OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Applications 493/03 & 247/04

493/03 - Participants:

KEVIN LINDEBERG
Applicant

DEPARTMENT OF THE PREMIER AND CABINET
Respondent

247/04 – Participants

KEVIN LINDEBERG
Applicant

DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL
Respondent

DECISION AND REASONS FOR DECISION

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REASONS FOR DECISION

1. Background

1.1 These two applications for review stem from requests by the applicant for access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to certain documents related to the shredding of the Heiner Inquiry documents (as to which, see *Re Lindeberg and Department of Families, Youth & Community Care* (1997) 4 QAR 14 at paragraphs 2-3).

1.2 By letter dated 18 March 2003, the applicant lodged an FOI access application with the Department of the Premier and Cabinet (DPC) in the following terms:

> *I seek public interest access to the following public records:*
>
> 1. *Indemnity Agreement between the Department of Family Services and Aboriginal and Islander Affairs and/or the State of Queensland and Mr Noel Oscar Heiner (Retd Magistrate) ... signed on or about late January/February 1990;*
>
> 2. *Any correspondence between either party to the aforesaid Indemnity Agreement relating to:*
> a. *the lead-up period to its signing;*
> b. *the period when the Queensland Government in May 1996 announced the appointment of two Queensland barristers Messrs Anthony JH Morris QC and Edward Howard to investigate the "Lindeberg allegations";*
> c. *the period when the Morris/Howard Report was tabled in the Queensland Parliament in October 1996 in which it recommended a public inquiry into the "Lindeberg allegations";*
> d. *the period when* The Courier-Mail *in November 2001 alleged that Mr Heiner was aware of the 1988 pack-rape incident of a 14 year-old Aboriginal girl in the course of his late 1989/early 1990 inquiry into the management of the John Oxley Youth Detention Centre at Wacol;*
> e. *the establishment of the 1998/99 Forde Commission of Inquiry into the Abuse of Children in Queensland institutions.*
>
> 3. *Copy of the letter from the Queensland Government (i.e. Department of Premier and Cabinet and/or Department of Justice and Attorney-General) to the Director of Public Prosecutions (DPP) seeking advice in respect of the findings of the October 1996 Morris/Howard Report;*
>
> 4. *Copy of the advice from the DPP to the Queensland Government in respect of point 3.*

1.3 By letter dated 24 April 2003, Ms Colleen Conway, the DPC's FOI Co-ordinator, informed the applicant that she had located 8 folios that fell within the terms of the applicant's FOI access application. Ms Conway decided to refuse the applicant access to those folios on the basis that they were exempt from disclosure under s.36(1)(a) and s.36(1)(e) of the FOI Act.

1.4 By letter dated 22 May 2003, the applicant applied for internal review of Ms Conway's decision. The internal review was conducted by Mr Michael Ries, the DPC's Acting Director, Constitutional and Administrative Law Services. By letter dated 10 June 2003, Mr Ries informed the applicant that he had decided to affirm Ms Conway's decision.

1.5 By letter dated 1 August 2003, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Mr Ries' decision. I will refer to this external review – no. 493/03 – as "the DPC external review".

1.6 By letter dated 22 January 2004, the applicant made an FOI access application to the Department of Justice and Attorney-General (DJAG) in identical terms to those set out at paragraph 1.2 above. DJAG did not process the applicant's FOI access application within the time limit specified by s.27(4) of the FOI Act, and was therefore taken to have refused access to the requested documents. By email dated 23 April 2004, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of DJAG's deemed refusal of access. I will refer to this external review – no. 247/04 – as "the DJAG external review".

2. Steps taken in the external review processes

2.1 Copies of the 8 folios in issue in the DPC external review were obtained and examined. Staff of my office also undertook, over a period of several months, extensive consultations, searches and inquiries in order to establish whether or not there were any reasonable grounds for believing that other documents falling within the terms of the applicant's FOI access application existed in the possession or under the control of the DPC.

2.2 By letter dated 1 December 2003, I provided the applicant with a progress report on the investigation and review of the DPC's decision. I informed the applicant that:

(a) I considered that the 8 folios that the DPC had identified as falling within the terms of the applicant's FOI access application dated 18 March 2003 (comprising a Cabinet decision and the official record of a Cabinet submission) did not, strictly speaking, answer the description in item 1 of the applicant's FOI access application, but that they did seem to indicate that a separate document answering the description of an Indemnity Agreement between Mr Heiner and the State of Queensland would not exist;

(b) I was of the preliminary view that, in any event, the 8 folios qualified for exemption under s.36(1)(a), s.36(1)(d) or s.36(1)(e) of the FOI Act; and

(c) I was of the preliminary view, based on the information then before me, that there were no reasonable grounds for believing that additional documents falling within the terms of the applicant's FOI access application, existed in the possession or under the control of the DPC.

2.3 I also set out, in detail, the various searches and inquiries that staff of my office had made in respect of 'sufficiency of search' issues, and the information that had been received in response to those searches and inquiries. I informed the applicant that inquiries had been made with DJAG about the existence of the documents to which the applicant was seeking access, and that DJAG had confirmed that copies of the documents referred to in items 3 and 4 of the applicant's FOI access application existed in DJAG's possession. However, DJAG could find no record of copies of those documents having been forwarded to the DPC. (I therefore suggested to the applicant that he may wish to apply to DJAG for access to the relevant documents, although it appeared to me that the documents were *prima facie* subject to legal professional privilege, and likely to qualify for exemption under s.43(1) of the FOI Act.)

2.4 In the event that he did not accept the preliminary views I had expressed, I invited the applicant to provide written submissions and/or evidence in support of his case. The applicant responded by letter dated 18 January 2004, in which he requested clarification of a number of issues. In particular, he requested clarification that the legal advice by the former Director of Public Prosecutions (Mr Miller QC) to which he sought access in item 4 of his FOI access application *"is not now and has never been held in Cabinet archives"*.

2.5 Further inquiries were then made with the DPC. Despite its earlier advice that it did not hold a copy of Mr Miller QC's advice, further searches of Cabinet records conducted by the DPC located a copy of a Cabinet decision made in response to an oral submission to Cabinet in March 1997, by the then Attorney-General Mr Denver Beanland. Attached to that decision was a copy of Mr Miller QC's legal advice to the former Attorney-General in respect of issues arising from the Morris-Howard report.

2.6 By letter dated 8 March 2004, I responded to the various issues raised by the applicant in his letter dated 18 January 2004. I informed the applicant that the DPC had located a copy of Mr Miller QC's advice, and that, in my preliminary view, the Cabinet decision, and the copy of Mr Miller QC's advice held by the Cabinet office, qualified for exemption under s.36(1)(a), s.36(1)(d) and/or s.36(1)(e) of the FOI Act. In the event that he did not accept my preliminary view in that regard, the applicant was invited to lodge written submissions and/or evidence in support of his case for disclosure of the documents.

2.7 On 30 March 2004, the applicant telephoned me to advise that he had made an FOI access application to DJAG for the same documents listed in his FOI access application to the DPC. He had not received a response to his application from DJAG and therefore intended to apply to the Information Commissioner for review of DJAG's deemed refusal of access to the documents. He asked for an extension of time within which to respond to my letter dated 8 March 2004, so as to allow him time to lodge his application for external review of DJAG's deemed refusal of access. The applicant stated that he wished both reviews to be dealt with together.

2.8 As noted at paragraph 1.6 above, by letter dated 23 April 2004, the applicant applied to the Information Commissioner for review of DJAG's deemed refusal of access.

2.9 By letter dated 17 May 2004, I wrote to the applicant in relation to both the DPC and DJAG external reviews. I reiterated the current status of the DPC external review. In respect of the DJAG external review, I informed the applicant that DJAG had provided copies of the documents that it had located in response to his FOI access application dated 22 January 2004, namely, an undated letter (and attachments) from former Attorney-General Beanland to Mr Miller QC, requesting legal advice, and an electronic version of Mr Miller QC's advice in response. I informed the applicant of my preliminary view that

the undated letter (and attachments) qualified for exemption under s.43(1) of the FOI Act, and that the electronic version of Mr Miller QC's advice qualified for exemption under s.36(1)(f) of the FOI Act.

2.10 In response, the applicant telephoned my office and repeated an earlier request for a meeting with the Information Commissioner. He subsequently reduced this request to writing, contained in a letter dated 20 May 2004, and said that he wanted to meet with the Information Commissioner, the Deputy Information Commissioner, and the respondent agencies, to discuss a "serious question of law" relating to Mr Miller QC's advice.

2.11 I responded by letter dated 21 May 2004, informing the applicant that I was the delegate of the Information Commissioner's powers (under s.90 of the FOI Act) with responsibility for the conduct of these reviews, and for making a decision under s.89 of the FOI Act in respect of these reviews. I further informed him that, as delegate of the Information Commissioner's powers in that respect, I possessed the discretion to determine the procedure to be followed in the course of the reviews, and that I considered that there was no question of law relevant to the reviews that the applicant could not address by way of written submissions. I said that that there was no point in the applicant meeting with the Information Commissioner, as the Information Commissioner had not had, and would not have, any involvement in the reviews.

2.12 By letter dated 7 June 2004 to the Information Commissioner, the applicant raised allegations of real or apprehended bias against the Information Commissioner and the Information Commissioner's delegates, and submitted that no authorised decision-maker in the Office of the Information Commissioner could properly adjudicate the question of "public access" to Mr Miller QC's advice. The applicant therefore requested that the Information Commissioner exercise his discretion under s.97 of the FOI Act to refer the matter to the Supreme Court for determination:

> *I am making such a request on the following grounds:-*
>
> - *That all (delegated or otherwise) decision-makers under the* Freedom of Information Act 1992 *in this matter are or may be tainted by real or apprehended bias and cannot properly adjudicate the matter of public access to the 6 January 1997 DPP's advice to the Borbidge Queensland Government in respect of the findings and recommendations of the Morris/Howard report;*
> - *That the 6 January 1997 DPP's advice is:*
> *(a) unlawful; and*
> *(b) covers up crimes;*
> - *That interpretation of the "no public interest" test of section 36 of the* Freedom of Information Act 1992 *advanced and embraced by the Office of the Information Commissioner suggesting that even evidence of a fraud or crime in a Cabinet record, submission or related document or thing may remain exempt is unlawful.*
>
> ...
>
> *It is against this background, I respectfully submit that you cannot properly delegate this matter to subordinates for adjudication but rather, it must go to a higher authority: the Supreme Court of Queensland.*

2.13 As regards the documents in issue, the applicant submitted that Mr Miller QC's advice was unlawful and should be disclosed in the public interest. The applicant argued that s.36(1) of the FOI Act must be interpreted as being subject to a public interest exception. I will discuss the applicant's submissions in that regard in further detail below.

2.14 Subsequent investigations undertaken by staff of my office in preparing this matter for decision revealed that the 8 folios identified by the DPC as falling within the terms of the applicant's FOI access application (see paragraph 2.2(a) above) had been tabled in Parliament on 30 July 1998 by the Premier, Mr Beattie, and were available to the public on request from the Parliament's Bills and Papers Office. That information was conveyed to the applicant, who subsequently advised that he did not wish to pursue access to those 8 folios. Accordingly, those folios are no longer in issue in the DPC external review.

2.15 In making my decision in these reviews, I have taken into account the following material:

- the contents of the matter in issue;
- the applicant's FOI access application to the DPC dated 18 March 2003, his FOI access application to DJAG dated 22 January 2004, his internal review application to the DPC dated 22 May 2003, and his applications for external review dated 1 August 2003 (in respect of the DPC) and 23 April 2004 (in respect of DJAG);
- the DPC's initial and internal review decisions dated 24 April 2003, and 10 June 2003, respectively;
- information provided by various persons in response to 'sufficiency of search' inquiries made by staff of my office (all of which was conveyed to the applicant in my letters dated 1 December 2003, 8 March 2004 and 17 May 2004); and
- the applicant's written submission dated 7 June 2004.

3. Allegations of bias

3.1 The applicant has raised allegations of bias, or reasonable apprehension of bias, against the Information Commissioner and all of the Information Commissioner's delegated decision-makers. He has submitted that the issues for determination cannot be impartially decided by the Information Commissioner or any of his delegates, but should be referred to the Supreme Court for determination under s.97 of the FOI Act.

3.2 The applicant's allegations of bias against the Information Commissioner, Mr Bevan, relate to the position which Mr Bevan previously held as Deputy Director of the Official Misconduct Division of the then Criminal Justice Commission (now the Crime and Misconduct Commission) and Mr Bevan's alleged involvement, in that capacity, in various investigations and inquiries surrounding the shredding of the Heiner Inquiry documents.

3.3 However, upon their receipt, these cases were allocated by the Deputy Information Commissioner to my supervision (in accordance with standing arrangements), as cases involving 'sufficiency of search' issues and straightforward exemption claims. In my letter to him dated 21 May 2004 (see paragraph 2.11 above), I informed the applicant that I would be the delegate of the Information Commissioner's powers under s.90 of the FOI Act with responsibility for conducting the reviews, and for making a decision under s.89 of the FOI Act.

3.4 To the best of my knowledge, there are no facts or circumstances which might preclude me, on the grounds of bias or reasonable apprehension of bias, from making a decision under s.89 of the FOI Act in respect of the substantive issues remaining for determination

in this review. I do not consider that there is anything in the way in which I have conducted these reviews which might cause a fair-minded observer to have a reasonable apprehension that I may not bring an impartial and unprejudiced mind to the resolution of the relevant issues.

4. 'Sufficiency of search' issues

4.1 In dealing with a 'sufficiency of search' issue, the questions I must answer (as stated at paragraphs 18 and 19 of the Information Commissioner's reasons for decision in *Re Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464) are:

(a) whether there are reasonable grounds to believe that the requested documents exist, and are documents of the agency, as that term is defined in s.7 of the FOI Act; and if so,

(b) whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of the particular case.

4.2 In my letter to the applicant dated 1 December 2003, I explained in detail the various searches and inquiries that had been conducted by staff of my office in an effort to locate any additional documents falling within the terms of the applicant's FOI access application dated 18 March 2003, and the results of those searches and inquiries. I reiterated aspects of those searches and inquiries in my letters to the applicant dated 8 March 2004 and 17 May 2004. In the event that the applicant contended that further relevant documents ought to exist in the possession or under the control of the DPC or DJAG, I invited the applicant, on several occasions, to provide a written submission:

(a) specifying the grounds which he said afforded a reasonable basis for believing that the DPC or DJAG held additional documents falling within the terms of his FOI access applications, but which had not yet been identified and dealt with by those agencies; and

(b) attaching copies of any relevant documentary evidence which tended to support the grounds for a reasonable belief, and explaining the relevance/significance of any such annexed documents; and

(c) specifying what further searches and inquiries the applicant said the DPC or DJAG should reasonably be required to undertake in an effort to locate any such additional documents.

4.3 Apart from his request that the DPC conduct a search of Cabinet archives in an effort to locate a copy of Mr Miller QC's advice (which search was successful in locating a copy of the requested document), the applicant has provided no material or evidence in support of a contention that it is reasonable to expect that additional responsive documents ought to exist in the possession or under the control of either respondent agency.

4.4 The contents of the Cabinet documents referred to in paragraphs 2.2(a) and 2.14 above (which have been tabled by the Premier and are publicly available) indicate that Mr Heiner was indemnified by a decision of Cabinet, rather than pursuant to a separate indemnity agreement. Accordingly, I am satisfied that there are no reasonable grounds for believing that a separate indemnity agreement exists. There never was any reasonable basis for believing that DJAG would hold copies of documents responsive to items 1 or 2 of the relevant FOI access applications, and the DPC has conducted extensive searches for documents responsive to item 2, with no result.

4.5 On the basis of the material before me, as communicated to the applicant in my letters dated 1 December 2003, 8 March 2004 and 17 May 2004, I am satisfied that there are no reasonable grounds for believing that additional documents, responsive to the terms of the applicant's FOI access applications dated 18 March 2003 and 22 January 2004, exist in the possession or under the control of the DPC or DJAG. I am satisfied that the search efforts made to locate any additional responsive documents have been reasonable in all the circumstances of these reviews.

5. Matter in issue

5.1 The matter remaining in issue in these reviews is as follows:

- review no. 493/03 (DPC) –

(i) official record of a Cabinet decision, with attachment comprising -

(ii) memorandum of advice dated 6 January 1997 from former DPP Mr Miller QC to former Attorney-General Beanland.

- review no. 247/04 (DJAG) –

(iii) undated letter from former Attorney-General Beanland to former DPP Mr Miller QC, with attachments; and

(iv) electronic draft of document (ii).

6. Application of s.36(1) of the FOI Act to documents (i), (ii) and (iv)

6.1 Section 36(1) of the FOI Act relevantly provides:

> ***36. Cabinet matter***
>
> ***(1)*** *Matter is exempt matter if—*
>
> *(a) it has been submitted to Cabinet; 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*
>
> ... .

6.2 During the course of the reviews, I expressed to the applicant my preliminary view that documents (i) and (ii) qualified for exemption under s.36(1)(a), s.36(1)(d) and/or s.36(1)(e) of the FOI Act. Document (i) is an official record of a Cabinet decision. Document (ii) is an attachment to document (i). Document (i) records that former Attorney-General Beanland tabled document (ii) before Cabinet, pursuant to an oral submission made to Cabinet.

6.3 As to document (iv), I expressed to the applicant my preliminary view that that document, which is an electronic draft of Mr Miller QC's advice, qualified for exemption under s.36(1)(f) of the FOI Act, on the basis that it is a draft of a document that has been submitted to Cabinet, as per s.36(1)(a), and that also forms part of an official record of Cabinet, as per s.36(1)(d).

6.4 I explained to the applicant that s.36(1) turns on what are essentially questions of fact. If the material facts are established, matter is exempt, irrespective of whether disclosure of the particular matter would have any prejudicial consequences. Moreover, I explained that s.36(1) is not subject to a public interest balancing test, which means that, in the application of s.36(1), no account is to be taken of public interest considerations which might favour disclosure of matter which falls within one of the defined classes or categories of exemption in s.36(1).

The applicant's submissions

6.5 In his submissions in response dated 7 June 2004, the applicant focussed on Mr Miller QC's advice. He stated that he was aware of the contents of the advice, although he did not hold a copy. He did not explain how he could have become aware of the contents of the advice. (The Crown in right of the State of Queensland is entitled to assert legal professional privilege over Mr Miller QC's advice, and that privilege could not be intentionally waived other than by the Attorney-General, or another Minister acting with the authority of Cabinet in that regard.) The applicant contended that Mr Miller QC's advice contained an "unlawful interpretation" of s.129 of the *Criminal Code 1899* Qld, and that it "covered up" crimes.

6.6 In that regard, the applicant relied upon a recent ruling by Judge Samios of the District Court prior to the commencement of the trial in *R v Douglas Roy Ensbey* (Samios DCJ, Brisbane, 11 March 2004, unreported), declining to strike out a charge under s.129 of the *Criminal Code* of destroying a document that may be required in evidence in a judicial proceeding, even though no judicial proceeding was on foot at the time the document was destroyed. I have read a transcript of that ruling. At p.2 of the transcript, the Crown Prosecutor suggested to the court that there were "very real problems" with the charge under s.129 of the *Criminal Code*, saying: "it seems to me, on reading section 129, that it really presumes that there is a judicial proceeding on foot". However, the Crown Prosecutor did not expound further on that issue. After brief argument from the defendant's counsel, Judge Samios expressed the view that s.129 was wide enough to cover the potential for a proceeding to arise in the future. The charge under s.129 was allowed to proceed. No detailed arguments, along the lines of Mr Miller QC's interpretive approach to reconciling the respective ambits of s.129, s.132 and s.140 of the *Criminal Code*, were raised for consideration by Judge Samios.

6.7 The applicant has argued that Mr Miller QC's advice cannot qualify for exemption under s.36(1) of the FOI Act because s.36(1) must be read as containing a public interest exception:

> *It is not possible for you and/or others to conduct this application without having read the content of the DPP's advice, and therefore, should you and/or others still decide to proceed with this application against my clear wishes and deny me public access by your decision, you and/or others will be declaring that the so-called "no public interest test" of section 36 of the* Freedom of Information Act 1992 *allows unlawful advice and/or*

submissions to Executive Government (i.e. Cabinet or Governor-in-Council) covering up serious crime involving the Executive Government of Queensland itself and others engaging in the serious crimes of:

(a) destroying documents required in evidence in a judicial proceeding; and
(b) destroying public records concerning abuse of children in State care et al to be withheld from public access and scrutiny even in the face of such undeniable knowledge.

I hold to the principle that the Crown must not engage in crime, nor cover it up.

I suggest that the present interpretation of section 36 of the Freedom of Information Act 1992 *applied by the Office of the Information Commissioner is unlawful. In my opinion, it is an affront to all notions of open and accountable government in a democratic society purportedly governed by the rule of law where no one, including the Executive, is supposed to be above the law.*

Analysis

6.8 As I indicated at paragraph 6.4 above, s.36(1) of the FOI Act does not incorporate a public interest balancing test. I can see nothing in the terms of s.36(1), or in its intended scope of operation, which would justify the implication of a public interest exception. As explained by the Information Commissioner in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at p.67 (paragraph 17):

> *The exemptions in respect of Cabinet matter and Executive Council matter (ss.36 and 37) on the other hand, do not require any judgment to be formed about the likely effects of disclosure. Matter in a document is exempt upon proof of the facts which bring it within the prescribed class, irrespective of whether disclosure of the contents of the document would cause any damage to the public interest. This reflects Parliament's judgment that the maintenance of the convention of collective responsibility of all Ministers for decisions of Cabinet and advice tendered to the Governor by Executive Council (through protection of the confidentiality of Cabinet deliberations and decisions, and of Executive Council deliberations and advice) is a public interest of such importance to the proper functioning of our system of government that no other public interest considerations should be permitted to take precedence over it.*

6.9 While the Information Commissioner has criticised the unnecessarily broad scope of the s.36(1) and s.37(1) exemptions following amendments made in March 1995 (see *Re Lindeberg* at p.18, paragraph 12), the legislative history (see *Re Beanland & Ors and Department of Justice and Attorney-General & Ors* (1995) 3 QAR 26 at pp.36-45) leaves me in no doubt that, in passing the 1995 amendments, Parliament intended that exemption under s.36(1)(a) should apply, without exception, to any document submitted to Cabinet, unless Cabinet itself decided to officially publish the document (see s.36(2) of the FOI Act).

6.10 This does not mean that a document submitted to Cabinet could never be obtained for use as evidence in a criminal proceeding, by use of a court's coercive powers to compel the production of documents: see *The Commonwealth v Northern Land Council* (1993) 67 ALJR 405 at pp.408-409. However, the FOI Act establishes a self-contained statutory

scheme of access to documents of agencies (as defined) and Ministers. Section 21 of the FOI Act confers a legally enforceable right of access to documents of agencies and Ministers, but the right is subject to the conditions and exceptions provided for in the scheme of the FOI Act. My jurisdiction as a delegate of the Information Commissioner is confined to applying the law as enacted by the Queensland Parliament in the FOI Act.

6.11 I accept that where an exemption provision in the FOI Act contains a public interest balancing test, evidence that disclosure of matter in issue would expose a crime or fraud would be likely to give rise to one or more public interest considerations favouring disclosure of the matter in issue (which must then be balanced against the public interest favouring non-disclosure that is inherent in the satisfaction of the initial test for exemption). However, s.36(1) is not an exemption provision of that kind.

6.12 Accordingly, even if I were satisfied that there are public interest considerations favouring disclosure of Mr Miller QC's advice, that is not a relevant consideration when applying s.36(1) of the FOI Act.

6.13 The respondent agencies possess a discretion under s.28(1) of the FOI Act to give access to matter which is exempt matter under s.36(1), or any other exemption provision in the FOI Act (see *Re Norman and Mulgrave Shire Council* (1994) 1 QAR 574 at paragraph 13), and the existence of public interest considerations favouring disclosure of matter which is otherwise exempt under s.36(1) may be relevant to the exercise of that discretion.

6.14 However, in a review under Part 5 of the FOI Act, the Information Commissioner is specifically deprived of the discretionary power possessed by Ministers or agencies (under s.28(1) of the FOI Act) to permit access to exempt matter: see s.88(2) of the FOI Act. The only issue for my determination, therefore, is whether the documents in question meet the requirements for exemption under s.36(1) of the FOI Act.

6.15 For the reasons indicated at paragraphs 6.2-6.3 above, I find that document (i) is exempt matter under s.36(1)(d) of the FOI Act, document (ii) is exempt matter under s.36(1)(a) and s.36(1)(d) of the FOI Act, and document (iv) is exempt matter under s.36(1)(f) of the FOI Act.

6.16 As regards the applicant's contention that Mr Miller QC's advice contains an unlawful interpretation of s.129 of the Criminal Code, I note that I am constrained from discussing the contents of Mr Miller QC's advice (see s.87 of the FOI Act). Moreover, the issues for determination in this case do not require me to assess the correctness or otherwise of that advice. The fact that Mr Miller QC may have given s.129 of the *Criminal Code* a particular interpretation, which differed from a view expressed some years later by a District Court judge, does not render Mr Miller QC's advice "unlawful". Lawyers are frequently called upon to provide advice about issues of statutory interpretation and often reach differing views in that regard. I find it difficult to accept that an objective reader of Mr Miller QC's advice would find it other than a careful, reasoned and detailed analysis of the complex issues about which he had been asked to advise, in light of the evidence available to him at that time.

7. Application of s.43(1) of the FOI Act to document (iii)

7.1 Document (iii) comprises an undated letter (and attachments) from former Attorney-General Beanland to former DPP Mr Miller QC, requesting legal advice.

7.2 Section 43(1) of the FOI Act provides:

> ***43.(1)*** *Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.*

7.3 Following the judgments of the High Court of Australia in *Esso Australia Resources Ltd v Commission of Taxation* (1999) 201 CLR 49, the basic legal tests for whether a communication attracts legal professional privilege under Australian common law can be summarised as follows. Legal professional privilege attaches to confidential communications between a lawyer and client (including communications through their respective servants or agents) made for the dominant purpose of -

(a) seeking or giving legal advice or professional legal assistance; or
(b) use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.

Legal professional privilege also attaches to confidential communications between the client or the client's lawyers (including communications through their respective servants or agents) and third parties, provided the communications were made for the dominant purpose of use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.

7.4 It has been held by Australian courts that a person holding office as Director of Public Prosecutions may stand in a professional relationship of legal adviser to clients, such as the Attorney-General, who seek legal advice or provide instructions (see the discussion in *Re Ferguson and Director of Public Prosecutions* (1996) 3 QAR 324 at paragraph 39, and the cases cited there).

7.5 In this case, it is clear on the face of document (iii) that, in his capacity as Attorney-General, Mr Beanland was seeking legal advice or professional legal assistance from Mr Miller QC, in Mr Miller's capacity as Director of Public Prosecutions, in relation to certain issues. I am satisfied from my examination of document (iii) that it comprises a confidential communication between client and legal adviser, made for the dominant purpose of seeking legal advice or professional legal assistance. There is no evidence of any conduct that could involve waiver of the privilege attaching to document (iii), nor is there any other contention that document (iii) is disentitled to the privilege. I find that document (iii) is subject to legal professional privilege, and that it is exempt matter under s.43(1) of the FOI Act.

DECISION

8.1 In review no. 493/03, I decide to vary the decision under review (being the decision dated 10 June 2003 by Mr Michael Ries of the DPC), by adding the findings that document (i) is exempt matter under s.36(1)(d) of the FOI Act, and document (ii) is exempt matter under s.36(1)(a) and s.36(1)(d) of the FOI Act.

8.2 In review no. 247/04, I decide to vary DJAG's deemed refusal of access by making the specific findings that document (iii) is exempt matter under s.43(1) of the FOI Act, and that document (iv) is exempt matter under s.36(1)(f) of the FOI Act.

8.3 As regards 'sufficiency of search' issues, I find that there are no reasonable grounds for believing that additional documents, responsive to the terms of the applicant's FOI access applications dated 18 March 2003 (to the DPC) and 22 January 2004 (to DJAG), exist in the possession or under the control of the DPC or DJAG. I am satisfied that the search efforts made to locate any additional responsive documents have been reasonable in all the circumstances of the respective cases.

8.4 I have made this decision as a delegate of the Information Commissioner's powers, under s.90 of the FOI Act.

.....

RACHEL MOSS

ASSISTANT INFORMATION COMMISSIONER

Date: 30 July 2004