the Information Commissioner does not have jurisdiction to assist you at this stage.”

Apart from the alleged “out of time” reason, the writer does not explain “technical legal reasons.” The statement, “does not have jurisdiction to assist you at this stage” could imply that the Information Commissioner may be “able to assist me at some stage in the future.” The statement is somewhat ambiguous.

I recently contacted Miss Banks at the Office of the Information Commissioner and in discussion, referred to the recent High Court of Australia decision which allowed a matter, some 30 to 35 years out of time (Alleged rape) to be now considered by the Courts and in view of the requirements of the Information Commissioner to consider all Superior Court Decisions, would this Decision be taken into account. Miss Banks advised that that case may not be applicable and to the effect that the Office could not conduct an External Review of the Caboolture Shire Council matter as according to the present FOI legislation, the matter was “out of time”

1/2



The third paragraph of the abovementioned letter mentions inter alia, "Whilst CSC (Caboolture Shire Council) is able to exercise its discretion to accept a 'late' application, its decision not to do so, is not reviewable by the Information Commissioner"

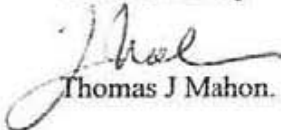
Here is a classic case of an Agency enjoying "discretion" and the Information Commissioner, established to review decisions of Agencies being denied the very discretion so essential to carry out the Object of the Act.

#### **RECOMMEDATION - I**

To enable the Information Commissioner to carry out the Object of the FOI Act in an effective and appropriate manner, an amendment be made to the Act to provide the Information Commissioner with a Discretion to Review any Application for External Review in such cases where an Agency has refused to conduct an Internal Review or any other matter which the Information Commissioner considers necessary.

Thank you for your assistance.

Yours sincerely

  
Thomas J Mahon.

2/2