

V I C T O R I A

**ALLEGATIONS RAISED CONCERNING
THE ACTIVITIES OF THE
OPERATIONS INTELLIGENCE UNIT
AND OTHER RELATED ISSUES**

**FINAL REPORT
of
THE
OMBUDSMAN**

May 1999

Ordered by the Legislative Assembly to be printed

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Mr President and Mr Speaker

In October 1997 a series of articles were published in *The Age* newspaper concerning the activities in the late 1980's and the early 1990's of a unit within the Victoria Police known as the Operations Intelligence Unit.

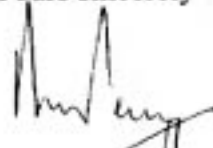
These articles prompted many complaints to the Ombudsman that the activities of the Operations Intelligence Unit as described in the articles in *The Age* were improper. I determined to investigate the complaints under the provisions of Section 86N (4) (b) (i) of the Police Regulation Act 1958.

Several other issues have arisen in the course of my investigation, including the question of whether the records of the Special Branch of the Victoria Police, disbanded in 1983, were destroyed as claimed by police at that time.

This third and final report examines the circumstances of the reappearance of six Special Branch files in January 1998 and the broader question of the fate of the Special Branch files.

In accordance with Section 86I of the Police Regulation Act 1958, I now present my final report.

Yours sincerely



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1. INTRODUCTION.

This is the third and final report concerning an investigation into the non-criminal intelligence gathering activities of the Victoria Police.

As readers of the two preceding interim reports on this matter will be aware, one of the issues under investigation has been the question of the fate of files held by the Special Branch at the time of its disbandment in 1983. The destruction or otherwise of these files and their subsequent whereabouts has been the subject of repeated controversy since the closure of Special Branch. This report details the evidence I have discovered and the conclusions I have reached regarding this issue.

I feel it necessary to apologise in advance for the fact that this report may be heavy going for the reader. By necessity it deals with a large amount of very detailed evidence in relation to which many possibilities and permutations must be considered. I have attempted to arrange the information in digestible “bites” associated with a conclusion, or in some cases a question, which logically follows. It is my hope that this method allows the information, and my reasoning, to be more easily followed.

2. BACKGROUND.

2.1 SIXTEEN YEARS OF CONTROVERSY, RUMOURS AND ALLEGATIONS.

On 5 July 1983, Mr Race Mathews, Minister for Police, announced that Special Branch would be disbanded and that all files, except those which were of continuing operational relevance, would be destroyed. It was also announced that retired Supreme Court Judge, Mr F. Nelson QC, would be engaged to examine those files which police proposed to retain in order to ensure that they were indeed worthy of retention on the grounds of continuing operational relevance.

Since the disbandment of Special Branch the issue of the fate of the Special Branch files has been the subject of varying degrees of public concern on four occasions. I shall briefly outline the circumstances of each.

2.1.1 THE 1983 FOI FIASCO.

The first was in 1983, almost immediately after the closure of Special Branch, in what I have referred to in my interim reports as “the 1983 Freedom of Information fiasco”. Within days of the July 1983 announcement of the closure of Special Branch and the intended destruction of most of its files, the Freedom of Information Act 1982 (“the FOI Act”) came into operation. It is apparent from newspaper reports of the time that the imminent commencement of the FOI Act had been overlooked by the Minister when he announced that the Special Branch files would be destroyed. He made a further announcement that the destruction of Special Branch files would be delayed to allow people to have access to their files under the FOI Act.

Neither the Minister nor police gave any indication of how long the destruction of the files would be delayed to allow FOI requests to be made.

My investigators have spent an enormous amount of time examining and analysing the surviving records of the Victoria Police Freedom of Information Branch which relate to the earliest FOI requests received by the Victoria Police. It has been established that by the end of 1983 there had been over 370 applications for access to documents, of which 220 were applications for access to Special Branch files. The majority of these applications were made in July, August and September of 1983 - the first three months of the operation of the FOI Act. Many applicants were surprised when they were told that there was no record of them at Special Branch. In other cases it was acknowledged that there was a Special Branch file and applicants were denied access or given partial access. Invariably, those who attempted to take the matter further by seeking an internal review of the decision were later advised that their Special Branch file had been destroyed along with all other Special Branch materials in August 1983 and that no further action could be taken. No further details were offered to applicants by police.

Not surprisingly, many applicants were very angry and deeply suspicious of these claims by police. Some attempted to take the matter further. At least one took the matter to the County Court where the same explanation was offered and an apology was given by police to the applicant in court. Between September 1983 and January 1984 a total of nine frustrated applicants complained to the Ombudsman about the destruction of their files. Six of the nine also complained of delays in the FOI process.

As each complaint was received, the Ombudsman, Mr Norman Geschke, commenced an investigation into the matter by requesting a written explanation from the Chief Commissioner of Police. In each case the Ombudsman received a response along the lines that there had been a "breakdown in communication" between those responsible for the closure of Special Branch and those responsible for meeting the Force's FOI obligations.

It was explained that the usual process was that the FOI officer went to the Special Branch offices in Fitzroy, assessed the file, photocopied those documents to which access was to be granted and returned to his office leaving the Special Branch file at the Special Branch offices. The Ombudsman was told by police that those responsible for the winding-up of Special Branch and the destruction of the files had not communicated with the FOI officer and were not aware of the requirement to postpone the destruction of Special Branch files until FOI obligations had been met. Consequently, on 18 August 1983, all Special Branch files, except those which had earlier been cleared for retention by Mr Nelson QC, were taken from the offices of the Special Branch to an incinerator in Port Melbourne and were destroyed - including those which were at that time subject to FOI applications. It was put to the Ombudsman that this accounted for the situation where applicants had been granted partial access to their files and were later told that their files had been destroyed, and also accounted for the inability of police to respond to requests received later than 18 August 1983 for access to Special Branch files. Throughout this report I shall refer to this explanation as the "official explanation".

In addition to seeking a written explanation from the Chief Commissioner in each case, Ombudsman's investigators in January 1984 interviewed former Special Branch members who had been responsible for the winding-up of Special Branch and the destruction of its records. Staff of the Victoria Police FOI office were also interviewed. Although the inference was drawn by many observers that the Special Branch files had been destroyed by police with intent to avoid obligations under the FOI Act, nothing which could be described as evidence was found to support this conclusion. The evidence of all police members who were involved in the destruction of the files on 18 August 1983 was consistent. It was not contradicted by any other evidence. The Ombudsman did not locate any of the files which police claimed to have destroyed and he was therefore unable to disprove the claim by police that all Special Branch files had been destroyed. The Ombudsman concluded that he could take this aspect of the matter no further.

That left only the question of the complaints of delay. In December 1983, an Ombudsman's investigator inspected files at the Victoria Police FOI office and made detailed notes of those inspections. These notes, and certain aspects of the Ombudsman's 1983-84 enquiries, will be dealt with below in exhaustive detail. For present purposes it is sufficient to note that the Ombudsman concluded that there was no evidence of a deliberate attempt by police to delay the FOI process. He concluded that the cause of the delays was a combination of the unexpectedly large number of requests, the lack of staff in the FOI Branch, and difficulties caused by the fact that the FOI process was new and unfamiliar territory for all concerned.

It should be noted at the outset that the 1983-84 Ombudsman's investigation was concerned with complaints of delays in the FOI process and with allegations that Special Branch files had been improperly *destroyed*. At this time there had not yet been any suggestion that the files had been improperly *retained*. The general consensus among the 1983 complainants to the Ombudsman appeared to be that police had sought to frustrate the operation of the new FOI Act by delaying applications until such time as the files could be deliberately and improperly destroyed. This was certainly the hypothesis on which the Ombudsman's investigation proceeded. The humiliating nature of the admission by police that they had destroyed the files in error added weight to the general belief that the files probably had in fact been destroyed. The explanation offered by police met with a great deal of public scepticism, but the scepticism was centred on the claim that the files had been destroyed in error rather than the claim that they had been destroyed at all. The possibility that they may not have been destroyed did not emerge until later in the saga.

2.1.2 SEPTEMBER 1988 ALLEGATIONS IN *THE MOORABBIN STANDARD.*

The second public expression of concern about the closure of Special Branch and the fate of Special Branch files occurred in September 1988 when a letter was published in

the *Moorabbin Standard* alleging that all Special Branch files had been transferred to the Counter Terrorist and Explosives Information Section (“the CTEIS”) and that the Special Branch lived on in all but name through the activities of the CTEIS and the Operations Intelligence Unit (“the OIU”). This letter, and its consequences, are discussed in detail in the Ombudsman’s interim report tabled in Parliament on 12 May 1998. Although the letter had an effect within the Force, it appears to have passed largely unnoticed by the wider public.

2.1.3 AUGUST 1989 ALLEGATIONS IN *THE AGE*.

The third eruption of public concern occurred in August 1989. *The Age* published a series of articles in which it was claimed that reporters had seen copies of materials, variously described in the reports as “dossiers”, “a vast index”, “index cards” and “files”, which police claimed to have destroyed in 1983 at the time of the closure of Special Branch. It was alleged that these materials were being circulated inside and outside the Force.

A front page story in *The Age* on 21 August 1989, under the headline “Secret Spy Dossiers Exposed”, contained the following descriptions of the materials seen by *The Age*.

“The material examined by Insight includes photocopies of thousands of index cards which summarised materials on the complete files held by the Special Branch”.

“The material seen by Insight is the card summaries which list the highlights of the full files. There would be summaries on more than 9000 people.”

The Age continued the story on the following day, 22 August 1989. The articles appearing on that day gave edited details of index cards seen by *The Age*.

A front page story in *The Age* on 24 August 1989, under the headline “*How Six Confused Weeks Hold Key to Leaking of Files*”, included the following.

“Insight, from documents it has seen, knows that at least 69 files on individuals were sent to the Operations Intelligence Unit, which looks after protection of VIPs. These files include some labeled in the names of potential victims, including the Prime Minister, Mr Hawke, and leading businessmen including a knight.

The unit was also given dozens of files on other individuals and organisations. They include files on the Ku Klux Klan (noted in supposedly confidential Victoria Police files in its abbreviated form, KKK), the Communist Party of Australia’s Women’s’ Collective”(etc)

This description of documents seen by *The Age* appears to be inconsistent with the descriptions given in the articles which appeared on 21 August 1989 to the extent that the latter description suggests *The Age* had seen more than a photocopy of the index cards. It suggests that *The Age* had seen a list of some or all of the files which were retained by the OIU.

On one hand, the possibility cannot be discounted that the photocopy of the index cards seen by *The Age* had some sort of notation about the destination of the actual file (i.e to be destroyed, to be transferred to CTEIS, to be transferred to OIU). The officer in charge of the closure of the Special Branch, Detective Inspector J. McIver, stated to Ombudsman’s investigators in 1989 that he began to make such notations on the photocopy of the index cards but he soon discontinued this practice because he felt it was of no use. It may be that he noted the transfer of 69 files to the OIU before discontinuing the practice. On the other hand, however, it is significant that the article refers only to files which went to the OIU and not to files which went to any of the other possible destinations which were of equal interest at this point (i.e. to destruction or to the CTEIS). This in turn suggests that the document seen by *The Age* identifying the 69 files came from a source *within* the OIU.

The article concluded with the following.

“... But it seems that a number of copies of the photocopy [of the index cards] have turned up in the possession of a number of people around Melbourne. The trail is so muddy and confused, and the security measures during the crucial time so informal, the State Ombudsman, Mr Geschke, who has been asked to investigate the illegal photocopying, will have his work cut out.”

As a result of the articles, the then Minister for Police, Mr Steve Crabb, made a complaint to the Ombudsman who conducted an extensive investigation into the likely fate of the Special Branch files. It was found that in the last days of Special Branch, when index cards and files were being sorted into those to be destroyed and those to be retained, each index card was attached to the relevant file so that all material concerning a particular subject would be dispatched together. In order to keep administrative control of the process the officer-in-charge of Special Branch directed that a photocopy of the index cards (several to a page) was to be made. It was stated to the Ombudsman that only one photocopy of the cards was made but because there were several thousand index cards it ran to many pages. The photocopy of the index cards was stored in a four-ringed binder which was kept in the desk of the staff member who made it. It was not locked away and was available to all Special Branch staff assisting in the closure of the Branch. The officer in charge of Special Branch at the time of its disbandment stated that the photocopy of the index cards was also destroyed with the last of the Special Branch files.

It must be understood that, in one sense, the index cards could be regarded as the “files” of Special Branch. When a person came to the attention of Special Branch, a card was made up and filed. When the information about that person filled the card, or when other material was received which was not suitable for recording on a card, a file was made up and filed away in filing cabinets. Many people and organisations were mentioned only on index cards and there was no file or dossier relating to them.

The Ombudsman was unable to find the “files” which were seen by *The Age*. *Age* journalists were interviewed by the Ombudsman’s investigators and were questioned closely about the materials they had examined. They claimed the only materials they had seen were photocopies of the index cards. It could not be established with any clarity whether the photocopies the journalists had seen were made before or after holes had been punched to allow storage in the four-ringed binder. There was no evidence that the “files” seen by the *Age* included files of the kind which would be stored in a filing cabinet. The Ombudsman concluded that the “files” seen by the *Age* were most likely to have been a surreptitiously made copy of part or all of the legitimately made photocopy of the index cards. It could not be established when or by whom the unauthorised copy had been made. Although it was accepted that photocopies of at least some of the index cards were still in existence in 1989, the Ombudsman concluded that there was no evidence to support the claim that these materials were widely available to police investigators.

2.1.4 OCTOBER 1997 ALLEGATIONS IN *THE AGE*.

The fourth and most recent burst of public interest in the Special Branch files began in October 1997 when *The Age* published a series of articles concerning the activities of the OIU. The articles included an allegation that, at the time of the 1989 Ombudsman’s investigation, files were removed from the West Brunswick offices of the OIU and hidden away for the duration of the investigation. These allegations were subsequently repeated by a former member of the OIU, Mr Alan Middleton, on a “Four Corners” television program. These allegations were the subject of detailed analysis in my Interim Report of May 1998. For present purposes, the important aspect of these allegations is that they imply that there were files held at the offices of the OIU which should not have been there, such files most probably being the very material for which the Ombudsman was searching at the time – the Special Branch files which it was alleged had not been destroyed.

Further related allegations emerged in December 1997. It was reported in *The Age* that Mr Hugh Selby, former head of the Police Complaints Authority, claimed to have been told by a “very senior” officer at a 1987 lunch that the officer had, in defiance of specific orders to destroy Special Branch files, saved the files from destruction and had them taken to suburban police stations where they continued to be used and updated by police. Mr Selby’s allegations were discussed at length in my Interim Report of May 1998.

In January 1998, *The Age* revealed that it had in its possession six files which, it was claimed, were Special Branch files which police had claimed to have destroyed. *The Age* reported that up to 300 such dossiers had been improperly retained. These files were subsequently produced to my investigators and remain in my possession. *Age* reporters have given evidence under oath to my investigators that the six files arrived at *The Age* by mail from an unknown source in January 1998. This was the first time that there has ever been any physical evidence in the public domain that some Special Branch files have indeed continued to exist when a claim had been made by police that the files in question had been destroyed.

3. THE EVIDENCE

3.1 THE SIX RECOVERED FILES.

As I have stated, the appearance of the six files is the first time any tangible evidence has been produced to give support to the many rumours that some or all Special Branch files were not destroyed as claimed by police. The six files, therefore, were the obvious starting point of an investigation of the matter. The six files relate to the following people.

Coldicutt, K. J.

Dalton, D. & L.

Fehring, I. R.

Halfpenny, K.

Sennett, W. J.

Tattam, V.

They have the following characteristics in common.

- There is no doubt that they are all files which were created and maintained by Special Branch prior to its closure in 1983.
- None of the files have any entries which post date the closure of Special Branch.
- They are “files” in the commonly understood meaning of the word: they are manila folders containing documents rather than being index cards or copies thereof.
- Each of the six files has the related index card stapled to the cover of the file.

- Five of the files (the exception is the Dalton file) are among over 1200 files listed on a document entitled “Destruction Authority for Records in Public Offices” dated 18 August 1983 - the day of the claimed destruction of the Special Branch files. This strongly suggests that it was intended at the time this list was compiled that these five files were to be destroyed. The fact that the index cards are stapled to the front of the files is further evidence that the files were processed or prepared for destruction. The contents of the Dalton file suggest no reason why it might have been selected as being worthy of retention. Given that the relevant index card was also attached to the Dalton file, it is more than possible that this file was left off the “Destruction Authority for Records in Public Offices” in error.

- Each of the six files was subject to a request for access under the FOI Act.

- The request for access under the FOI Act was, in each of the six cases, made between 5 July 1983, the date of the commencement of the FOI Act, and 25 July 1983. The significance of these dates will be discussed below.

- Five of the six files (the exception is the Halfpenny file) appear on a list of file numbers produced to an Ombudsman’s investigator on 12 December 1983 when, in the course of the Ombudsman’s 1983 investigation of the FOI fiasco, the investigator attended the offices of the Victoria Police FOI Branch to inspect the Branch’s files. This handwritten list purports to be a list of the FOI Branch’s files which were not available to the investigator on that day because they were “current files”. (I shall refer to the FOI Branch’s files as “FOI request files”: they were files created by the FOI Branch recording correspondence etc. in relation to individual FOI requests. They are to be distinguished from Special Branch files to which access was sought under FOI.) A photocopy of the handwritten list of unavailable “current files” remains on the Ombudsman’s file. This list and its implications will be considered in exhaustive detail below.

Having regard to these common characteristics, particularly the common connection of all six files with the FOI process, it was plain to me that the 1983 FOI fiasco should be re-examined from a different perspective. Although the passage of 15 years would make this a difficult task, I was not without some strong advantages. I had the records of the 1983-84 Ombudsman's investigation, including transcripts of interviews and interview notes made by investigators. In addition, my investigators secured the remaining records of the Victoria Police FOI Branch relating to applications for 1983 – 84. Unfortunately the FOI request files had been destroyed (in accordance with the requirements of the Public Records Act as part of a regular file culling process), but the index cards kept by the FOI office in 1983 – 84 remained complete. These cards were a valuable resource for my investigators and allowed them laboriously to reconstruct the work of the FOI office day-by-day and file-by-file.

My re-examination of the 1983 FOI fiasco will be in two stages. I will first attempt to give a general overview of the processing of FOI applications in respect of Special Branch files. This general overview will highlight some of the questions about the FOI process which are raised by the recent appearance of the six recovered Special Branch files. It will also provide a framework within which I will then make a detailed examination of the FOI processing of each of the six recovered files. At the conclusion of this process I will be in a position to reach some conclusions about the wider question of the fate of Special Branch files generally.

I will state at the outset that the following examination of the 1983 FOI fiasco is based upon a working hypothesis (which is in turn based upon evidence detailed below at para 4.1) that Special Branch files which were held at the offices of Special Branch at the Fitzroy Town Hall on 18 August 1983 were, as described in the evidence given to the Ombudsman in his 1983 and 1989 investigations, taken on that day to an incinerator in Port Melbourne and were destroyed.

3.2 GENERAL OVERVIEW OF SPECIAL BRANCH FILES AND THE FOI PROCESS.

Prior to the commencement of the FOI Act on 5 July 1983, there existed an FOI Code. The Victoria Police adopted the Code and appointed an FOI officer, Superintendent R. Jensen. Applications under the Code were fewer than had been anticipated, and Superintendent Jensen took leave from 5 July 1983 to 25 July 1983, a period which coincided with the first three weeks of the operation of the FOI Act. In his absence, Chief Inspector Noel Newnham (as he then was) was appointed as the Acting FOI officer. Possibly as a result of the publicity which the closure of Special Branch was receiving at the time, there was an unexpected flood of FOI applications. The vast majority of these were applications for access to Special Branch files. It will be recalled that one of the common characteristics of the six recovered files was that in each case the FOI request was received between 5 July and 25 July 1983.

3.2.1 MR NEWNHAM'S EVIDENCE.

Mr Newnham was interviewed by Ombudsman's investigators in January 1984 as part of the Ombudsman's 1983 investigation. He is now retired and was again interviewed by my investigators in 1998. On both occasions he recalled that he was inundated with FOI applications. He stated that he initially attempted to deal with the many applications by going to the offices of Special Branch rather than having the files brought to his office. He stated that it was his practice to ask administrative staff at Special Branch whether there was a file relating to an applicant. They would refer to the Special Branch index cards and, if there was a file or other documents, they were handed to him. He would then assess the documents, photocopy the material to be released and hand the documents back to Special Branch staff. If there was no record of an applicant he would, upon return to his office, advise the applicant by letter. Importantly, Mr Newnham stated both in 1984 and in 1998 that he soon found this

system to be impractical and that he “very quickly” adopted a process of bringing the Special Branch files to his office on the first floor of police headquarters at 380 William Street.

Mr Newnham’s diary records that he attended the offices of the Special Branch on three occasions during his time as Acting FOI officer – on 4 July, 8 July and 14 July 1983. When interviewed in 1984, Mr Newnham recalled that on the last occasion he took a large number of files back with him. He stated that they were still in his possession when Superintendent Jensen returned from leave and he handed them over to Mr Jensen. In the 1998 interview Mr Newnham considered that, in addition to bringing files back to his office himself, it was possible he arranged to have files delivered to his William Street offices by others. Mr Newnham stated it was possible he left some of the more complex requests for Superintendent Jensen to deal with on his return, but his recollection was very clear that he certainly prepared files for access by photocopying documents and blacking out parts to which access was to be denied. Mr Newnham also stated he recalled returning some files to Special Branch when he had finished with them.

The information gleaned by my investigators from the FOI index cards corroborates Mr Newnham’s recollections. They reveal that Mr Newnham was a very busy man during his time as Acting FOI officer. The FOI role was in addition to his usual duties and, in the fourteen working days between 5 July 1983 and 25 July 1983, the FOI office received over 100 applications for access to documents, of which 91 were requests for access to Special Branch files. By the time Superintendent Jensen returned from leave on 25 July 1983 Mr Newnham had responded to a total of 33 applications, leaving a backlog of 58 for Mr Jensen to complete.

Of the 33 applicants to whom Mr Newnham responded, 31 were advised that there was no record of them at Special Branch. These responses were usually made within 3 or 4 days of the receipt of the application. The FOI index cards show that the remaining two

applicants to whom Mr Newnham responded were cases in which it is clear that Mr Newnham had located a Special Branch file: in one case he offered partial access, in the other he denied access. It is significant that these two cases were among the first applications received by Mr Newnham, having been received on 6 and 7 July 1983. It is possible that these cases may be among the cases Mr Newnham remembers processing at Special Branch. Alternatively, it is possible that it is these two files which Mr Newnham recalls returning to Special Branch when he had finished with them.

It is apparent from the FOI index cards that Mr Newnham adopted a methodical approach to his work and dealt with applications in the order in which he received them. The 31 “no record” responses sent out by Mr Newnham covered requests received by him up until about 15 July 1983. (The cut off is not clear-cut; some requests received a day or two before this date did not receive responses from Mr Newnham, others received a day or two later did receive responses from him.)

The backlog of 58 applications which Mr Newnham left for Mr Jensen’s attention is of particular interest. The six recovered Special Branch files were all subject to applications which come from this group. The 58 applications may be divided into two groups.

d) *Applications received by Mr Newnham prior to 15 July 1983, but to which he did not respond with a “no record” response (20 cases).* It can be inferred in relation to this group that Mr Newnham located a Special Branch file but decided to leave the final decision making to Mr Jensen. This inference is based on the fact that the FOI index cards show that these are the only cases received by Mr Newnham prior to about 15 July to which he did not respond, and that in every one of these cases Mr Jensen subsequently responded to the applicant offering partial access or refusing access to the relevant Special Branch file.

2) *Applications received by Mr Newnham after about 15 July 1983 (38 cases).*

These applications were received in the latter part of Mr Newnham's time as Acting FOI officer. Mr Newnham was obviously carrying a heavy workload and it appears he simply did not reach the stage of sending a response in these cases. However Mr Newnham's evidence to my investigators suggests that it is very probable that, upon receiving the applications, he requested Special Branch to supply the relevant files which, if available, may have been sent to him at William Street while he was still Acting FOI officer.

A diagrammatic representation of the above analysis is set out at **Figure 1** on page 18.

In attempting to determine the whereabouts of files, the matter of Mr Newnham's recollection that he returned some files to Special Branch is of particular interest. It should be noted that it is not necessarily the case that Mr Jensen, when dealing with files which had been left by Mr Newnham for his final decision, ever referred to, or even sighted, the Special Branch file. It is possible that Mr Newnham processed Special Branch files to the point where they were ready for Mr Jensen's signature and then returned them to Special Branch before Mr Jensen returned to duty. However, I believe this possibility to be very unlikely for a number of reasons.

1) It would mean that Mr Jensen simply responded to applicants on the basis of the photocopies left on the FOI file by Mr Newnham without any further question. This simply defies logic. It seems far more probable that Mr Newnham, if he preferred to leave the final decision to Mr Jensen, would also leave the source material against which Mr Jensen could check the preparatory work done by Mr Newnham. It seems probable that Mr Jensen, too, would wish to check Mr Newnham's proposed responses against the source material before he signed a response.

FIGURE 1

**Analysis of the 91 applications received by Mr
Newnham
5/7/83 - 24/7/83**

31 "No Record"
responses by Mr
Newnham.
All for applications
received prior to
15/7/83

1 offer of partial access &
1 denial of access.
These were early
applications, received by
Mr Newnham on 6/7/83
and 7/7/83.

Backlog of 58 files left for
response by Mr Jensen.
Probable that Newnham
sent for, and received,
Special Branch files in
most of these cases.

20 received prior to 15/7 &
left for Mr Jensen to make a
response. All
offered/denied access. This
suggests a file was found,
taken to William Street &
subsequently seen by Mr
Jensen.

10 received after 15/7 & left
for Mr Jensen to respond.
All offered/denied access.
This suggests file found,
taken to William Street &
subsequently seen by Mr
Jensen.

28 "No Record"
responses by Mr
Jensen.
All received by Mr
Newnham after
15/7/83.

2) Mr Jensen has stated to my investigators that, although he could not say that this never occurred, it was his belief that he did not sign offers or denials of access without examining the relevant Special Branch file himself.

3) It is also clear that Mr Newnham did not perform preparatory work in all applications received during his time as Acting FOI officer, particularly those received later in his time acting in the position. In the later cases there is evidence from Mr Newnham to suggest that he was still in possession of files which he handed over to Mr Jensen.

Nevertheless, even though it seems to be unlikely, the possibility cannot be completely dismissed that some files were processed by Mr Newnham and returned to Special Branch without ever being seen by Mr Jensen.

Summary/Conclusion

The above evidence supports the following conclusions in relation to the 91 FOI applications received by Mr Newnham.

- a) In 31 cases Mr Newnham was apparently unable to locate a Special Branch file and responded promptly with a “no record” response.***
- b) In an unknown (but probably small) number of early applications where a Special Branch file was located by Mr Newnham, the Special Branch file was processed at Special Branch. In later cases the Special Branch file was taken/delivered to Mr Newnham’s office at William Street.***
- c) Mr Newnham prepared some cases for release but appears to have left the final decision making in all but two very early cases to Mr Jensen.***

(continued over page)

Summary/Conclusion (continued)

- d) In cases where Mr Newnham left decision making to Mr Jensen it is logical to assume that he also left the Special Branch file for Mr Jensen's reference rather than return it to Special Branch, although the possibility that he did return such files cannot be excluded.***
- e) Mr Newnham handed over to Mr Jensen an unknown number of Special Branch files.***

3.2.2 MR JENSEN'S EVIDENCE.

Superintendent Jensen was also interviewed in the course of the Ombudsman's 1983 – 84 investigation. He is now retired and was again interviewed by my investigators in 1998.

In his 1984 evidence Mr Jensen stated that it was his practice to go to the offices of Special Branch, examine the files, select documents suitable for release, photocopy them and return to his office at William Street leaving the Special Branch file at the Fitzroy offices of Special Branch. He stated that there were some occasions, possibly because the photocopier at Special Branch was not working, when he took the Special Branch file to his office at William Street. There were also occasions when he arranged for files to be delivered to him from Special Branch.

Analysis by my investigators of the FOI index cards shows that, from the date of his return to duty (25 July 1983) to the date of the claimed destruction of the Special Branch files (18 August 1983), Mr Jensen received 64 FOI requests for access to Special Branch files. Together with the 91 requests received by Mr Newnham, this makes a total of 155 requests received by police for access to Special Branch files between 5 July and 18 August 1983.

When my investigators contacted Mr Jensen in 1998, his recollection was generally consistent with his earlier evidence, but differed on some points. I appreciate, of course, that there is a 15 year gap and that some of these points may be said to be matters of detail. Nevertheless, they are matters worthy of note.

The **first** difference was that Mr Jensen stated to my investigators that he recalled being present when Special Branch files were destroyed. Mr Jensen had not mentioned this in his 1983 evidence – not, I believe, because of a desire to mislead, but rather because this was not an issue in 1983 and he was not asked any questions which might cause him to volunteer this information.

(It will be recalled that, in 1983, there was no issue about *whether* the files had been destroyed, the issue was *why* they had been destroyed.) My investigators were surprised to hear Mr Jensen's recollection. The circumstances of the claimed destruction of the Special Branch files on 18 August 1983 had been an issue at the heart of the Ombudsman's 1983 and 1989 investigations and my investigators were very familiar with the detailed evidence gathered at that time which remains on file at my office. None of those who stated that they were present at the claimed destruction of Special Branch files on 18 August 1983 had indicated to investigators in 1983 or in 1989 that Mr Jensen was present. Moreover, there seems to be no reason for Mr Jensen to have been present on that occasion: he was not concerned in any way with the closure of the Special Branch. Mr Jensen could not recall how he came to be present, or which Special Branch files were being destroyed. The only other specific recollection he had in relation to the occasion was that it was his opinion that the destruction process at the Alphington APM mill was not sufficiently secure because police were required to leave files there to be mulched at a later time. He chose instead to destroy the files at an incinerator at Port Melbourne operated by the Port of Melbourne Authority because he could witness the files actually going into the flames.

Mr Jensen's recollection of being present on an occasion when Special Branch files were destroyed gives rise to at least two possibilities. The **first** is that there was a conspiracy to destroy all Special Branch files in order to avoid giving access to them under the new FOI Act, that Mr Jensen was a party to this and that he witnessed the destruction of files. The **second** is that he is referring to another occasion on which Special Branch files were destroyed.

The former seems to me to be the least likely. Given Mr Jensen's position as FOI officer, and given that it would be he who would have to answer embarrassing questions when the destruction of the files inevitably came to light, it seems to me that Mr Jensen would prefer to be just about anywhere but at the scene of the destruction of the files. Even if such a conspiracy existed, it seems extremely unlikely that Mr Jensen would, even fifteen years later, apparently forget the serious

impropriety of involvement in such a scheme and volunteer to my investigators that he was present when Special Branch files were destroyed.

The second option seems much more probable. I have referred to the evidence of Mr Newnham and Mr Jensen (which was supported by others who worked at the FOI Branch in 1983–4) that Special Branch files were taken to the FOI office at 380 William Street for processing. Given the relatively high ratio of files to be destroyed in relation to files which were to be retained by the OIU and the CTEIS, it is certain that some of these files were among those marked for destruction. Mr Jensen has stated to my investigators that he was aware that the majority of Special Branch files were to be destroyed and that only a few were to be retained by the CTEIS and the OIU. Mr Jensen agreed that at the conclusion of the FOI process he may have had in his possession Special Branch files which had been marked for destruction and for which there was no further use. He stated that he had no specific recollection of what he may have done with these files but believes he would have dealt with them properly. Having regard to all of the above, it seems to me to be more than possible that Mr Jensen's recollection is of the destruction of these, or at least some of these files.

The **second** aspect in which Mr Jensen's 1998 evidence differed from his earlier evidence was that in the 1998 interview Mr Jensen stated the following.

"Noel [Newnham], I know, operated in a different manner to what I did. I did not go out to any of the sections - well, that's wrong, I went to the new section, the intelligence section, on one occasion requesting documents. But other than that, I always rang the particular O.C. or person concerned, gave them the information that I had a request and asked them to bring all documents in, which invariably they did."

It is significant that Mr Jensen also stated he did not simply put his signature to files which had been prepared for partial release by others. He very clearly stated that when offers of access were made it was he who made decisions and that these decisions were made by reference to the file itself rather than to photocopies prepared for him by

others. He also stated that it was his practice to retain the file to which access had been sought (i.e. the Special Branch file) until the final dates for review of FOI decisions had passed.

Although it is true that in his 1984 evidence Mr Jensen stated he sometimes arranged for Special Branch files to be brought to him at his William Street office, he also stated very clearly that it was his practice to go to the offices of Special Branch, examine the files, select documents suitable for release, photocopy them and return to his office at William Street leaving the Special Branch file at the Fitzroy offices of Special Branch. It can be seen that this aspect of Mr Jensen's 1984 evidence was, without ruling out other possibilities, consistent with the then official police explanation of how files which were subject to current FOI applications came to be destroyed. It can be also seen that the point at which Mr Jensen's 1983 evidence coincided with the official explanation is the very point which seems to have dropped out of his recollection by 1998. This is a point to which I will return.

Summary/Conclusion

The above evidence supports the following conclusions.

- a) It is not clear whether Mr Jensen ever attended the Special Branch offices and processed FOI files there.***
- b) It is very clear that, like Mr Newnham, Mr Jensen caused an unknown number of Special Branch files to be removed from the Fitzroy offices of the Special Branch and taken to William Street for FOI processing prior to 18 August 1983.***
- c) Mr Jensen claims to have retained files until the expiry of the relevant review period rather than return files once he had responded to applicants.***
- e) Mr Jensen recalls being present at the destruction of Special Branch files, but this is unlikely to have been the destruction of Special Branch files which took place on 18 August 1983. It is more likely to have been the destruction of files for which the FOI process had been completed.***

There are some other general points emerging from Mr Jensen's evidence which are worthy of emphasis. In 1984, and again in recent interviews with my investigators, Mr Jensen pointed out the great difficulties under which he was working in the first few months of the operation of the FOI Act. He was inundated with requests, the FOI process was unfamiliar territory, he had no support staff and was under extreme pressure because of the statutory time limits for responses to requests. Mr Jensen's requests for administrative assistance were not receiving support at a senior level, where it was felt that there were other priorities. It was not until late 1983, when the situation became critical and it was obvious that the Force was not able to meet its FOI obligations unless further resources were made available, that additional staff were assigned to the FOI office. All of these difficulties, particularly the heavy workload and lack of support staff, were acknowledged by the Ombudsman in his 1983 investigation. The detailed analysis of the work of the FOI office by my investigators in recent months has confirmed Mr Jensen's evidence of the extreme difficulties he faced.

3.2.3 OTHER EVIDENCE RE THE FOI PROCESS GENERALLY.

My investigators have spoken to staff who were appointed to the FOI office in November 1983. The general thrust of the evidence is that the FOI process was not operating efficiently. This is consistent with other evidence of the great pressure under which Mr Jensen was working. There was no effective file tracking system and it was only at this late stage, with the appointment of additional staff, that the system of index cards was established. It is these cards which have been used by my investigators. They record the dates of incoming and outgoing correspondence in relation to each FOI request file. The cards record events which occurred well before November 1983 and it follows that information appearing on the cards recording events occurring before November 1983 was gleaned from the FOI files themselves by the authors of the cards.

One witness stated his view that, “part of the problem was... that there were an excessive number of files kept there and you had to make the best of a fairly inadequate system when you were processing requests.” The witness went on to describe the processing of FOI files at the time of his arrival in November 1983 as a “schemozzle” and said that it was his task to try to put some order into the system.

3.2.4 WHICH SPECIAL BRANCH FILES WENT WHERE?

The issue of just how many files were removed from the Special Branch offices and taken to William Street, and to which FOI applications they related, requires some analysis. It is clear from Mr Newnham’s evidence that not all files processed by him were removed from the Special Branch offices and that some were returned to Special Branch when he had finished with them. To further complicate the issue, it cannot conclusively be ruled out that Mr Jensen may also have processed some files without removing them from the Special Branch offices. The physical movement of files to and from Special Branch is not recorded on any of the FOI index cards obtained by my investigators. However, it is possible to draw inferences in general terms, and in relation to particular files, from the available information.

I will first examine the FOI applications received during Mr Newnham’s time as Acting FOI officer (5 July – 24 July 1983), and then apply the same process to applications received from the date of Mr Jensen’s return from leave to the date of the claimed destruction of the Special Branch files (25 July – 18 August 1983). Along the way I will highlight questions which emerge from this analysis. I will then move on to attempt to answer these questions through a detailed examination of the FOI process in relation to each of the six recovered Special Branch files.

3.2.4 (a) APPLICATIONS RECEIVED BY MR NEWNHAM.

As I have shown above, analysis of the information taken from the FOI index cards shows that Mr Newnham worked his way through applications in the order in which he received them. He appears to have processed all applications received up until about 15 July 1983, although (with two exceptions in which he offered/denied access) he responded only to those for which he could locate no records, leaving a backlog of 58 for Mr Jensen's attention. Included in the backlog were applications relating to the 6 recovered Special Branch files.

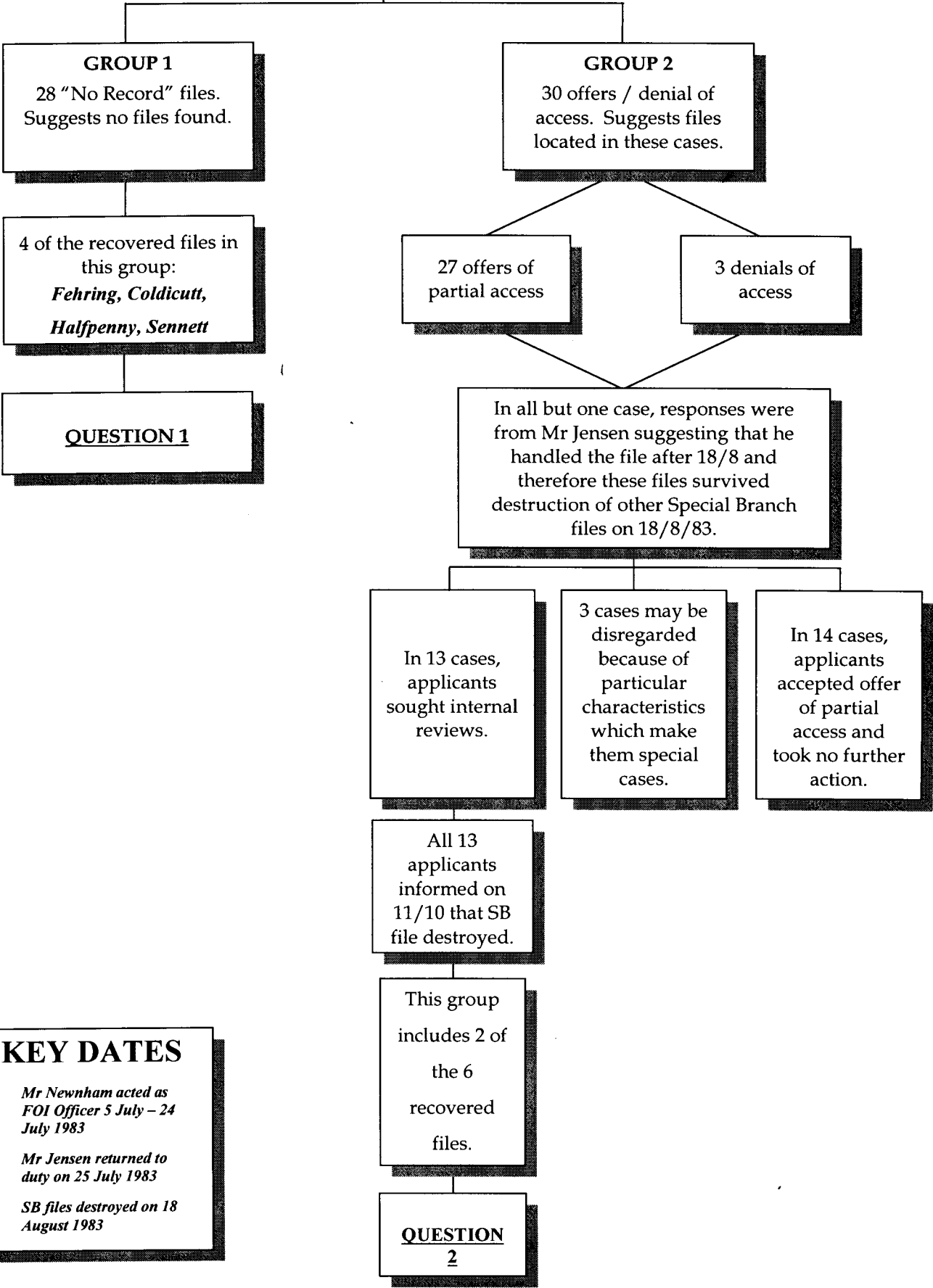
The following is an analysis of the group of 58 FOI requests which were left by Mr Newnham for Mr Jensen to deal with. A diagrammatic representation of this analysis is set out at *Figure 2*. It may assist the reader to refer to it when reading the following analysis.

It has been established that within the group of 58 files left by Mr Newnham there are, in terms of the responses subsequently made by Mr Jensen, two groups:

- 1) 28 applications which later received a "no record" response from Mr Jensen; and
- 2) 30 applications in which the applicant was either offered partial access (27 cases), or was denied access (3 cases).

It seems logical that the 28 "no record" responses indicate that in each case Mr Jensen was unable to locate relevant Special Branch records. But in at least four of these cases we now know that Mr Jensen's "no record" response was incorrect because four of the six recovered Special Branch files relate to applicants who number among the 28 (Fehring, Coldicutt, Halfpenny, Sennett).

FIGURE 2
Analysis of the backlog of 58 Applications received by Mr Newnham and left for Mr Jensen's attention



KEY DATES

- *Mr Newnham acted as FOI Officer 5 July – 24 July 1983*
- *Mr Jensen returned to duty on 25 July 1983*
- *SB files destroyed on 18 August 1983*

This presents the first question which must be answered (“Question One”).

Question One

Why did Mr Jensen provide a “no record” response when:

- a) in these four cases (and possibly up to 28 similar cases) it is now beyond doubt that a Special Branch file existed; and***
- b) in these four cases (and possibly other similar cases) it is probable that Mr Newnham had obtained the file from Special Branch and taken it to his office at William Street?***

I will return to this question at a later time, but will now move on to an analysis of the second group of files left by Mr Newnham for Mr Jensen – the group of 30 applications in which the applicant was offered partial access (27 cases), or was denied access (3 cases). This group is also of particular interest because the remaining 2 recovered files (Dalton and Tattam) relate to applicants who number among the 27 who were offered partial access by Mr Jensen.

Given what appears to have been Mr Newnham’s *modus operandi* of preparing files for release but apparently leaving the final decision to Mr Jensen, one must consider the possibility that Mr Newnham prepared some or all of these 30 files for Mr Jensen’s signature and returned the Special Branch file. However, as I have said above, I do not think that this is very likely. Mr Jensen himself has stated that he referred to the Special Branch file when preparing responses. It can be established from the FOI index cards that, in all but one of the 30 cases in question, Mr Jensen did not respond to the applicant until after 18 August 1983 (the date of the claimed destruction of the Special Branch files). In such cases it seems likely that the Special Branch file was seen

by Mr Jensen when he prepared his response. It follows that these files were not destroyed with other Special Branch files on 18 August 1983.

Summary/Conclusion

The above evidence supports the following conclusions.

- a) From the backlog of 58 applications Mr Jensen subsequently offered/denied access in 30 cases. It may safely be inferred that Special Branch files were located in each of these cases.*
- b) It is extremely unlikely that these offers/denials were made by Mr Jensen on the basis of Mr Newnham's recommendation alone. Therefore it seems probable that, in at least some of these 30 cases (very probably a high proportion of them), Special Branch files were at 380 William Street until Mr Jensen made decisions and advised the applicant, and probably until such time as the final dates for reviews under the FOI Act had passed.*

If these 30 files were at the FOI office and survived the claimed destruction of Special Branch files on 18 August 1983, and if Mr Jensen did retain possession of them until the period for review had passed, one would expect these applications to have been processed to their conclusion without the need to advise applicants that the process had, in effect, been aborted because their file had inadvertently been destroyed. But this did not occur in one single case.

In 14 cases the applicants apparently accepted the initial decision by Mr Jensen and took the matter no further. In such cases there would be no need for Mr Jensen to refer again to the Special Branch file. Presumably the file was, as Mr Jensen has stated, retained until the expiry of review dates, but the fate of these files is not recorded on the index cards. It is possible that some may have been files approved by Mr Nelson QC for retention and were therefore returned to either the OIU or the CTEIS. However, given that relatively few Special Branch files were to be retained, it is likely

that most or all of these 14 files were among those files marked for destruction. If so, Mr Jensen was left with files that had reached the end of the FOI process, were not approved for retention by OIU or CTEIS, but which had survived the destruction of all other Special Branch files. It is possible that it is the destruction of these files which Mr Jensen has recalled.

Of the remaining 16 cases, 3 may be put aside for various reasons which make them special cases, but in 13 remaining cases the applicant requested a review of the initial FOI decision. In each of these 13 cases the applicant was advised by letter dated 11 October 1983 that an internal review was not possible because the Special Branch file to which access was sought had been destroyed with all other Special Branch files on 18 August 1983.

It can be seen that if these files had never left Special Branch, or had been returned to Special Branch by Mr Newnham, the explanation of inadvertent destruction would - in logic, if not for other reasons - be acceptable. That is to say, the argument that they were left at the Special Branch offices at Fitzroy and were destroyed with all the other Special Branch files on 18 August 1983 would be a possible explanation. But as we have seen, this explanation cannot apply to all 30 files, some of which, in my view, *must* have been at William Street when other Special Branch files were destroyed on 18 August 1983. The advice to the 13 applicants that their files had been destroyed on 18 August 1983 is, therefore, to say the least, difficult to reconcile with the abundant evidence that the files survived destruction and were most probably at the FOI office. The fact that the last two of the six recovered files (Dalton and Tattam) fall within this group of 13 files proves conclusively that this advice was, in at least two cases, incorrect.

It seems to me that the “now we have them, now we don’t” response by police in these 13 cases raises a further question which must be answered.

Question Two

Why did Mr Jensen advise applicants for internal reviews that files had been destroyed along with other Special Branch files when:

- a) in two cases (and possibly up to 11 similar cases) it is beyond doubt that a Special Branch file existed; and*
- b) in these cases it is probable that these files survived the 18 August destruction and were at the FOI office at William Street after that date ?*

We also have another conclusion which I shall simply note at this point, but to which I will return in detail at a later time.

Summary/Conclusion

It is very clear that the official “breakdown in communications” explanation offered by police in 1983 to the Minister for Police and Emergency services, the County Court, the Ombudsman and various other parties in respect of the 1983 FOI fiasco is an inaccurate explanation. It was built on the claim that Special Branch files did not leave the offices of Special Branch – a claim which has been demonstrated not to be so. Moreover, it cannot explain the known facts in relation to at least 2, and possibly more, of the 30 files referred to above.

Finally, it must also be observed that the abovementioned total of 30 FOI applications in which a Special Branch file must have been found does not necessarily limit the number of associated Special Branch files to 30. Many applicants may have been mentioned in more than one Special Branch file – a situation which the elaborately cross referenced Special Branch index cards would have picked up. For example, there may have been a file in the name of an individual with a cross reference to the file relating to one or more organisations in which the individual was prominent. Mr Jensen referred to a particular example, referring to an FOI application made by prominent trade unionist Mr John Halfpenny. No file could be found for Mr Halfpenny whose application was received shortly before the August destruction of the Special Branch files, but Mr Jensen was able to find reference to Mr Halfpenny in the file of his former wife, Mrs K Halfpenny, whose file is one of the six files which have been recovered.

Before attempting to answer the two questions which have emerged, I will move on to examine briefly the 64 FOI applications received by Mr Jensen between the date of his return and the date of the claimed destruction of the Special Branch files (25 July – 18 August 1983).

3.2.4 (b) APPLICATIONS RECEIVED BY MR JENSEN.

As I have stated above, Mr Jensen received a further 64 FOI applications from the time he resumed duty on 25 July 1983 until the date of the claimed destruction of the Special Branch files on 18 August 1983.

The following brief analysis of this group of 64 applications is represented diagrammatically in *Figure 3*.

FIGURE 3

**Analysis of the 64 Applications received by Mr Jensen
25/7/83 - 18/8/83**

4 offers / denials of access to
Special Branch file.
Suggests SB file located.
Dates of responses suggest
file handled after 18/8/83
and therefore these survived
destruction of other SB files.

In all 4 cases, applicants
accept offer / denial of access
and take no further action.

2 cases where it cannot be
determined whether offer of
access is for SB file or other
file.

58 "No Record" responses.
Suggests no Special Branch
file found.

Of the 64 applications, Mr Jensen replied to 58 applicants advising that there was no record of them at Special Branch. In the remaining six cases, five offers of partial access were made and one denial of access was made. In two of these cases it cannot be determined from the FOI index cards whether the offer of partial access refers to a Special Branch file or to other documentation also requested by the applicant, but in the remaining four cases it follows that there *must* have been a Special Branch file located and sighted by Mr Jensen. Although there is some lack of clarity in Mr Jensen's evidence regarding his method of operation, it seems likely that these four files would also have been taken from the Special Branch offices to William Street for FOI processing, including retention for the review period.

Summary/Conclusion

It seems very clear that in at least four cases Special Branch files were obtained, processed, and retained by Mr Jensen at his offices at William Street. It follows that these files could not have been destroyed on 18 August with other Special Branch files.

It is perhaps unfortunate that none of the four applicants chose to exercise their rights of review. In these 4 cases, as in the 14 cases received by Mr Newnham where there was no review requested, there would be no need to refer again to the Special Branch file. Presumably the file was retained until the expiry of review dates. The fate of the Special Branch files in these cases is not recorded on the index cards, although it is possible that it is the destruction of these files, along with others of the same category, which Mr Jensen has recalled.

3.2.5 SUMMARY OF CONCLUSIONS/QUESTIONS ARISING OUT OF THE OVERVIEW OF THE FOI PROCESS AND THE SPECIAL BRANCH FILES.

Bringing all the above information, conclusions and unanswered questions together, the following has been established.

There was a total of 155 FOI applications for access to Special Branch files received prior to the claimed destruction of the Special Branch files on 18 August 1983 (91 by Mr Newnham, 64 by Mr Jensen). Access was offered or denied in 36 cases (2 by Mr Newnham, 34 by Mr Jensen). “No record” responses were sent in 117 cases (31 by Mr Newnham, 86 by Mr Jensen.) In two cases it could not be determined from the FOI index cards whether the offer of access was in relation to Special Branch files or other documents sought. I have excluded these two cases from my analysis. (See *Figure 4* for a diagrammatical representation of these totals).

It can be seen that in terms of initial responses from police the FOI applications fall into two groups – those in which a “no record” response was made and those in which an offer/denial of access was made. Dealing with each group separately, the following propositions have been established.

3.2.5 (a) “NO RECORD” APPLICATIONS.

1) Mr Newnham responded to 31 applicants with “no record” responses. In the backlog of 58 files he left for Mr Jensen there were a further 28 such responses made by Mr Jensen.

2) It is obvious that, if these responses were correct, a Special Branch file did not exist in relation to the applicants, or at least that no such file was located by Mr Newnham or Mr Jensen.

FIGURE 4

**Totals of FOI Applications
5/7/83 - 18/8/83**

	MR NEWNHAM	MR JENSEN	TOTALS
Offers / denials of access (ie cases where SB files were located)	2	34 <i>(consists of 30 left over by Mr Newnham and 4 received by Mr Jensen)</i>	36
“No Record” (ie cases where no SB file was located)	31	86 <i>(consists of 28 left over by Mr Newnham and 58 received by Mr Jensen)</i>	117
Cannot be classified	Nil	2	2
Adjustments	<i>ADD number of files left over for Mr Jensen to finalise</i> 58	<i>LESS number of files left over by Mr Newnham</i> 58	
TOTALS	91	64	155

3) However, four of the six recovered files relate to applicants who number among the 28 “no record” responses made by Mr Jensen which were, in turn, among the backlog of 58 files left by Mr Newnham.

4) This raises the following question (to which I have referred as “Question One”) in relation to this class of file.

Why were applicants provided with a “no record” response when:

- a) in these four cases (and possibly up to 28 similar cases) it is now beyond doubt that a Special Branch file existed; and
- b) in these four cases (and possibly other similar cases) it is probable that Mr Newnham had obtained the file from Special Branch and taken it to his office at William Street?

3.2.5 (b) CASES WHERE OFFERS/DENIAL OF ACCESS WERE MADE.

1) The fact that access was offered/denied in 36 cases (2 by Mr Newnham, 34 by Mr Jensen) leaves little room for doubt that in those 36 cases there was a Special Branch file located.

2) The evidence of Mr Newnham and Mr Jensen suggests strongly that it is extremely likely that in at least some – probably a high proportion - of the 36 cases the Special Branch file was taken to William Street for FOI processing.

3) Of these 36 cases, in the 2 cases in which Mr Newnham offered/denied access there is a strong possibility that the Special Branch file was never removed from, or was returned to, Special Branch.

4) Mr Jensen responded in the remaining 34 cases. In all but one of these cases Mr Jensen did not respond until after 18 August 1983. Mr Jensen has stated that he retained Special Branch files until after the review period had expired. It follows that

these 34 files would have been at William Street on 18 August 1983, the day of the claimed destruction of Special Branch files, and would, therefore, have survived destruction.

5) Of those 34 cases in which access was denied/offered, 18 applicants took the matter no further, but 16 sought a review of Mr Jensen's decision. Three of the 16 cases may be put aside as being cases of a different nature, In the remaining 13 cases the applicant was advised by letter dated 10 October 1983 that the review could not be completed because the relevant Special Branch file had been destroyed when Special Branch was disbanded (i.e. on 18 August 1983).

6) This advice is very difficult to reconcile with the evidence that the files in question had survived the 18 August 1983 destruction of Special Branch files and were at the FOI office after that date. In 2 cases the Special Branch file has been recovered, proving conclusively that in these two cases the advice that the file had been destroyed was incorrect.

7) This raises the following question, (to which I have referred above as "Question Two") in relation to this class of file.

Why did Mr Jensen advise applicants for internal reviews that files had been destroyed along with other Special Branch files when:

a) in two cases (and possibly up to 11 similar cases) it is beyond doubt that a Special Branch file existed; and

b) in these cases it is probable that these files survived the 18 August destruction and were at the FOI office at William Street after that date ?

At least one possible answer to "Question One" and "Question Two" has been circulating for many years: that the claims by police that Special Branch files were

destroyed were false and that Special Branch files – including those which were subject to current FOI applications - were spirited away for continued secret use by police. The only real evidence produced to date which might support this theory is the six recovered files. It seems to me, therefore, that the only way to test this “conspiracy theory” is to conduct a close examination of the FOI process in relation to the six recovered files with a view to finding possible alternative explanations for their survival which, in turn, may provide alternative answers to the two questions.

3.3 THE SIX RECOVERED FILES AND THE FOI PROCESS.

My investigators have reconstructed the FOI process in relation to each of the six recovered files. I will now turn to these reconstructions.

3.3.1 THE FEHRING, COLDICUTT AND HALFPENNY FILES.

These files have strong similarities and can be dealt with together.

All three applications were received during Mr Newnham’s time as Acting FOI officer. Mr Fehring’s application was received at the FOI office on 12 July 1983, Mrs Halfpenny’s on 18 July 1983 and Mr Coldicutt’s on 20 July 1983. All three applicants were advised by letter dated 16 September 1983, signed by Mr Jensen, that no documents could be located.

To the extent that it implied that no documents existed, Mr Jensen’s advice was clearly incorrect because the Special Branch files in relation to each are now in my possession. How can this be explained?

As I have outlined above, Mr Newnham initially attempted to process applications at the offices of Special Branch but “very quickly” adopted the practice of processing the Special Branch files at William Street. Mr Newnham has stated that on his last visit to Special Branch on 14 July 1983 he took a large number of files back to William Street with him and it is possible that after this date he arranged for files to be brought to him at William Street. Having regard to the dates these three applications were received, it is reasonable to assume that in each case the Special Branch files were taken from the Special Branch office to William Street for processing.

Mr Jensen’s “no record” response to these three applicants is dated 16 September 1983. This was a busy day for Mr Jensen. He sent responses to 21 applicants on this date. An analysis of the 21 responses leaves little doubt that Mr Jensen’s output on that day was the result of an extensive effort to trawl through uncompleted work to bring it up to date (by 16 September many FOI files were already outside the statutory response period of 45 days). Of the 21 responses sent, 13 (including the 3 files here in question) were part of the backlog left by Mr Newnham. In 18 of the 21 responses, Mr Jensen advised that no records could be found. In the other three cases it appears that a Special Branch file was found: there were two denials of access and one offer of partial access. The three applications in relation to which a Special Branch file was found were also part of the backlog left by Mr Newnham. This suggests that in these three cases Mr Newnham had obtained the file and had passed it on to Mr Jensen for a final decision.

Although much was said in the wake of the 1983 FOI fiasco about the resistance of police to the philosophy of FOI and the reluctance of police to release documents, the fact that Mr Jensen offered access in some cases and acknowledged the existence of documents but denied access to them in others, suggests that Mr Jensen was not in the habit of “stonewalling” all FOI applicants by falsely denying that any relevant documents existed. Even if he was so inclined on occasions, I have been unable to detect any distinguishing feature in the Fehring, Coldicutt or Halfpenny cases which could explain why he would mislead these particular applicants but acknowledge the

existence of documents to three other applicants on the same day, and to many other applicants at other times. In my view, the weight of the available evidence suggests that if Mr Jensen had knowledge of the existence of relevant documents he advised applicants of this fact and applied the provisions of the FOI Act.

In each of the three cases under consideration, it is now clear that files existed and that it is very probable they had been taken to William Street for FOI processing. Why, then, did the applicants receive a “no record” response from Mr Jensen? If one accepts it to be unlikely that Mr Jensen knowingly misled applicants, the most obvious answer is that Mr Jensen had no knowledge that the relevant Special Branch files existed.

There are at least two possible ways this may have occurred. The **first** is that Mr Newnham assessed the files, photocopied the documents he recommended for release (as he has stated he did in a number of files) and then returned the file to Special Branch. For reasons outlined above, I do not think that this is a likely explanation. The **second** possibility is that the files in question were either mislaid in the handing over process from Mr Newnham to Mr Jensen, or were subsequently mislaid by Mr Jensen. I believe this to be the most likely explanation for several reasons.

Apart from the obvious potential for slip-ups in a situation where a person who is a temporary replacement is caught completely unaware by a flood of work, the most powerful reason for this conclusion is the content of notes made by an Ombudsman’s investigator during an inspection of FOI request files at the FOI office in December 1983. As I have related above, many applicants did not accept the advice of police that there was now no Special Branch record of them and wished to complain about the premature destruction of their file by police. The Ombudsman received nine such complaints under s. 27 (1) (e) of the FOI Act, two of which were from Mr Fehring and Mr Coldicutt. In December 1983, an Ombudsman’s investigator made two visits to the Victoria police FOI office and conducted a detailed inspection of the FOI request files (now destroyed). He did not at any stage sight any Special Branch files. The

investigator made detailed notes of his inspection of the FOI request files and these notes remain on my file today.

In relation to the Fehring file, the investigator noted that the letter of request was dated 12 July 1983 and was received at the Chief Commissioner's office on 13 July. He noted that there were,

“no other docs on file just memo from Det. Sen. Const I. J. Arrell (FOI Liaison officer)... [dated 8/9]... stating that no records now exist. Reply to applicant from Supt. J. 16/9”.

In relation to the Coldicutt file, the Ombudsman's investigator noted as follows.

“Letter of request dated 17/7. No receipt date (stamp shows 20/7).

Was recorded at Special Branch.

I. J. Arrell reply dated 7/9/83

Reply from Supt. J. to applicant dated 16/9”

This note is ambiguous to the extent that it is not clear that the words *“Was recorded at Special Branch”* are the contents of Mr Arrell's reply, or whether it was information which pre-dated the receipt of Mr Arrell's reply. The investigator who made the note believes it to be the former.

Mr Arrell was a former member of Special Branch. He remained attached to Special Branch until the very last day of its existence. Mr Arrell was one of the members who gave evidence to the Ombudsman's 1989 investigation stating that he had witnessed the destruction of Special Branch files on 18 August 1983. As near as can be established by my investigators, Mr Arrell did not commence his role of FOI liaison officer until on or about 23 August 1983 when the Special Branch ceased to exist.

At first glance it may seem odd that, at a time after all the records of Special Branch, including the index cards, were supposed to have been destroyed, Mr Arrell was able to advise that Mr Coldicutt had been recorded at Special Branch but no record now existed. Mr Arrell's response in regard to the Fehring application - "*no records now exist*" - also implies an acknowledgment that Mr Fehring had been recorded at Special Branch. This was clarified by Mr Arrell who, when interviewed by my investigators in 1998, stated that at the relevant time he had a list of the names and numbers of all Special Branch files which had been marked for destruction. This was the first time my investigators had heard of the existence of such a list. It was clearly not the list prepared for the Keeper of Public Records to which I have referred above, which recorded only file numbers and not names. The whereabouts of Mr Arrell's list, if it survives, is unknown.

In late August 1983 the statutory time limit for responses to the three files in question were about to expire. The 45 day deadline for Mr Fehring was 26 August 1983. The deadline for Mrs Halfpenny's application was 1 September, and for Mr Coldicutt it was 3 September 1983. It seems most likely that Mr Arrell was requested to make enquiries about the existence of a Special Branch file relevant to the Fehring and Coldicutt FOI applications after he commenced as FOI liaison officer on 23 August 1983. It is almost certain that the request came from Mr Jensen as part of his drive to eliminate the backlog. By that time, of course, the claimed destruction of the Special Branch files had already occurred. There was only one answer possible from Mr Arrell - that all Special Branch files held at the Special Branch offices had been destroyed.

Whatever the explanation for the advice received from Mr Arrell, one thing is very clear from the investigator's notes regarding the contents of the Fehring and Coldicutt FOI request files: prior to the receipt of Mr Arrell's advice of 8 September 1983 there was no indication on the face of the FOI request files themselves that any enquiries had been made to establish whether there was a Special Branch file, nor was there any indication as to whether such a file had been obtained by Mr Newnham. At any time

prior to 8 September 1983 a reader of the file would be led to believe that no action had been taken.

In my view, the following scenario is consistent with the available evidence.

Mr Newnham received the applications of Mr Fehring, Mr Coldicutt and Mrs Halfpenny. He raised FOI request files, made enquiries at Special Branch, subsequently took possession of each applicant's Special Branch file and held them at his office at William Street. Mr Newnham was not able to keep up with the very large number of requests which were received and there was a backlog of work when Mr Jensen resumed duty. In the hand-over from Mr Newnham to Mr Jensen some of the Special Branch files were misplaced, or at least Mr Jensen was not aware that they were included in the materials which were passed on to him from Mr Newnham. Mr Jensen began to work on the backlog, but new applications continued to pour into his office. The volume and pressure of work was great and, understandably, the FOI office was not working efficiently. There was no file tracking system.

In late August, as the 45 day statutory period drew to a close for the earliest applications, Mr Jensen conducted an audit of files and found that there were many for which the 45 days had, or was about to expire. Mr Newnham had handed over to Mr Jensen the Special Branch files in relation to some of these applications. Mr Jensen examined these documents and offered or denied access to the applicants. In other cases there was no indication on the face of the FOI request file that Mr Newnham had made any enquiries regarding the existence of a Special Branch file, nor was Mr Jensen aware of any relevant documentation having been obtained by Mr Newnham for processing. Mr Jensen made enquiries of Mr Arrell, the newly appointed FOI liaison officer. It is known that in relation to Mr Fehring and Mr Coldicutt a report was received from Mr Arrell, who had checked his list of the files which had been marked for destruction, advising that the applicants had been recorded at Special Branch but all Special Branch files had been destroyed. It seems likely that the same thing happened in the Halfpenny case. Mr Jensen had no knowledge that the relevant Special Branch

files were at William Street and assumed that if they were not in his possession, as some Special Branch files were, they could only have been at the offices of Special Branch and had therefore been destroyed on 18 August 1983. He advised applicants accordingly, including Mr Fehring, Mr Coldicutt and Mrs Halfpenny.

Summary/Conclusion

In relation to the Fehring, Coldicutt and Halfpenny files, a possible answer to the question posed above as “question one” has emerged. But it leads to another question: if these files were mislaid, where were they?

I shall return to this question and to the issue of what subsequently happened to the Special Branch files relating to Mr Fehring, Mr Coldicutt and Mrs Halfpenny, and how they came to light in 1998, at a later time.

3.3.2. THE SENNETT FILE.

Mr Sennett’s application was received on 21 July 1983. It was also in the backlog of 58 files not reached by Mr Newnham. Mr Jensen sent a “no record” response to Mr Sennett on 16 November 1983, some 73 days beyond the 45 day deadline.

The Sennett file was featured prominently in *The Age* on 27 January 1997. A report on page 6 quite correctly pointed out the following.

“Sitting on William Sennett’s Victoria Police special branch file is the freedom of information request he lodged on 20 July 1983 seeking a copy of his dossier. The letter is stamped “Not recorded, CIB special branch, Melbourne” and is signed by a Detective Inspector who was then head of Special Branch.”

The article is accompanied by what purports to be a picture or reproduction of the request and the “Not Recorded” stamp. The picture is not an accurate reproduction of the letter. Its various elements have been manipulated and rearranged so as to suggest that the letter is a response to Mr Sennett with a stamp advising that there is no record of him at Special Branch. One may be forgiven for thinking that this manipulation was an attempt to accentuate the main thrust of the article – that there is a clear contradiction between the fact of the existence of the file and the “no record” stamp, and that this proved that police had lied to the applicant, Mr Sennett.

There certainly may have been a contradiction had the “no record” stamp not been crossed out. The picture showed that the “no record” stamp had four oblique lines across it, a significant fact which struck my investigators the moment they saw the document, but of which the article made no mention. Nor did the article make any mention of another matter which immediately struck my investigators: that the file contained loose photocopies of documents from the file and that these photocopies had blacked out words and sections – an obvious indication that they were photocopies which had been prepared for release under the FOI Act. One of the photocopies even contained the calculations of the cost of the application, five dollars application fee plus three photocopies at 20 cents each, totaling \$5.60.

It seems to me to be clear that Mr Newnham or Mr Jensen made an initial enquiry about the existence of a Special Branch file by sending either the original or a copy of Mr Sennett’s letter of request to Special Branch. The officer in charge of Special Branch applied the “no record” stamp and his signature on 1 August 1983. It seems that the stamp was applied in error or the file was subsequently found. It seems most likely that the file was found before the letter with the “no record” stamp left the Special Branch office because the stamp was simply crossed out, the letter was put into the Special Branch file and sent back to the FOI office where it was processed in preparation for release. It also seems that the main thrust of the *Age* article is, at best, a misinterpretation of the facts. An examination of the Sennett file does not suggest that

police were deceitful. To my mind it suggests a certain amount of diligence. But the fact remains that, although the file appears to have been processed for release under the FOI Act, no documents ever reached the applicant, Mr Sennett, who was eventually incorrectly advised that there was no record of him.

Given that the officer in charge of Special Branch purports to have signed the “no record” stamp on 1 August 1983, it seems clear that the file would very probably have been received at the FOI office after that date. This eliminates the possibility that it was lost in the handover from Mr Newnham to Mr Jensen, but it does not eliminate the possibility that Mr Jensen misled Mr Sennett about the existence of the file, or that it was mislaid within Mr Jensen’s office after it was received there. Again, it is my view that the former is the least likely explanation. As with the Fehring, Coldicutt and Halfpenny files, there is nothing in Mr Sennett’s Special Branch file which might cause one to believe that its existence may have been denied in order to protect some perceived police interest or to prevent embarrassment, and I have no reason to believe that Mr Jensen, even if he was inclined to mislead applicants, would act randomly in this regard. Indeed, the partial FOI processing of Mr Sennett’s Special Branch file suggests that there was no intention improperly to deny the existence of documents in this case. The misplacement of the file seems to be the only feasible alternative explanation.

The conclusion that Mr Sennett’s Special Branch file, and possibly the FOI request file, was lost is strengthened by the fact that the response to Mr Sennett was dispatched 73 days after the expiry of the 45 day statutory limit – a delay which, even for the overworked FOI office in 1983, was unusually long. It is a delay which is consistent with the file or files being lost. Indeed, in the absence of a file tracking system, it is conceivable the file may never have been missed. *The Age* reported on 27 January 1998 that Mr Sennett, concerned that he had not received a reply to his FOI application, rang the FOI office to inquire and was told that his file was “away in another place”. The date of this call is not known, but it may be that this call took place after 18 August 1983 and prompted Mr Jensen to make enquiries of Mr Arrell

who, as he had in the Fehring and Coldicutt matters, advised that there was no record of Mr Sennett. This possibility cannot be confirmed because Mr Sennett was not a complainant under s. 27 (1) (e) of the FOI Act and, consequently, the Ombudsman's investigator made no specific notes of the content of the Sennett FOI request file during his December 1983 inspection.

There is one other issue which arises out of an examination of Mr Sennett's file. If, as I have concluded above, the photocopies on the file were copies of documents which were to be released to Mr Sennett in response to his FOI application, it must be said that the proposed response was inadequate. There are several documents which in my opinion should have been released but which, it would appear, may not have been had the response gone ahead. I raise this only in passing. There is insufficient evidence for me to be able to draw any conclusions from this observation. It may be, for example, that the Special Branch file was only partially processed before it went missing.

Summary/Conclusion

In relation to the Sennett file, a possible answer to the question posed above as "question one" has emerged. As in the Fehring, Coldicutt and Halfpenny cases, it leads to another question: if the file was mislaid, where was it?

3.3.3 THE DALTON AND TATTAM FILES.

These two files are Special Branch files associated with that group of thirteen FOI applications in which partial access was initially granted and in which applicants sought internal reviews only to be told that the relevant Special Branch file had been destroyed. This examination of the circumstances of these two applications is directed at answering the question to which I have referred above as “Question Two”.

The application in respect of the Dalton file was received by Mr Newnham on 11 July 1983. The applicants are recorded as being D. and L. Dalton. Mrs Tattam’s request was received on 19 July 1983, also by Mr Newnham.

In each case it is clear that there was a Special Branch file located because in each case an offer of partial access was made. The offer to the Daltons was by letter dated 29 August 1983; Mrs Tattam’s was dated 7 September 1983. It will be noted that both responses were dated after the 18 August 1983 destruction of Special Branch files, and must have been made by Mr Jensen. This suggests very strongly that the files survived destruction and were handled by Mr Jensen after the date of the destruction of other Special Branch files.

In each case the applicants were not satisfied with partial access and sought an internal review of the decision. Mrs Tattam’s request for review was received by police on 12 September 1983 and the Daltons’ request for review was received by police on 23 September 1983. In each case the request for review was lodged with police within the statutory time limit.

The next recorded action on each file is a letter to each applicant dated 11 October 1983 advising them that their files had inadvertently been destroyed along with all other Special Branch files.

The Daltons appear to have taken the matter no further. Mrs Tattam, by letter dated 20 December 1983, made a complaint to the Ombudsman. Attached to her letter of

complaint was a photocopy of some of the documents which had been released to her. They are copies of police reports of a May Day march and a list of marchers, including Mrs Tattam, who were known to Special Branch police. Sections of the document are blacked out. When compared with the originals on Mrs Tattam's Special Branch file, it can be seen that the blacked out sections on the copies sent to Mrs Tattam were the names of other demonstrators and of the reporting police member.

Unfortunately, Mrs Tattam's complaint was received by the Ombudsman after the Ombudsman's investigator had completed his December 1983 inspections of the FOI request files and there are no specific notes about the contents of Mrs Tattam's FOI request file.

How can it be that Mr Jensen made offers of partial access to the applicants but later informed them that the files had been destroyed ("Question Two")? Again, it is possible that Mr Newnham received the files from Special Branch, assessed their contents, photocopied documents for release and returned the Special Branch file, leaving a response ready for Mr Jensen to sign and send out upon his return. Again, for reasons I have set out above, I do not regard this as a likely explanation. As I have made clear above, it seems far more likely to me that, even if Mr Newnham did prepare the file, Mr Jensen sighted the Special Branch file prior to sending the offers of partial access to the applicants. It follows that in the case of these two files, unlike the other four recovered files, it is not possible to argue that they may have been mislaid in the handover from Mr Newnham, nor is it possible to argue that the file was mislaid somewhere within the FOI office before Mr Jensen had knowledge of its existence.

To his credit, Mr Jensen, when interviewed by my investigators in 1998, accepted without hesitation that it is most probable that he handled the Special Branch file in each of these two cases and that he referred to the Special Branch file to prepare his offers of partial access. Mr Jensen was unable to offer my investigators any explanation as to how, given that it was his practice to retain files until after the period for review had passed, only a matter of weeks later he could conclude that the Special

Branch files in these two cases (and apparently other similar cases) had been destroyed.

The detailed analysis of the FOI index cards undertaken by my investigators has revealed some information which has enabled me to make an attempt to reconcile the apparently irreconcilable, and to arrive at a possible explanation for the observed facts. As I have stated above (on several occasions by now!) the Dalton and Tattam Special Branch files are associated with FOI applications which number among the group of 13 applications in which internal reviews were aborted because, it was claimed by police, the Special Branch file had been destroyed. In an attempt to discover what happened in the Dalton and Tattam cases, as well as to find an answer to “Question Two”, I will now turn to a detailed examination of this group of 13 applications.

3.3.3 (a) THE THIRTEEN “11th OCTOBER” APPLICATIONS.

It has been demonstrated above that these thirteen applications were all received by Mr Newnham and were part of the backlog of 58 files left by Mr Newnham for Mr Jensen. In each case Mr Jensen’s response offered partial access and in each case the applicants subsequently sought an internal review of that decision to grant only partial access. All 13 applicants were advised on 11 October 1983 that the Special Branch file from which documents had been made available to them had been destroyed.

Figure 5 (below) is a table setting out relevant dates in relation to the 13 applications. It can be seen that in all but one case the requests for review were made within the statutory time limit of 28 days. If Mr Jensen did handle these files after the 18 August 1983 destruction of other Special branch files, and if, as he has stated, he retained possession of Special Branch files until after the expiry of the 28 day time limit in which requests for internal reviews were to be lodged, it follows that the internal reviews should have proceeded without difficulty. But none of them did. Why, as I have asked above (“Question Two”), did this not occur?

FIGURE 5

	Date application received by Mr Newnham.	Date of access offer By Mr Jensen.	Date review requested by applicant.
File 1	6.7.83	18.8.83	23.8.83
File 2	7.7.83	18.8.83	12.9.83
File 3	7.7.83	16.8.83	6.9.83
File 4	7.7.83	18.8.83	25.8.83
File 5	7.7.83	18.8.83	19.9.83
File 6	8.7.83	24.8.83	10.9.83
File 7	9.7.83	8.9.83	16.9.83
File 8	11.7.83	8.9.83	4.10.83
File 9 (Dalton)	11.7.83	29.8.83	23.9.83
File 10	13.7.83	8.9.83	29.9.83
File 11	18.7.83	7.9.83	4.10.83
File 12	18.7.83	25.8.83	2.9.83
File 13 (Tattam)	19.7.83	7.9.83	12.9.83

One possibility which can be excluded is that offers of access were made, the files were then, as a group, put aside pending the expiry of the 28 day review period and were subsequently lost as a group. It can be seen from Figure 5 that there is no gap between the dispatch of the last offer by Mr Jensen and the receipt of the first request for review. Only the existence of such a gap could allow for such an explanation to apply. Assuming that the request for a review was placed on the FOI request file upon receipt, and that the relevant Special Branch file would be retrieved from wherever it was stored within a reasonable time to allow the review process to begin, it seems very unlikely that these requests for internal review were processed as a group. It seems much more likely that they would be at various stages of the process at any given time after the requests for review began to arrive at the FOI office throughout August, September and October 1983.

It seems to me that there are at least two possibilities to explain the observed facts in these 13 cases. The **first**, to which I have referred above as the “conspiracy theory”, was alleged from the beginning by many dissatisfied FOI applicants: police simply

decided that this FOI business had gone far enough, that the internal review process - which had the potential to be time consuming, embarrassing and costly - should be stopped, and the destruction of Special Branch files at another time and place provided a convenient excuse to enable this dishonest avoidance of FOI obligations to occur. Indeed, if such a conspiracy can be shown to have occurred, it would in turn provide some support for the long standing rumours and allegations that an even bigger, related deception may have occurred: that Special Branch files were not destroyed but were, with approval from the highest level, spirited away by police for safe keeping and future reference. The **second** possibility, which might be referred to as the “botch-up” theory, is that, by some mechanism which can now only be guessed at, the thirteen Special Branch files in question were misplaced sometime after the initial offers of partial access had been made but before the internal review process commenced. If this occurred, it follows that the subsequent incorrect FOI responses involved no impropriety by police.

The analysis of the circumstances of the Fehring, Coldicutt, Halfpenny and Sennett files has revealed evidence which is consistent with the possibility that those files may have been misplaced during the FOI process. That conclusion was based on evidence that the FOI process was less than perfect at the relevant time. The loss of the occasional file in such circumstances is not difficult to accept. It involves quite a stretch of the imagination, however, to add the possibility of a further 13 Special Branch files being misplaced, particularly as my analysis suggests that they would not have gone missing as a group. Nevertheless, I am prepared to accept it as a possibility for the following reasons.

The conspiracy theory is based on no evidence other than that it fits the facts. It is a possible explanation for the extraordinary FOI outcomes, including the 13 “now we have them, now we don’t” cases. But there is no direct evidence to support this explanation. It is a mere possibility. The alternative “botch-up” explanation has at least as much going for it. It might be argued that the odds are against the botch-up theory and that the misplacement of so many files seems to be so unlikely as to be

impossible, but there is ample evidence that the FOI process at the relevant time was in deep difficulty.

There is also one more piece of evidence which leads me to consider the “botch-up” explanation as a possible alternative to the conspiracy theory. I have received evidence on oath that, in early January 1984, a quantity of Special Branch files were seen at the OIU offices in Alfred Crescent, North Fitzroy. A junior officer was instructed to examine the files to determine if there was anything of use to the OIU in them, but it was decided that there was not. Without official sanction, these files were later loaded into a car and taken away, allegedly to be stored in an attic in case they became useful at some future time.

This evidence came to me from a credible source. It is indirectly supported from two independent sources. The fact that these files were spirited away for storage in an attic suggests strongly that they should not have been at the offices of the OIU. For reasons I will set out in detail elsewhere, I consider it to be likely that the six recovered Special Branch files were among the files which appeared at the OIU and were taken away.

It will be seen immediately that evidence of the existence of Special Branch files in a place where it appears they should not have been neatly complements the possibility that a quantity of Special Branch files may not have been where they should have been, namely, at the FOI office.

Summary/Conclusion

In relation to the Dalton and Tattam files, a possible answer to the question posed above as “Question Two” has emerged.

It is to be noted that this possible explanation could apply not only to the Dalton and Tattam files (and the whole group of 13 FOI review presently under consideration of which they are part), but might also be applied to other Special Branch files which had been subject to an FOI application and for which an inaccurate response had been given to the effect that the relevant Special Branch file did not exist or had been destroyed. This would include the Fehring, Coldicutt, Halfpenny and Sennett files. The evidence of the appearance of some Special Branch files at the offices of the OIU provides a possible answer to the outstanding question of where, if these files had been misplaced during the FOI process, they might have gone.

3.3.4 CONCLUSIONS RE THE SIX RECOVERED FILES AND THE FOI PROCESS

I commenced my analysis of the circumstances of each of the six recovered Special branch files with two questions which had been raised by their appearance and by a general analysis of the FOI process in respect of Special branch files (“Question One” and “Question Two”). I noted that at least one possible answer to these questions has been circulating for many years: that claims by police that Special Branch files were destroyed were false, and that Special Branch files – including those which were then subject to current FOI applications - were spirited away for continued secret use by police. In order to test this “conspiracy theory” I then conducted a close examination of the FOI process in relation to each of the six recovered files with a view to finding possible alternative explanations for their survival.

In my view there is clear evidence, which is at least as strong as that which supports the conspiracy theory, of a possible alternative explanation for the survival of each of the six files. There is evidence to suggest that the six files, and probably an unknown number of similar files, were mislaid or went missing at some point during the FOI process to which each of them was subject.

Having identified two possible explanations for the survival of the six recovered files, and for other anomalies in the outcome of the FOI process in relation to Special Branch, I will now examine these alternative explanations.

3.4 A CONSPIRACY OR A BOTCH-UP?

3.4.1 THE CONSPIRACY.

I have argued above that evidence of a conspiracy to frustrate the FOI process would in turn provide some support for the allegations, most recently publicly aired by Mr Hugh Selby, that an even bigger, deception may have occurred: that, with approval from the highest level, all Special Branch files had been saved from destruction and had been spirited away for secret future use by police. But to date the only hard evidence which has been produced of the survival of original Special Branch files (as opposed to the unauthorised copies of the index cards) is the six recovered files, and the evidence suggests that their survival is related to the FOI process. The question, then, is whether the circumstances of the survival of the six files provides evidence of a lesser conspiracy to frustrate the FOI process.

The argument that the FOI internal reviews were aborted by means of a deliberate deception is not without some appeal. It has been put to my investigators by various witnesses that the attitude of many police to the new FOI Act was not one of willing compliance. Moreover, Special Branch files were seen as being “top secret” files which were now being laid bare to the very “subversives” they were intended to keep tabs on. Add to this the undeniable evidence that the official explanation for the 1983 FOI fiasco (that files never left the offices of Special Branch and there was a “breakdown of communication”) was an incorrect explanation of the facts - and must have been known to be so at the time by some police – and one has some strong grounds for suspicion

that the claimed destruction of the Special Branch files could possibly have been used as an excuse to shut down the FOI process in relation to Special Branch files.

On the other hand, there are some weighty arguments which tend to lead in the opposite direction. There are a number of questions which come to mind.

- If police did adopt a bloody-minded attitude to the FOI review process, why did they not do so from the very start?
- If there was a high-level conspiracy to save Special Branch files and to lie about their destruction, and if the claimed destruction was seen as an opportunity to avoid all FOI obligations, why was it apparently so poorly coordinated with the conspiracy to shut down the FOI process rather than being seized with alacrity at the earliest possible moment?

The fact is, as can be seen from Figure 5, that Mr Jensen was still making offers of partial access as late as 8 September 1983, more than two weeks after the 18 August destruction of Special Branch files. (Going beyond the small group of 13 files represented in Figure 5 there are other cases where Mr Jensen offered partial access to Special Branch files in late September and early November). This evidence is in stark contradiction to the notion that there was a decision made to shut down the FOI process for Special Branch files. It also suggests that, if there was a conspiracy to save the Special Branch files and to lie about their destruction, it appears not to have included - at least initially - any intent to deny access via the FOI process. For Mr Jensen it appears to have been business as usual until at least 8 September.

One must also balance the discomfort police may have felt at giving access to Special Branch files to a relatively small number of people against the profoundly embarrassing admission police were eventually forced to make publicly – that they had destroyed files subject to FOI requests because of a “breakdown in communication”.

This admission brought considerable ignominy and ridicule upon police - an outcome which would have been entirely predictable at the outset of such an enterprise.

It must also be recognised that there were two possible motives for improperly denying access to the Special Branch files: one was an institutional or philosophical resistance to the FOI Act, the other was a commitment to the secret work of Special Branch and a desire to protect the Special Branch files from disclosure. It is only the latter which would be consistent with a decision to lie publicly about the destruction of the files and then to keep them. There is no reason whatsoever to conclude that Mr Jensen, as the principal decision maker in the FOI process, no matter how defensive he may have been with regard to giving access to documents, was guilty of the type of zealotry which would see the improper and dishonest preservation of the files for their own sake as a good idea. Nor is there any evidence that Mr Jensen was under the influence or direction of anybody else who may have held such views. Indeed all the evidence suggests that Mr Jensen was abandoned by senior management and was left alone and under-resourced to struggle with the difficulties presented by the new FOI legislation.

All of the above discussion regarding the likelihood of a conspiracy is composed of arguments, unanswered questions and inferences. This is because there is simply no *evidence* of a conspiracy to frustrate the FOI process. There is, however, one piece of evidence which, to my mind, tends to suggest that there was no plan worthy of description as a "conspiracy" to shut down the FOI process. I refer to the sworn evidence received regarding the appearance of Special Branch files at the OIU in early 1984. Although it is not known how these files came to be at the OIU, there is sworn evidence that a junior officer was instructed to look through them to see if there was anything of any immediate use to the OIU. It was found that there was not, and the files were taken away. This suggests to me that the files arrived at the OIU by way of a windfall rather than as a result of a conspiracy to save all Special Branch files. Apart from the matter of the relatively small volume of files involved, the examination of the files with a view to sorting them into useful and, by implication, useless files is

inconsistent with the belief, implicit in such a conspiracy, that all Special Branch files were valuable and worth keeping. (It is to be noted that for similar reasons this evidence also suggests that there was no larger conspiracy to keep all Special Branch files for future use.)

3.4.2 THE BOTCH-UP.

The alternative possibility to the “conspiracy theory” to explain the observed facts for the 13 FOI applications in question (and others) is that, by some non-conspiratorial mechanism which can now only be guessed at, the relevant Special Branch files were taken to the offices of the OIU and were among those files which were seen there in January 1984. If this did occur, it is less likely that there was any conspiracy to save Special Branch files or to frustrate the FOI process in relation to them, and that the survival of these files was largely the result of a botch-up. This possibility also has arguments for and against.

There is ample evidence that Mr Jensen was working under extremely difficult conditions for the first four months of the operation of the FOI Act. On his return to duty he inherited from Mr Newnham a backlog of 58 requests and continued to receive several new requests per day. Mr Jensen advised Force Command that the obligations of the Force under the FOI Act would not be met unless he was allocated support staff. The FOI index cards indicate that Mr Jensen was frequently not able to meet the statutory time limits for responses. It was only in November 1983 that two support staff were appointed to assist Mr Jensen. The state of the FOI office at the time of their commencement has been described to my investigators as a “schemozzle” and an “inefficient system”. It is also significant to note that there was no file tracking system until the index cards were made up in November 1983.

Between August and November, the only assistance Mr Jensen enjoyed was the services of Mr Arrell, the Crime Department FOI liaison officer. Mr Arrell’s function

was, in response to requests from Mr Jensen, to find and deliver to Mr Jensen files from within the Crime Department (which covered Special Branch and its successors) in relation to which an FOI application had been received. It was also part of Mr Arrell's duties to deliver files back to the various units of the Crime Department at the completion of the FOI process for that file. As one would expect, Mr Arrell was a frequent visitor to the FOI office on the first floor at 380 William Street. There is also evidence that the officer-in-charge of the OIU, to whom I have referred in my second interim report as Member 13, was a frequent visitor to William Street Police Headquarters and, according to Mr Jensen, also made a couple of appearances at the FOI office. Mr Arrell was a former member of Special Branch, as was Member 13.

It seems to me feasible that Special Branch files which were lying around in the confusion of the FOI office in the months of August, September and October could easily have been picked up, innocently or otherwise, and taken from the FOI office to the offices of the OIU by either Mr Arrell or Member 13. It is conceivable, for example, that it appeared that the FOI process had been completed in relation to these Special Branch files and they were mistakenly taken to the OIU with the intention of destroying them. Of course, it is also possible that they were removed for reasons which were not so innocent. Mr Arrell has stated to my investigators that, although he had been to the North Fitzroy offices of the OIU, he cannot recall ever returning files there from the FOI office. Member 13 claims to have almost no recollections of his time at the OIU. There is now, 15 years later, simply no evidence upon which any accusations can be based, but the evidence very clearly leaves open the possibility that, by one means or another, Special Branch files found their way from the FOI office to the OIU.

Such a possibility is consistent with the known facts and does not leave as many outstanding issues and questions as does the conspiracy theory. The "botch-up" possibility provides an explanation of how, in the cases of the Fehring, Coldicutt, Halfpenny and Sennett files, the Special Branch files may have been at William Street but were apparently never found by Mr Jensen who advised each of these applicants

that there was no record of them at Special Branch. It also provides an explanation of how, in the Dalton and Tattam files (and the rest of the group of 13 files from which they come), Mr Jensen may have possessed files at the time an offer of access was made but, when later faced with a request for review, was forced to explain that the file no longer existed.

The only hitch appears to be that the official explanation of how Special Branch files which were subject to current FOI applications came to be destroyed (i.e. the “breakdown in communication” furphy) does not square with the “botch-up” theory. The official explanation is based on the claim that Special Branch files never left the offices of Special Branch; the latter relies on the presence of the Special Branch files in the FOI office at William Street. It is in this dark corner of the mystery of the Special Branch files that the waters have been muddied by information from police which, in my opinion, was misleading.

3.4.2 (a) Problems with the official explanation for the 1983 FOI fiasco.

It will be recalled that the official explanation for the 1983 FOI fiasco emerged in response to two types of complaint to the Ombudsman from disappointed FOI applicants:

- 1) complainants who simply did not accept the advice that there were no Special Branch documents located relating to them; and
- 2) complainants to whom partial access had been offered but, when they requested an internal review, were advised that their files had inadvertently been destroyed.

In relation to one of the former group (similar explanations were received for all complainants in this group), the Ombudsman was advised by letter dated 7 November 1983 from Mr E.T Millar, Deputy Commissioner (Operations), that the advice to the applicant that no file could be located was,

“somewhat ambiguous and has since been changed to more clearly state what it was intended to convey. I suspect that our advice to [the applicant] gave rise to [the applicant] believing that a file does exist when this is not the case. ... I have explained in detail the situation about the destruction of a substantial number of Special Branch files on 18 August 1983 following the decision to disband that Branch. No record was maintained of the documents destroyed because they were no longer of practical use and because of the huge number involved. To sift and to record each individual document would have amounted to an unreasonable and unnecessary task in the circumstances, merely to be able to confirm or deny the previous existence of a document and the destruction of that document. Thus, there is no way of ascertaining whether or not [the applicant] was recorded at the former Special Branch prior to the destruction of its files.”

In regard to the complaints made by the latter group, the Ombudsman received the following advice from Deputy Commissioner Millar on several occasions in relation to different complainants,

“...documents containing non-exempt material were either copied at Special Branch or files were removed for very short periods to enable copying arrangements to be undertaken and returned to the Branch. ... Unfortunately, as the Freedom of Information Officer was not aware Special Branch records were to be destroyed on 18 August 1983 no arrangements were made for the retention of documents which could have been the subject of Freedom of Information reviews.”

As I have already made clear above, this “official explanation”, which was subsequently repeated publicly on numerous occasions by police, has several serious inaccuracies. In my view it has been established beyond any reasonable doubt that, with very few exceptions, Special Branch files were not processed at Special Branch by the FOI officer and that he (and this applies to both Mr Newnham and Mr Jensen) did not attend the offices of Special Branch for this purpose. It has also been established that not all Special Branch files were destroyed on 18 August 1983, and that an unknown number of Special Branch files survived destruction on 18 August 1983 because they were at William Street for FOI processing. In addition, having regard to Mr Arrell’s evidence that he had a list of files which had been destroyed (see para 3.3.1 above), it would appear that the claim that “*there is no way of ascertaining whether or not (the applicant) was recorded at the former Special Branch prior to the destruction of its files*” is also incorrect.

It seems to me that the difficulties with the official explanation are, once again, most starkly evident in relation to the 13 cases in which partial access was offered after 18 August 1983 (i.e. the Special Branch files survived destruction) but in which the official explanation was subsequently used to explain an inability to conduct an internal review of the FOI decision. If the files did mysteriously go missing from the FOI office, as hypothesised in the “botch-up” theory, it follows that Mr Jensen would have been confronted with a situation where he could not find the files but had no explanation as to where they might be. The requests for internal review could not be ignored. An explanation had to be found.

The possibility that Mr Jensen simply had no explanation and, in the absence of the files, could only assume that they had been returned to Special Branch and destroyed can be dismissed because it simply does not go far enough. At a stretch it might provide an explanation for the inexplicable loss of the files. But where did the other elements of the official explanation which are obviously incorrect – the claim that files were not removed from Special Branch, and the claim that it was not possible to determine if there had ever been a Special Branch file – come from? To me, it seems

very clear that there can be no innocent explanation for the emergence of these apparently inaccurate aspects of the official explanation. It seems equally clear to me that the source of the official explanation is also an important issue: if it came from a very high level it would provide some support for the many claims over the years that there was a high level conspiracy surrounding the fate of the Special Branch files.

One very disturbing possibility is that the matter was taken out of Mr Jensen's hands and an explanation which went as near as possible to fitting the facts was manufactured at a higher level. The following exchange occurred when my investigators interviewed Mr Jensen.

Investigator: "... the official explanation offered to the Ombudsman, to the Premier, to the Minister for Police and Emergency Services, to Chief Commissioner, and to the public was that there was a lack of communication between the FOI office and the Special Branch people, and that the habit of the FOI office had been to leave Special Branch files at Special Branch, and that the blockheads down at Special Branch had destroyed them all, and we are left with nothing. Now that was clearly an explanation of convenience and we have no option but to conclude that.

Mr Jensen: Well, that would have been an official explanation offered and one that I would have followed, I'm sure.

Investigator: Well was that the case? Were you bound? You see, you would have been in a position to know that that did not accord with the facts, that explanation.

Mr Jensen: Mmmm. That's a difficult one. I would have believed that there would have been some breakdown in communication because I don't think I was fully informed on everything, but it would have been a view that I'd have been probably instructed to take, and took.

Investigator: Well, is that the case, were you instructed by ...

Mr Jensen: I can't remember being given an express instruction by anyone, but obviously there were conferences all the way along the line in all these matters and as far as I'm concerned I can't remember any particular instruction being given to me but I know that was the line that was taken and it's one that I went along with.

Investigator: Knowing that it didn't meet the facts fully?

Mr Jensen: No , I won't say that I knew that it didn't meet the facts because I'm being made aware of the facts now and they present differently to what I would have thought at that time. All I can say is that I gave what I thought was the reasonable answer at that time, but looking at the material you produce here today I see that it's not a reasonable one."

Assistant Commissioner D. Ball, the author of the letters of 11 October 1983 to FOI applicants, went on extended sick leave in late 1983 and retired in 1984. My investigators have spoken to Mr Ball who retained only a general recollection of the 1983 FOI fiasco and could take the matter no further.

Another obvious possibility is that it was Mr Jensen who was the source of the inaccuracies in the explanation. There is some evidence to support this view.

I have set out above (para 3.3.1) the evidence in relation to the Fehring, Coldicutt and Halfpenny FOI applications. These three cases are fairly typical of cases in which “no record” responses were made by police. I concluded in relation to those cases that it was more than possible that Mr Jensen was not aware of the existence of the file and that the advice that no record could be located was not knowingly inaccurate. But as soon as some further pressure was applied by dissatisfied applicants, an inaccurate or misleading gloss was put on the “no record” responses in the form of Mr Millar’s explanation that the initial response had been “ambiguous” and that it was not possible to determine whether there had ever been a Special Branch file. This flies in the face of the content of Mr Arrell’s advice to Mr Jensen in the Fehring and Coldicutt cases which clearly demonstrates that it *was* possible to determine whether there had been a Special Branch file. It seems to me that the source of this inaccurate gloss could only have been Mr Jensen, to whom Mr Millar would, no doubt, have referred the matter for advice.

An examination of such documentation as I have been able to locate suggests strongly that Force Command was, until it became apparent that there was a problem with responding to FOI applications, very clearly of the view and expectation that Special Branch files which were subject to FOI applications were to be separated from the rest of the Special Branch files and dealt with according to the FOI Act. For example, a memorandum from the Chief Commissioner, Mr Miller, to the Secretary, Ministry of Police and Emergency Services dated 6 September 1983 advising of the destruction of the Special Branch files and the retention of files approved by Mr Nelson, includes the following.

“Files which have been the subject of applications under the Freedom of Information Act have been retained for the time being whilst the applications are being processed. A decision in regard to the destruction, or otherwise, of these files will be taken at a later date.”

Similarly, two memoranda, dated 26 August 1983 and 15 December 1983, signed by the Assistant Commissioner (Crime), Mr P. Delianis, reflect the same understanding.

There is also evidence that when the issue was brought to the attention of Force Command by way of letters from the Ombudsman and the Minister of Police and Emergency Services, both seeking comment on letters of complaint received by them from disappointed FOI applicants, an explanation was sought from Mr Jensen. There are memoranda on Police Department files which are referenced to Mr Jensen's initials and those of his secretary. They have obviously been prepared and typed in the FOI office for signature by Deputy Commissioner Mr Millar and the Chief Commissioner, Mr Miller. They contain the inaccurate official explanation, referring to the "breakdown in communications" and to the claim that material required for FOI processing was copied from files at Special Branch and was not transferred to the FOI officer.

Although I acknowledge Mr Jensen's evidence (quoted above) that he was not in a position to know that the official explanation was inaccurate, I cannot accept this claim entirely. I accept that Mr Jensen might not have known where the files were and that, in the absence of any explanation for their disappearance, he assumed that they had been returned to Special Branch and destroyed. I cannot accept, however, that he was not aware that the explanation of how this occurred – that the files never left Special Branch – was not correct.

It seems to me that the weight of the evidence suggests that the official explanation, whatever its origins and whoever its author, was an explanation of convenience which was an attempt to explain the apparently inexplicable disappearance of a number of files. Although it was inaccurate, and was known by some to be at least partly inaccurate, there is no evidence that it was part of a conspiracy to prevent FOI access to Special Branch files or to secretly save the Special Branch files. In my view the available evidence strongly suggests that the explanation came *after* the disappearance of the files rather than being associated with the *cause* of the disappearance.

3.4.2 (b) Some “lost” documents.

One very interesting aspect of my enquiries into the possibility that the official explanation was an explanation of convenience is the mysterious disappearance of a number of apparently relevant Police Department Central Registry Branch (“CRB”) files. My investigators attempted to obtain access to files which might document the conferences referred to by Mr Jensen, or which might possibly contain documents to throw some light on the background to the official explanation. Searches were made of the records of the CRB to identify files which might be relevant to the issue of FOI access to Special Branch files. Although several apparently very relevant files were identified, only one file was located and forwarded to my investigators: file “6-1-3/82: *Special Branch Files: Request for comments re application of Freedom of Information Act as regards above.*” Two other files which, judging by their titles, may have been very interesting reading were reported as being missing. They were:

- 6-1-17/82: *FOI requests – Destruction of Special Branch files – problems with;* and
- 5-1-2402: *Special Branch – information requested re transfer of functions to other areas.*

The last recorded movement of these two files, along with three other files, was to the office of the Assistant Commissioner (Operations), Mr Frank Green, on 14 September 1988. The three other files taken to Mr Green on that day were as follows.

- 36-8-37: *Special Branch – appointment of Nelson, Frank, to examine files on an annual basis.*
- 94-2-63: *ASIO – proposal to hold a State police Special Branch training course to be held at Australian Police College.*
- 36-8-173: *CIB Special Branch – Suggested increase in strength.*

It appears that 14 September 1988, the day on which the last movement of these files was recorded, was a bad day for orderly file keeping in the Force. It will be recalled that this was the date on which an unknown but substantial number of files were burned at the OIU following the publication in the *Moorabbin Standard* of a letter from a disaffected member alleging that Special Branch lived on in the form of the OIU and the CTEIS, and that Special Branch records had not been destroyed but had been passed on to these two units. It is very likely that the appearance of this letter was also the cause of CRB files relating to Special Branch and its records being taken to Mr Green's office. Mr Green has stated to my investigators that he has no recollection of the files. There is no evidence that the files were deliberately lost or destroyed, and I should not be taken as suggesting that this occurred. I simply note that, on one view, the loss of these files can only add weight to the conclusion that the official explanation was, at best, suspect and may well have been recognised as such by some within the Force.

3.4.2 (c) The December list of "current files."

I am aware that many will be dissatisfied with the "botch-up" theory and the suggestion that the 1983 FOI fiasco did not necessarily involve organised misconduct by police other than manufacturing an explanation *ex post facto*. But before reaching final conclusions on this issue, there is further evidence which must be considered relating to the possibility that files were mislaid. This is the evidence which results from the inspection of the FOI request files by an Ombudsman's investigator on 12 December 1983.

I have described the circumstances which led to this inspection of FOI request files, and I have referred to the notes taken by the investigator which remain on file in my office. I shall now turn to a detailed analysis of those notes.

The investigator's task was to examine FOI request files to determine whether there was any evidence of deliberate delay by police in FOI processing. There was a suspicion on the part of complainants to the Ombudsman that the release of Special Branch documents had been delayed until the Special Branch files were destroyed, which then provided an handy excuse for not releasing documents at all. The investigator attended the police FOI office at William Street on 12 December 1983. The investigator cannot now remember whether he gave advance warning of his intention to examine all files relating to FOI requests or whether he simply turned up on the appointed day and announced that was the way in which he intended to conduct his task. The notes record that the files he examined were "*prepared and made ready for inspection by Registry staff*" whose names he recorded in his notes. The investigator's recollection is that the files which were brought from the Central Registry Branch ("CRB") were FOI request files which had been completed and filed away. The notes record that the examination commenced at file 6-2-21, the very first application made after the commencement of the FOI Act (the first 20 requests, files 6-2-01 to 6-2-20, had been made under the FOI Code). The investigator worked his way through to file 6-2-97, making a brief note in relation to each file recording the date on which the request was received, the date of the response and a brief note of the outcome of each application. Many simply have the comment "*no record*", others are noted as "*record provided*". Some have slightly more detail where it seemed relevant to the issue at hand: one file is noted as "*unable to meet request in terms of Act – further letter 5/8 – replied to on 6/9 – NOTE document did exist but was destroyed on 18/8*". Some file numbers have nothing at all written next to them, but reference to the FOI index cards reveals that these files were FOI applications which sought access to documents other than Special Branch files.

This pattern of note taking ceased at file number 6-2-97, after which the investigator simply recorded the file numbers of all files he sighted. Some are noted as "*inspected*" but most are not. The investigator recalls that by the time he reached file 6-2-97 he had seen enough to determine patterns and simply noted the numbers of the FOI request files which had been prepared by registry staff for his inspection, occasionally

randomly selecting a file to inspect its contents. The last file he recorded in the notes was file number 10-2-356 which had been received in December 1983, only days before the inspection.

There are gaps in the file numbers recorded by the investigator as having been inspected or sighted. His recollection is that he asked about these files and was told that they were “current files” which had not yet been completed and therefore had not been filed away in the central registry. His recollection is that staff of the FOI office prepared a list of these “current files”.

Attached to the handwritten notes of the investigator is a photocopy of a handwritten list of 85 file numbers. The list is not in the handwriting of the investigator. The investigator has written across the top of the list, “*Files not available for inspection as they were still current*”. A comparison of the two lists reveals that the file numbers recorded on the photocopy list match perfectly the gaps in the file numbers recorded by the investigator. In other words, where the handwritten notes of the investigator do not record that he inspected or sighted a file, that file appears on the list of files which were “*not available for inspection because they were current files*”. The investigator’s notes include a note that, “*Inspection of current files to take place on Wed 21/12, 2 – 2.30*”.

The investigator attended on that day and his notes record that he examined the FOI request files relating to the applications made by Mr Fehring, Mr Coldicutt and two other applicants. Each of the applicants in these four files were complainants to the Ombudsman. This suggests that the investigator did not exhaustively examine each of the “current files” which appeared on the list, but confined his inspection to those files of particular interest to him, namely, the FOI request files relating to applicants who had complained to the Ombudsman about delays in the FOI process.

The handwritten list of “current files” given to the investigator on 12 December 1983 is a very interesting document. It is striking for two reasons.

The **first** is that the FOI request files of five of the six applicants to whom the recovered Special Branch files relate appear on the list. The exception is Mrs Halfpenny's file. Significantly, an FOI request file relating to Mrs Halfpenny's former husband, prominent trade unionist John Halfpenny, appears on the list. Mr Jensen stated to my investigators that no file could be found for Mr Halfpenny, whose FOI application was received shortly before the 18 August 1983 destruction of the Special Branch files, but Mr Jensen was able to find reference to Mr Halfpenny in the file of his former wife, Mrs K. Halfpenny. If, on the basis of this recollection, one assumes that Mrs Halfpenny's file was linked with the FOI request file relating to Mr Halfpenny's application, it may be said that all six recovered Special Branch files are closely linked to FOI request files appearing on the December "current files" list.

The **second** main point of interest is that not all of the files appearing on the list could reasonably be described as being "current" on 12 December 1983. For many of the listed FOI request files there was no current correspondence as at 12 December, and action which would appear to have been final had been taken some time previously. These files can be divided into a number of sub-groups or "batches".

a) There is a series of sequentially numbered FOI request files, all of which were finalised on 3 August with "no record" responses – advice which seems to be very final and which, one would think, left very little room for further action to be required on the file. There is no reason at all to suppose that these files were "current files" on 12 December 1983, but the fact that they were not to be found in the central registry on that day, and the fact that they were sequentially numbered and dealt with in the same way on the same day, gives them the characteristics of a "batch" of files which, wherever they may have been, would most probably have been together.

b) There are nine FOI request files appearing on the list wherein the applicants were given partial access, sought review, and were advised on 11 October 1983 that the internal reviews could not be completed because the relevant Special Branch files had

been destroyed. Again, this is advice which gives every appearance of being final and leaves very little room for further action to be taken. Again, it follows there is no reason at all to suppose that these files were “current files” on 12 December 1983. Although not sequentially numbered, these files were dealt with in the same way on the same day and may be described as a “batch”. Again, wherever they may have been, it seems a safe bet that they were together.

c) There is another group of five files in which the applicants were sent “no record” responses on 16 September 1983. For the same reasons as stated above, these could not sensibly have been described as “current”, but they are certainly a batch according to the criteria I have applied above.

d) Another batch of three files received “no record” responses on 2 September 1983. The same thing applies.

At this point, readers who have come this far by the long route will not be surprised to find that the six FOI request files which are linked to the six recovered Special Branch files are in that group of files which could not reasonably be described as “current”. This cannot be a mere coincidence.

The batch referred to in paragraph b) above includes the Dalton and Tattam files. The batch referred to in paragraph c) includes the Fehring and Coldicutt files. The batch described in paragraph d) includes Mr John Halfpenny’s FOI file which, for reasons described above, is closely associated with the Special Branch file of his former wife. The Sennett file seems to be “one-out”: there are no other files with which it can be batched, although it appears on the list and was certainly not a “current file” on 12 December 1999, a “no record” response having been sent to the applicant on 16 November 1983.

Why do the FOI request files associated with the six recovered Special Branch files appear on the list of “current files”, and why, if they were not really “current”, were they not available for inspection by the investigator with all the other completed files? It seems to me that, as always, there are a number of possibilities.

One is that the FOI request files were not put away with the completed FOI request files because they had been mislaid. Although they were apparently completed, they were never put away in the CRB and therefore they were not among the completed files retrieved from CRB to be produced to the investigator on 12 December 1983. Mr Jensen has said to my investigators that he does not recall ever losing such a number of files. This is very possibly true when one considers that, according to this analysis, most of these files would have been regarded by Mr Jensen as completed files. He may well have assumed that they had been put away with other completed files in their final resting place at the CRB when in fact they had not been.

Another possibility is that the FOI request files were not mislaid but had been put aside because it was known that the associated Special Branch file had gone missing. Alternatively, it may be that, in some of the cases appearing on the 12 December list, the FOI request file was with the Special Branch file which had already been taken to the offices of the OIU. When it became known that certain FOI request files were missing, possibly as a result of enquiries made by Mr Jensen or his staff who were looking for the files, they were found at the offices of the OIU and quietly returned to the FOI office so that they could be produced to the investigator on his second visit on 21 December 1983.

I am sure that other possibilities – and arguments for and against – can be dreamed up. But whatever the explanation, the fact that the investigator subsequently saw four of the “unavailable” FOI request files on his 21 December visit to the FOI office suggests that they were found in the days following his 12 December visit. The notes made by the investigator on 21 December of the contents of the four “found” files indicate that the files had been dealt with and completed by Mr Jensen in the usual way.

My analysis of the 12 December list of “current files and my examination of the investigator’s notes suggest that, if a number of FOI request files were mislaid, they went missing in batches, and that they went missing *after* Mr Jensen had finished processing them. This is entirely consistent with an opportunistic or accidental removal of files from the FOI office at a time when completed files may have been lying around in the FOI office waiting until someone was able to file the FOI request file away in the CRB, and to deal with the associated Special Branch file by arranging for destruction or return to the OIU or the CTEIS. At the very least the unavailability of the files on 12 December, and the failure to explain it adequately, is consistent with other evidence that the FOI office was operating under considerable pressure and that the methods used were sufficiently flawed to allow some files to slip down cracks in the system. Unfortunately, the available evidence does not allow for anything more than supposition as to how this may have occurred. Nevertheless, it is very clear that there is a strong link between the appearance on the 12 December list of unavailable “current files”, the fact that a number of them were not current files at all, and the survival of at least six (and, by implication, probably more) of the closely associated Special Branch files. More importantly, the evidence indicates that the pattern which applies to these cases – and apparently to a number of similar cases – is not a universal pattern applicable to all FOI requests for access to Special Branch files. It seems to me, therefore, that the available evidence tends to indicate that the outcome of the FOI process for the six recovered Special Branch files and their escape from destruction, if not entirely inadvertent, was not part of a systematic attempt to shut down the FOI process for Special Branch files.

3.4.3 CONCLUSIONS – CONSPIRACY OR BOTCH-UP?

I have observed above that the “conspiracy theory” as an explanation of the failure of the FOI process in relation to Special Branch files is based on no evidence other than that it appears, at first glance, to fit the facts. Its acceptance by some can only be attributed to its superficial attractiveness because I am unaware of any argument, backed by evidence, to support it.

The existence of the six files is of no assistance to conspiracy theorists. My lengthy analysis of the FOI process and of the circumstances of the six FOI applications relating to the six recovered Special Branch files explains their survival in circumstances which provide no support for the claims that there was a conspiracy to shut down the FOI process for Special Branch files.

This is also true of the broader application of the “conspiracy theory” to the fate of Special Branch files generally. The 1989 revelations that an unknown proportion of the Special Branch index cards still existed proved only that the process of the destruction of the records of Special Branch had suffered to some degree from what *The Age* referred to as “informal” security measures. The mere fact of the existence of the copies provided no support for the conspiracy theory.

There is, however, a certain amount of evidence which supports the view that there was no conspiracy to frustrate the FOI process for the Special Branch files and that the FOI office and Police Command were mystified by the disappearance of a number of Special Branch files. Not only does this evidence fit the facts in the loosest sense – just as the conspiracy theory does - but it is supported by certain detailed evidence in a way in which the conspiracy theory is not.

3.5 FINAL SUMMARY AND CONCLUSIONS RE THE SIX RECOVERED FILES

At the end of a very long examination of the FOI process generally, and in relation to the six recovered Special Branch files, the following has been established.

1. A close examination of the FOI process in relation to Special Branch files reveals evidence that, with very few exceptions, Special Branch files which were the subject of FOI applications were removed from the Special Branch offices and taken to Police Headquarters at 380 William Street for FOI processing.
2. A close examination of the FOI process in relation to the six recovered Special branch files reveals that it is highly probable that the six recovered Special Branch files were all taken from the offices of Special Branch to William Street for FOI processing prior to 18 August 1983. These files (and probably a number of other files) survived destruction because they were separated from other Special Branch files for the purpose of FOI processing. This explanation is an alternative to the claims of a conspiracy among senior police to lie about the destruction of Special Branch files and to secretly preserve them for future use.
3. The inaccurate outcome of the FOI process for four of the six Special Branch files (Fehring, Coldicutt, Halfpenny, Sennett) may be explained as follows. It is possible that they were at William Street without Mr Jensen's knowledge, or were misplaced at William Street, or were removed from William Street prior to Mr Jensen getting to the point of processing them. When he did finally reach these requests, there was nothing on the face of the FOI request file to indicate to him that the Special Branch file had ever been located or obtained by Mr Newnham. Mr Jensen made enquiries on a date after 18 August 1983 (when all other Special Branch files had been destroyed) and was incorrectly advised that the files in

question had been destroyed along with other Special Branch files on 18 August 1983.

4. The inaccurate outcome of the FOI process for the remaining two of the six files (Dalton, Tattam) may be explained as follows. It is almost certain that Mr Jensen handled these two files at the time he initially made an offer of partial access. By the time he came to process the request for internal review, the files may have been misplaced at, or removed from, the FOI office. In the absence of the two files and any explanation for their loss, it may have been assumed by Mr Jensen that the only possible explanation was that the files had been returned to Special Branch and destroyed. Again, the story offered to the applicants by letter dated 11 October 1983 was that the relevant Special Branch file had been destroyed along with all other Special Branch files on 18 August 1983.
5. The abovementioned explanation offered by police to FOI applicants was expanded in subsequent explanations to the Ombudsman and others. It was claimed by police that the Special Branch files never left the offices of Special Branch, and that there was a breakdown in communications between the FOI office and those responsible for the closure of Special Branch with the result that all Special Branch files, including those which were subject to FOI applications, were destroyed. However, the weight of the evidence suggests that, rather than being proof of a dishonest conspiracy to avoid obligations under the FOI Act, this explanation was constructed *ex post facto* in an attempt to explain the otherwise inexplicable disappearance of Special Branch files from the FOI office.
6. The explanations offered in paragraphs 3, 4 and 5 above are an alternative to the claims of conspiracy by police to use the claimed destruction of Special Branch files as an excuse to avoid FOI obligations in respect of Special Branch files. To the extent that it can be argued that the alternative relies too much on an unlikely possibility that files would go missing from the FOI office, the following evidence must be considered.

i) The FOI office was operating under extreme pressure with the inevitable result that its efficiency was compromised. There was a flood of incoming requests, the FOI office was unable to meet statutory obligations and there was no file tracking system within the FOI office until the appointment of additional staff in November 1983.

ii) On 12 December 1983 certain FOI request files (including those associated with the six recovered Special Branch files) were unavailable for inspection by an Ombudsman's investigator because, it was claimed, they were "current files". Analysis has shown that many were not "current" files but were in fact completed FOI request files which had not been put away with all other completed files. This suggests that these files were, together with the associated Special Branch files, mislaid or removed from the FOI office after they were completed.

iii) There are people known to have been present in the FOI office in the period between August and November 1983 who may have had the opportunity to have taken Special Branch files to the offices of the OIU. This may have been done innocently, possibly with later destruction in mind, or there may have been some other explanation.

iv) A quantity of Special Branch files are reported to have been at the Alfred Crescent offices of the OIU in early January 1984. They were dealt with in a way which leaves little doubt that they should not have been there. This evidence of the existence of Special Branch files in a place where it appears they should not have been neatly complements the possibility that a quantity of Special Branch files may not have been where they should have been, namely, at the FOI office.

7. It is reasonable to infer that it is possible, perhaps even likely, that the Special Branch files which apparently went missing from the FOI office were among those Special Branch files which are reported to have been at the offices of the OIU in early 1984.

8. The only “evidence” to support claims of conspiracies to frustrate the FOI process in relation to Special Branch files, and to lie about their destruction and to save them for future use, is that they appear – superficially at least - to fit the facts. There is, however, a certain amount of evidence which supports the view that there were no such conspiracies and that alternative explanations for the incorrect FOI outcomes and for the survival of the six recovered files are much more likely to be accurate. Not only does this evidence fit the facts in the loosest sense – just as the conspiracy theory does - but it is supported by certain detailed evidence in a way in which the conspiracy theory is not.

3.6 REAPPEARANCE OF THE FILES AND SUBSEQUENT DEVELOPMENTS.

I have detailed above the evidence I have received from a credible source that a quantity of Special Branch files were seen at the offices of the OIU in early January 1984. It was stated that the files were taken away in a car by Member 13 to be stored in an attic. The witness stated his belief that it was intended by those who knew of the removal of the files that they would be returned when there was a change of government and police were able to resume the activities which had formerly been undertaken by Special Branch. As I have stated above, I regard the witness by whom this evidence was given to be generally reliable. Other matters to which the witness referred have been checked and have been found to have been correct. The witness was shown the six recovered files and stated that they were familiar to him, but could not definitely state whether that familiarity was because he had seen them at the offices of the OIU or whether he had seen them when they appeared on the front page of *The Age* in January 1998. According to the witness there were no other witnesses to the removal of the files.

Apart from the general credibility of the source of the information, there are two other pieces of evidence, neither of them substantial when taken alone, but which tend to support the claim that a quantity of Special Branch files appeared at the offices of the OIU in late 1983.

The premises of the OIU at Alfred Crescent, North Fitzroy was shared between the OIU and the Crime Prevention Bureau. There were a number of police members and non-police administrative staff working in the building. One person who worked in the building at the time has confirmed to my investigators that there was a large box in the room occupied by the Sergeant in charge of the OIU which contained files. The witness remembered the box because it kept getting in everybody's way. The witness did not recall what happened to the box.

Another relevant snippet came from a witness, referred to as Member 12 in my interim reports, who took over command of the OIU from Member 13. Member 12 told my investigators that he always believed that there had been a clearing out of files at the OIU before he commenced as officer-in-charge. He was at pains to point out that he had no evidence of this, that it was based on a few things he had heard at the time but had now forgotten, but that he had always held this belief.

Member 13 has told my investigators that he has no recollection of any Special Branch files coming from the FOI office to the OIU. Mr Arrell has told my investigators that he has no recollection of ever returning Special Branch files from the FOI office to the Alfred Crescent offices of the OIU. Member 13 has denied that he removed any files from the OIU and has denied any knowledge of files being stored in an attic. The other member named by the witness as having knowledge of the incident (not Mr Arrell) has also denied having any knowledge of the alleged removal of the files or the storing of files in an attic. As there are no other witnesses to the alleged removal of these Special Branch files, I cannot take the matter any further in terms of direct evidence.

If I was to take a very narrow view of my jurisdiction and of this investigation, this could well be the end of the trail. My primary task in this investigation was to investigate complaints about allegations of police misconduct, not to find the Special Branch files. What happened to the files after they were removed from the “official system” could be seen as an enquiry which was unlikely to reveal any more evidence than I have already detailed above of police misconduct.

On the other hand, having come this far, and having made some significant advances in answering some of the long standing questions surrounding the fate of the Special Branch files, I recognised that it would not be a completely satisfying result if I was to leave the matter at this point. It was possible that an investigation of the subsequent movement of the files may not be completely irrelevant: it could throw further light on the question of how the six recovered Special Branch files survived destruction, at what point they went missing from the official system and went “underground” (if, indeed, they did), and where they have been for the last 15 years. For this reason I decided to continue my enquiries beyond the point where the Special Branch files left the “official system” and disappeared from sight.

These enquiries have been a very interesting exercise. Almost anyone who has been directly or peripherally involved, or merely aware of this long standing issue, has an opinion or a theory, or claims to have heard something on the grapevine. Although the theories, opinions and rumours have sprouted like mushrooms over the years, nobody to whom my investigators have spoken has produced anything which could be described as evidence to support their various points of view. But the fact that so many seemed to be aware of the issue indicates to me that, over the years, fact (and there is precious little of this commodity) and fiction (no shortage of this) have become inextricably mingled and the fate of the Special Branch files has been elevated to the status of what is now fashionably known as an “urban myth”. This myth, which takes many forms and is unsupported by any credible evidence, has hung about for years like an amorphous cloud and has influenced the conduct of many who have, in one form or another, been touched by it. My investigators have become aware of some

bizarre and paranoid behaviour for which there can be no explanation other than the general spookiness of the mythical powers of the Special Branch and the “secret police files”. The power of the myth also explains, for example, the panic at the OIU in September 1988 when files were removed and later burned (see my first interim report released May 1998, p 33 – 42). It seems to me probable that this incident was caused by an apprehension of a possibility, based on the myth, rather than an actual belief, based on fact, that there may have been incriminating documents at the OIU.

I will not make this an exhaustive exposition of all the evidence in my possession, but will simply set out some snippets of evidence which have emerged in the course of my extensive investigation into the fate of the Special Branch files and the activities of the OIU. These snippets of evidence provide some support for the view that a quantity of Special Branch files did exit the official system via the OIU as described above, and that these files may have included the six recovered files. None of these snippets are conclusive, nor, taken individually, could they be described as startling, or more than mildly persuasive. Put them all together, and they begin to raise a few questions.

After the initial controversy about the 1983 FOI fiasco, the Special Branch files next came to widespread public attention in August 1989. I have re-examined the Ombudsman’s investigation of the 1989 allegations and have found no evidence in the course of my current investigation which contradicts any of the conclusions reached by the Ombudsman in 1989. But it has always seemed to me that there are several aspects of the 1989 controversy which have never been satisfactorily explained. One of those aspects is the question of timing. Why did it happen in 1989?

My investigators began to consider the very obvious possibility that all of the above evidence suggesting a group of Special Branch files survived the destruction of Special Branch, and the evidence of the alleged subsequent appearance and then disappearance of Special Branch files at the offices of the OIU, may be related to the later emergence of the 1989 controversy.

The allegation that files were removed from the OIU for storage in an attic was made directly against Member 13. It was alleged that it was he who removed them and that it was he who arranged for their safekeeping. There are two pieces of evidence in this context which are of interest.

1. It will be recalled that in the final days of Special Branch, when decisions were being made about the destruction or retention of individual files, the officer-in-charge made a photocopy of the many thousands of index cards for administrative purposes. Member 13 was a member of Special Branch who, at the closure of Special Branch, was to become the officer-in-charge of the newly formed OIU, one of the two units which legitimately took possession of files which were approved by Mr F. Nelson QC for retention. Evidence has been given to my investigators that, in the course of checking the files which had been approved by Mr Nelson for retention, the officer-in-charge of the Special Branch found the photocopy of the index cards among the files which Member 13 was to take with him to the newly formed OIU. The witness who gave this evidence said that the officer-in-charge reprimanded Member 13 and took possession of the photocopy of the index cards which the officer-in-charge subsequently destroyed with the rest of the Special Branch files on 18 August 1983. It will be recalled that it was concluded by the Ombudsman in 1989 (and I do not disagree with this conclusion) that it was a surreptitiously made photocopy of part or all of this document which was made available to *The Age* in August 1989 and which was the centrepiece of the articles which appeared on the front pages at that time.

2. Member 13 left the OIU in April 1984. He served in various positions until late March 1989 (four months before the 1989 stories appeared in *The Age*) when he resigned from the Force and moved interstate.
3. I have referred above (at para 2.1.3) to my view that an examination of the August 1989 articles suggests that *The Age* had seen more than a photocopy of the index cards. It suggests that *The Age* had seen a list of some or all of the files which were retained by the OIU. I noted that it is significant that the articles referred only to files which went to the OIU and not to files which went to any of the other possible destinations which were of equal interest in 1989 (i.e. to destruction or to the CTEIS). This in turn suggests that the document seen by *The Age* identifying the 69 files came from a source *within* the OIU.

An observer might well say that these pieces of information prove nothing, and I would agree, but there are other tantalising snippets which should also be considered.

Many complainants to the Ombudsman have expressed their outrage that police should build and maintain databases such as those which were held by Special Branch, the CTEIS and the OIU. In my second interim report I expressed my own reservations. It may surprise and cause discomfort to many in the community to learn that there are privately owned, commercially operated databases which are very similar to those which have been built up by police. The operators of these databases number among their clients and subscribers such people as private investigators, finance providers, lawyers and journalists. One such enterprise which has been brought to my attention in the course of this investigation is operated by a person whom I have every reason to believe has had, in a previous professional position, close contact with members of Special Branch prior to its disbandment (including Member 13 and Member 12), and subsequently with members of the OIU. This person has come to my notice in the past in the course of an investigation where confidential information from a police database was known to have been leaked to the media. The position this person occupied at the relevant times allowed for indirect access to the databases of

the Special Branch, the OIU, the CTEIS and other police databases. My investigators have been told by witnesses that this person left that professional position in mid-1989 and commenced the private database. This person is known to have had contacts at that time with many journalists, including journalists closely associated with the articles which appeared in *The Age* in August 1989. I have evidence that those close links were still in existence in January 1998, the time at which the six recovered files are claimed to have appeared at *The Age*, having been sent by post from an anonymous source.

I do not present the foregoing as a definite finding of how the six files came to light. I freely conceded that it is a construction built entirely on circumstantial evidence. Yet it seems entirely possible.

There are other possibilities and other explanations as to how the files reappeared at the offices of *The Age* in January 1998. It must also be recognised that there could well be other groups of Special Branch files which “fell out”, or were opportunistically taken out, of the official system at other points. These files, if they exist, may appear in the future. My main reason for mentioning this particular possible route for the six recovered files is to highlight the existence of these privately owned information enterprises. It is, of course, possible to construct such databases by the acquisition of publicly available information and to operate these businesses lawfully. It should not be inferred that, by raising the matter, I am making any comment on the desirability or otherwise of the existence of these databases. It is not within my jurisdiction to do so and I leave that matter for others to make judgments.

There is, however, one aspect of the existence of these databases which is relevant to the Ombudsman. It is this: the existence of commercially operated databases means that information held on police databases and in police files has a commercial value.

It can be sold for money. It seems to me that this is one more motive which must be added to the long list of other motives I have observed in this and other investigations for serious breaches of the security of police databases. But whereas anger, revenge, and misplaced zealotry are powerful factors, they are largely random and circumstantial in nature. The ever present temptation of economic gain is not.

4. OTHER ISSUES.

There are a number of outstanding issues which I will briefly address before moving on to my final conclusions.

4.1 DESTRUCTION OF SPECIAL BRANCH FILES ON 18 AUGUST 1983.

I have stated at various points throughout this report that the available evidence has led me to adopt, as a working hypothesis, the view that the Special Branch files which were at the Fitzroy offices of Special Branch on 18 August 1983 were taken to an incinerator at Port Melbourne and destroyed as described in the evidence of several witnesses to the Ombudsman's 1983 and 1989 investigations. I will now explain the reasons for this methodology.

I have referred elsewhere (see first interim report para. 4.1.1) to the "Destruction Authority for Records in Public Offices" ("the Destruction Authority") dated 18 August 1983. This document is a list of Special Branch files (by file number only) which were approved for destruction by the Keeper of Public Records under the Public Records Act. The description of the records approved for destruction appears in the Destruction Authority as follows.

"Approximately 6,000 indexed cards of individual persons and organisations in alphabetical order from A to Z inclusive dating from 1934 to 1983 inclusive.

*Files for individuals and organizations as follows:-
(with associated index cards)"*

[There follows a six-page, six columns per page, list containing 1225 Special Branch file numbers.]

As I have also explained in detail elsewhere, the allegation that Special Branch files were not destroyed did not emerge until some years after the claimed destruction of the files in 1983. The purpose of the Ombudsman's 1983 investigation was not to establish *whether* Special Branch files had been destroyed in accordance with the Destruction Authority – that was accepted as a fact – but to establish whether they had been destroyed *with intent to avoid FOI obligations*. Allegations that the files had not been destroyed did not emerge until the appearance of an item in the *Moorabbin Standard* in September 1988. The *Age* articles of August 1989 took these allegations further, claiming that, despite police assurances about the destruction of Special Branch files, large volumes of Special Branch materials had survived and that “material relating to them has been circulating inside and outside the Force”. The claim that this material was circulating implied, at the very least, that there was some general knowledge within the Force that these materials had been improperly retained. At a higher level it hinted at the existence of a widespread and perhaps officially sanctioned conspiracy. The truth or otherwise of these allegations became the central question in the Ombudsman's 1989 investigation. The notion of a high level conspiracy has been a feature of many of the rumours over the years and reappeared most recently in December 1997 when *The Age* published allegations made by Mr Hugh Selby. I dealt with these allegations in my first Interim Report of May 1998.

In the course of his 1983 and 1989 investigations the Ombudsman interviewed police members who claimed to have been present at the destruction of the Special Branch files on 18 August 1983, as well as several others who were players in the events which led up to the destruction of the files. The 1989 articles referred to the materials which had been seen by *The Age* as being photocopies, and this was subsequently confirmed in evidence given by *Age* journalists. The Ombudsman concluded that the documents shown to *The Age* were not Special Branch files which had been improperly kept, but were unauthorised photocopies of an unknown number of the

Special Branch index cards. How or by whom these unauthorised copies were made remains unanswered but there is no evidence to suggest that the photocopies were made with official approval, that there was any widespread knowledge of their existence, or that they were used by police investigators.

The nature of the allegation that Special Branch files were not destroyed is such that it can only be proven to be correct by the discovery of files which survived destruction. No such files or original index cards were found in 1983 or in 1989. To the extent that he had no evidence to disprove the claim, the Ombudsman accepted in 1989 that the Special Branch files had in fact been destroyed as described in the uncontradicted evidence of several witnesses. The Ombudsman made extensive enquiries, formal and informal, inside and outside of the Force, about the possible survival of Special Branch files and their availability to investigators. These enquiries found no evidence that any such files existed or that any "material relating to them" had been "circulating inside and outside the Force". I have occupied the position of Deputy Ombudsman (Police Complaints) since 1988 and I have been Ombudsman since 1995. I have in that time developed many sources of information, formal and informal, inside and outside of the Force. Although rumours about the fate of the Special Branch files have persisted over the years, I have never received or heard anything which could be described as evidence to support the rumours. This position has not been altered in the course of the wide ranging enquiries made by my investigators in the current investigation.

The appearance in 1998 of the six recovered files, five of which appeared on the Destruction Authority, again raised the question of whether Special Branch files had been destroyed as claimed by police in August 1983, and whether there had been a conspiracy to save the files from destruction and to retain them for future reference. The appearance of the six files was the first time any physical evidence which may have supported the allegations had ever been produced. The subsequent investigation described in detail above has, I believe, shown that the six files (and possibly many more) survived destruction in circumstances which lend no support to the allegations of conspiracy or widespread impropriety by police.

This leaves me in a position where, like Mr Geschke in 1989, I have no evidence that some or all Special Branch files were improperly saved from destruction by means of a conspiracy - high-level, widespread, officially sanctioned or otherwise. Like Mr Geschke, I am led by the available evidence to conclude that all Special Branch files which were at the offices of the Special Branch on 18 August 1983 were, as described in the uncontradicted evidence of witnesses to the event, taken to the incinerator and destroyed on that date.

It must be emphasised that the above conclusion is subject to one important qualification. Although the evidence compels me to conclude that the Special Branch files were destroyed and that there was no widespread or high-level conspiracy to save them from destruction, I cannot eliminate the possibility that, as was probably the case in relation to the unauthorised photocopy of the index cards, some files may have been opportunistically saved and improperly kept by individuals.

There is, for example, evidence that from about 1981, before the closure of Special Branch became more than a mere possibility, an effort was made to cull the files of the Special Branch which, it has been put to my investigators, had never been previously culled. There is evidence that large numbers of files were destroyed at the APM mills at Alphington as part of this culling program. It is obviously possible that, by accident or design, some of these files went astray. It seems probable, however, that files voluntarily culled at about that time probably contained information dating back many decades and, if they were to be produced today, would be easily recognisable as coming from this source.

The same possibility of files going astray by accident or design applies to the destruction of files in the final days of Special Branch. Apart from the undoubted existence of the unauthorised copy of the index cards, and the appearance of the six files, there is no evidence of this having occurred. Nevertheless, the possibility must be recognised. Given this possibility, it follows that the future appearance of small

numbers of surviving Special Branch files which were not subject to FOI requests will not prove the existence of a conspiracy to save all of the Special Branch files.

4.2 EVIDENCE OF OTHER FILES NOT DESTROYED.

Even though I have concluded that there is no evidence to support the claims that Special Branch files were not destroyed as claimed by police, in the interests of thoroughness my investigators conducted a detailed and laborious comparison of the Destruction Authority with such records as still exist concerning the files inherited from Special Branch by the OIU and the CTEIS. The purpose of this exercise was to see if there was any evidence of files which appeared on the Destruction Authority somehow escaping destruction and reappearing in the records of the OIU or the CTEIS. The exercise uncovered several discrepancies which require further attention.

One of the biggest problems faced in successive investigations in to the fate of the Special Branch files has been the lack of any thorough or reliable record of the files destroyed and of those transferred to the OIU and to the CTEIS. My investigators have obtained the following evidence relating to the Special Branch files which were allocated to the OIU and to the CTEIS.

1) **Special Branch files inherited by the OIU.**

In my second interim report I set out in detail the means by which I secured the surviving files and records of the OIU and a description of those files (see second interim report paras. 1.2 – 1.6).

In addition to the actual files, my investigators have obtained a copy of a list, dated 2 April 1984, of 244 sequentially numbered files held by the OIU. The list has been signed by Member 13 and Member 12. It appears to be a list of files prepared at the time Member 13 handed over command of the OIU to Member 12. Although it is reasonable to assume that some or all of the 244 files appearing on the list are former Special Branch files, the list is of limited value because the OIU files have been renumbered in a way which bears no relationship to the old Special Branch file numbering system. This list, therefore, cannot be compared with the Destruction Authority which, it will be recalled, contains only Special Branch file numbers.

2) **Special Branch files inherited by the CTEIS.**

My investigators have found an old list of files (one handwritten copy, one typed copy of the same list) prepared by staff of the CTEIS. This list is undated, but sworn evidence has been given to my investigators that it was compiled in the very early days of the CTEIS when it was decided that a new filing system with new file numbering would be commenced. The foolscap paper on which the list appears is obviously old paper and I accept that the list is genuine. It appears to be a list of 570 Special Branch file numbers, each of which has next to it the new file number allocated to each former Special Branch file under the new filing system.

Although the list of 244 OIU files cannot be compared with the Destruction Authority, an examination of the surviving files of the OIU has revealed that there are, as one would expect, quite a few files which were obviously among the 246 files transferred over from Special Branch. These files contain documents which date back

to the days of Special Branch and in many cases they still have Special Branch file covers bearing Special Branch file numbers. Two such files are of particular interest because they also appear on the Destruction Authority. These two files also appear on the list of OIU files dated 2 April 1984 signed by member 12 and Member 13.

A similar comparison of the Destruction Authority and the lists of Special Branch files held by the CTEIS at its commencement reveal a total of 60 files or documents which, it seems, were passed to the CTEIS but which also appear on the Destruction Authority.

At first glance these might appear to be very serious discrepancies which lend some support to the claims that at least some Special Branch files were not destroyed and were improperly retained by police for later use. But a closer examination reveals some possible explanations for the discrepancies which make such a conclusion less certain.

The first important factor is that the Public Records Act 1973, in effect, prohibits the destruction of public records without the authority of the Keeper of Public Records. The Destruction Authority is, as its name would suggest, a document which permits, but does not compel, destruction of the public records listed in it. Therefore the mere fact that a document is listed on the Destruction Authority but was not subsequently destroyed is not itself evidence of impropriety. The crucial information which would be necessary to prove impropriety in this context would be a list of the files which were approved for retention by Mr Nelson QC. Unfortunately, no such list is attached to Mr Nelson's 29 August 1983 final report to the Minister for Police and Emergency Services and all indications are that no such list was ever compiled. Mr Nelson's final report, however, contains a very interesting passage which may explain the discrepancies to which I have referred. Mr Nelson reported that, by a rough estimate, approximately 7000 files and index cards were set aside for destruction. Referring to the estimated 7000 files, he stated the following:

“On reassessment by Inspector McIver of the files originally and provisionally set aside for destruction, only about 100 were reassigned for transfer to other units of the Force.”

This passage clearly refers to the possibility that, at the conclusion of a provisional sorting of the files, there was a further assessment and that approximately 100 files were reassigned to the class of files which were to be retained. Although Mr Nelson reported that he was present when an officer of the Public Records Office attended the offices of Special Branch and “indicated the appropriate steps to be taken to obtain authority for such destruction”, it cannot now be established whether the reassignment of the 100 files was done before or after the Destruction Authority had been prepared for the signature of the Keeper of Public Records. If it was the latter, the subsequent presence of these files which appear on the Destruction Authority in the records of the CTEIS and the OIU is explained.

There are two factors which, to my mind, tend to support the conclusion that the files in question were not improperly retained. The **first** is that the 60 files in question which went to the CTEIS were, from the beginning, recorded openly in the filing system of the CTEIS and no attempt was made to hide their presence. The available information does not allow any parallel conclusion to be made in regard to the OIU, but nor is there any evidence that the situation was any different. The **second** factor is that the list of files made by CTEIS staff in the very early days of that unit consists of 570 Special branch file numbers. There were, according to the Chief Commissioner’s report of 6 September 1983 to the Minister, a total of 572 files transferred to the CTEIS. The two numbers tally very closely and it would appear that the 60 files in question were not, as one would expect if they were improperly retained, in excess of the number which were legitimately transferred to the CTEIS.

In conclusion, it seems clear to me that the available evidence does not provide any basis on which one could conclude that the discrepancies observed by my investigators are a result of impropriety by police. Nor can they be said to be evidence that all or any Special Branch files were improperly saved from destruction by police and retained for use by the CTEIS or the OIU. The only certainties which emerge are that the Destruction Authority should not be taken as an unfailingly accurate guide to the identification of Special Branch files which were actually destroyed on 18 August 1983, and that any discrepancies are not necessarily evidence that something was amiss.

5. CONCLUSIONS

5.1 CONCLUSIONS RE SPECIAL BRANCH FILES.

In August 1989, when evidence first emerged to suggest that not all Special Branch records had been destroyed, *The Age* commented that,

“The trail is so muddy and confused, and the security measures during the crucial time so informal, the State Ombudsman, Mr Geschke, who has been asked to investigate the illegal photocopying, will have his work cut out.”

That was doubly true almost nine years later when I commenced this investigation. Nevertheless, I believe that it has been a fruitful and successful exercise. I have established that the six files escaped destruction in circumstances which, although suggesting that there may be a limited number of similar files still in existence, provide no support for the recurring claims that there was a high-level conspiracy to save Special Branch records from destruction.

The following is a very brief restatement of the conclusions I have reached regarding the fate of Special Branch files.

- My investigation has shown that the six recovered files escaped destruction because they were files which were subject to FOI requests. They were separated from other Special Branch files and taken to the FOI office at William Street for processing.
- A detailed analysis of the FOI index cards and other documentation relevant to the FOI processing of Special Branch files indicates that there is a strong possibility that there may be other files which escaped destruction in similar circumstances.

- There is evidence to suggest that by some unknown means the six recovered Special Branch files went missing from the FOI office. There is no evidence to suggest that there was a conspiracy to frustrate the FOI process in regard to the Special Branch files. It is more than possible that they were among a number of Special Branch files which were seen at the North Fitzroy offices of the OIU in early 1984 and that it was at this point that they were taken away and remained “underground” until their reappearance in January 1998.
- The explanation offered by police for the disappearance of a number of Special Branch files, some of which were subject to current FOI applications, was inaccurate and misleading.
- The survival of the six recovered files and the circumstances by which they escaped destruction does not support the long standing rumours, claims and allegations that Special Branch files were not destroyed on 18 August 1983 as claimed by police.
- In particular, I have found no evidence of a high-level conspiracy or any organised attempt to save the Special Branch files from destruction and to keep them for future use.
- I cannot rule out that some Special Branch files which were not subject to FOI applications may opportunistically have been saved from destruction, but, to support allegations that there was an organised move to save the files, such files would have to be produced in large numbers.
- I have found no evidence to alter the conclusion reached by the Ombudsman following his 1989 investigation when he found that the documents seen by *The Age* in 1989 were an unauthorised copy of the Special Branch index cards. There is no doubt, and there has been none since 1989, that this material was at large and probably still is.

5.2 FINAL COMMENTS.

This investigation commenced in October 1997 when *The Age* revealed that it had been shown information from the OIU database revealing that the OIU had conducted its business in a way which raised many serious questions. The scope of the investigation rapidly expanded to cover the issue of the fate of the Special Branch files and claims that evidence had been concealed from the Ombudsman in the course of his 1989 investigation. These are important issues and readers of this report and my two interim reports will see that I have devoted considerable time and effort to them. I believe I have had some success.

But I have also conducted this investigation with an eye to the broader question of intelligence gathering by police in the most general sense. Although I have found that there is no evidence to support the allegations of a conspiracy to save Special Branch files from destruction, and that the survival of Special Branch material produced since 1983 can be explained by other facts and circumstances which suggest mismanagement and isolated, opportunistic misconduct rather than organised misconduct, the fact remains that there is a vast amount of material which was collected by Special Branch which was not destroyed and which has been shown to *The Age* on at least two occasions. Add to this the vast data base stolen from the OIU, which has also turned up at *The Age*, as well as the materials known to have been leaked from police databases to which I have referred in unrelated investigations (my 1993 VEDC investigation found leaks and serious flaws in the record keeping practices of the Bureau of Criminal Intelligence) and the problem becomes one of extreme concern. All of this information is at large and it is anybody's guess to whom it has been distributed and where it may turn up next. It may well be available to anybody who knows where to get it and can pay for it. As I said in my second interim report, this is a situation about which every member of the community has a right to be angry.

The question of whether police should have been gathering and holding information as revealed by these repeated public controversies was an issue dealt with in detail in my second interim report. I do not propose to repeat my views here. The question of where the Force goes from here in regard to these issues is entirely in its own hands. My second interim report indicated there are some positive signs that the Force is at last learning the lessons which the history of the Special Branch and its successors has repeatedly thrust upon it.

BW PERRY

Ombudsman