OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 99006
Application S 99/97

Participants:

MILAN KUPR
Applicant

DEPARTMENT OF PRIMARY INDUSTRIES
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - referee reports relating to an applicant for employment with the respondent - referees assert that their reports were given on the understanding that the reports would be treated in confidence - information adverse to applicant in referee reports - whether requirements of procedural fairness displace the understanding that the referees' reports would be treated in confidence - whether contents of referees' reports are exempt matter under s.46(1)(a) or s.46(1)(b) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - whether disclosure of information in referee reports concerning an external applicant for employment could reasonably be expected to have a substantial adverse effect on the management or assessment by the respondent of its personnel - application of s.40(c) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - whether signatures of referees and panel member comprise information concerning the personal affairs of those persons - application of s.44(1) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.40(c), s.44(1), s.46(1)(a), s.46(1)(b), s.46(2), s.51, s.78, s.87(2)
Public Sector Management Commission Act 1990 Qld s.4.14(2)
Public Service Act 1996 Qld s.78(1), s.78(2), s.132(2)

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Cairns Port Authority and Department of Lands, Re (1994) 1 QAR 663
Corkin and Department of Immigration and Ethnic Affairs, Re (1984) 2 AAR 214
G v Day [1982] 1 NSWLR 24
Hamilton and Queensland Police Service, Re (1994) 2 QAR 182
McCann and Queensland Police Service, Re (1997) 4 QAR 30
McEniery and Medical Board of Queensland, Re (1994) 1 QAR 349
Murphy and Queensland Treasury & Ors, Re (1995) 2 QAR 744
Pemberton and The University of Queensland, Re (1994) 2 QAR 293
Shaw and The University of Queensland, Re (1995) 3 QAR 107
Stewart and Department of Transport, Re (1993) 1 QAR 227

DECISION

I set aside the decision under review (being the decision of Mr J R Dulley on behalf of the respondent, dated 20 May 1997). In substitution for it, I decide that -

(a) the parts of the reports in issue which record the comments of the referee, Mr Mellon, which were not disclosed to the applicant during the selection process (see paragraph 14 of my accompanying reasons for decision) comprise exempt matter under s.46(1)(a) of the *Freedom of Information Act 1992* Qld;

(b) the signatures of the referees, and of Mr Grimley, are exempt matter under s.44(1) of the *Freedom of Information Act 1992* Qld; and

(c) the balance of the matter in issue is not exempt from disclosure to the applicant under the *Freedom of Information Act 1992* Qld.

Date of decision: 27 September 1999

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INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant, Mr Kupr, seeks review of the respondent's decision to refuse him access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to two referee reports obtained by the respondent in connection with an application by Mr Kupr for employment as a Field Officer with the Queensland Boating and Fisheries Patrol (the QBFP), which forms part of the Department of Primary Industries (the Department). The Department contends that the reports are exempt matter under s.40(c) and s.46(1) of the FOI Act.

2. Mr Kupr's FOI access application was made by a letter dated 20 February 1997, which stated:

> *On 6 February I was interviewed for several 003 Field Officer positions with the QBFP.*
>
> *The interview process went well and was conducted in what I felt was a fair and professional manner. I was, however, unsuccessful due to two negative referee reports.*
>
> *While I believe in complete honesty from former employers, my personnel files from the organisations reveal that none of the negative comments were ever discussed with me, let alone, documented.*
>
> *I will be speaking to both of the people regarding the remarks but need copies of the reports to accurately address their content. ...*

3. The Department consulted both referees under s.51 of the FOI Act. Each objected to disclosure of his report. By letter dated 7 May 1997, Mr N O'Brien, the Department's authorised decision-maker, communicated to the applicant his decision refusing access to the referee reports on the basis that they comprised exempt matter under s.40(c) and s.46(1)(b) of the FOI Act. That decision was affirmed on internal review by Mr J R Dulley on 26 May 1997. By letter dated 17 June 1997, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Dulley's decision.

External review process

4. The documents in issue were obtained and examined. One referee report was given by Mr M Withnell, Chief Fisheries Officer of New South Wales Fisheries. The other was given by Mr C Mellon, Officer in Charge of the Darwin branch of the Australian Fisheries Management Authority. I note that the applicant had been informed of the identity of the referees during the selection process.

5. My staff consulted the referees, who maintained their objections to disclosure, but did not apply to become participants in this review in accordance with s.78 of the FOI Act. Further information was then obtained from the referees and the Department about the circumstances in which the reports were provided. Statutory declarations were obtained from Mr R Supple, Superintendent of the QBFP (who requested the reports from the referees), and Mr R Grimley, Operations Manager (North) of the QBFP (who chaired the selection panel for the Field Officer positions for which Mr Kupr was an applicant). Since Mr Grimley's evidence made it clear that, in the course of the selection process, he had orally conveyed to Mr Kupr the contents of significant parts of both referee reports, the referees were again consulted. Mr Mellon maintained his objection and supported it with a statutory declaration. However, Mr Withnell withdrew his objection to disclosure of his report. Nevertheless, the Department maintains that both reports comprise exempt matter under the FOI Act.

6. Each participant was provided with an opportunity to lodge submissions and/or evidence in support of their respective cases. In making my decision, I have taken into account the following material, which is in the nature of evidence and written argument (copies, or summaries, of which have been exchanged between the participants):

- the Department's initial and internal review decisions, and relevant documents from its FOI processing file (including responses from the referees Mr Mellon and Mr Withnell, when consulted under s.51 of the FOI Act);
- the applicant's external review application;
- the record of an interview between a member of my staff and Mr Roderick Supple (with Mr Neil O'Brien of the Department also in attendance) on 16 February 1998;
- a statutory declaration by Mr Roderick Supple, dated 26 February 1998;
- a statutory declaration by Mr Robert Grimley, dated 2 March 1998;
- information supplied by Mr Robert Grimley in answer to questions put by a member of my staff in conversations on 7 May 1998 and 3 August 1998;
- a statutory declaration by Mr Col Mellon, dated 15 June 1998;
- submissions contained in a letter from the applicant dated 21 May 1999;
- submissions contained in a letter from the Department dated 29 June 1998.

7. The referee reports comprise standard forms completed by each referee. The forms provided space for handwritten comments on each of up to six selection criteria, and space for additional comments. I find that the signature of each referee, and of Mr Grimley, is information which concerns the personal affairs of the relevant individuals (see *Re Corkin and Department of Immigration and Ethnic Affairs* (1984) 2 AAR 214, cited with approval in *Re Stewart and Department of Transport* (1993) 1 QAR 227 at p.257, paragraph 80) and hence is *prima facie* exempt from disclosure under s.44(1) of the FOI Act. I cannot discern any public interest considerations favouring disclosure of the signatures that would outweigh the public interest favouring non-disclosure which is inherent in the satisfaction of the test for *prima facie* exemption under s.44(1). I therefore find that the signatures are exempt matter under s.44(1) of the FOI Act.

8. As the applicant is already aware of the identity of the referees, I can see no arguable basis for exemption in respect of the formal parts of the referee reports, i.e., the parts of the standard forms other than the handwritten comments of the referees. I will therefore confine my reasons for decision to the comments. The Department contends that the reports are exempt under s.40(c) and s.46(1)(b) of the FOI Act. However, in light of the objections by Mr Mellon, who referred to both limbs of s.46(1), I will also consider the application of s.46(1)(a).

Application of s.46(1)(a)

9. Section 46(1)(a) of the FOI Act provides:

> ***46.(1)*** *Matter is exempt if—*
>
> *(a) its disclosure would found an action for breach of confidence;*
>
> ...

10. I discussed the requirements to establish exemption under s.46(1)(a) in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279. The test for exemption is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency faced with an application, under s.25 of the FOI Act, for access to the information in issue. I am satisfied that there are identifiable plaintiffs (Mr Mellon and Mr Withnell) who would have standing to bring an action for breach of confidence.

11. No suggestion of a contractual obligation of confidence arises from the circumstances under consideration, so the plaintiffs in the hypothetical legal action would be reliant on principles of equity. In *Re "B"*, I explained that there are five cumulative criteria which must be satisfied in order to establish a case for protection in equity of information claimed to have been communicated in confidence:

(a) it must be possible to specifically identify the information in issue, in order to establish that it is secret, rather than generally available information (see *Re "B"* at pp.303-304, paragraphs 60-63);

(b) the information in issue must possess "the necessary quality of confidence"; i.e., the information must not be trivial or useless information, and it must possess a degree of secrecy sufficient for it to be the subject of an obligation of conscience, arising from the circumstances in or through which the information was communicated or obtained (see *Re "B"* at pp.304-310, paragraphs 64-75);

(c) the information in issue must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see *Re "B"* at pp.311-322, paragraphs 76-102);

(d) it must be established that disclosure to the applicant for access under the FOI Act would constitute a misuse, or unauthorised use, of the confidential information in issue (see *Re "B"* at pp.322-324, paragraphs 103-106); and

(e) it must be established that detriment is likely to be occasioned to the original confider of the confidential information in issue if that information were to be disclosed (see *Re "B"* at pp.325-330, paragraphs 107-118).

Specific identification of information

12. I am satisfied that the information in issue can be identified specifically.

Necessary quality of confidence

13. In his statutory declaration, Mr Grimley stated that, when it was found that the two referee reports contained some adverse comments about the applicant, he contacted the applicant to give him the opportunity to respond to the adverse comments. Mr Grimley then set out in his statutory declaration the information from the reports which he communicated to the applicant. Significant portions of the reports were read out, almost verbatim, to the applicant. In his letter dated 21 May 1999, the applicant agrees that Mr Grimley telephoned him at his work place, subsequent to his selection interview, and put adverse comments from the referee reports to him, seeking his response. I accept the evidence of Mr Grimley (who has impressed as an honest and co-operative witness) concerning disclosure of information from the referee reports to the applicant, including his evidence as to the extent of that disclosure.

14. I am constrained from including in my reasons for decision information which is in issue in this external review (see s.87(2) of the FOI Act), and I am therefore unable to set out the detail of that part of Mr Grimley's statutory declaration which describes the information communicated to the applicant from the referee reports. However, that information (which I will refer to as the "disclosed comments") is recorded in the following parts of the reports:

Withnell report	Selection Criterion 1	All
	Selection Criterion 2	Last sentence
	Additional comments	Second sentence
Mellon report	Selection Criterion 1	All
	Selection Criterion 3	All
	Additional comments	First 9 words of the second sentence and all of the third sentence.

I will refer to the other comments in the referee reports as the "undisclosed comments".

15. The applicant asserted in his FOI access application that *"none of the negative comments were ever discussed with me, let alone documented"*. In a telephone conversation with a member of my staff, the applicant explained that he meant that the negative comments by the referees were never raised with him when he was working under the management/supervision of those individuals, and he was given no indication that either referee was dissatisfied with his performance. In fact, the applicant said, Mr Mellon provided him with a "glowing" letter of recommendation.

16. With respect to the undisclosed comments, I find that they do retain the necessary quality of confidence as against the applicant, to satisfy criterion (b) set out in paragraph 11 above. There is nothing before me to suggest that the applicant has been made aware of that information.

17. The parts of the reports which record the disclosed comments can no longer be considered confidential information *vis-à-vis* the applicant. In the circumstances, however, that might not necessarily disqualify that information from protection in equity. Assuming that circumstances were such that the grant of an equitable remedy would not be futile, a defendant would not ordinarily be permitted to avoid an equitable obligation where the only asserted ground for avoidance arose by virtue of the defendant's own conduct in breach of the equitable obligation. The crucial factor is whether or not the disclosure by Mr Grimley in itself constituted a breach of an equitable obligation of confidence. If it did, I do not consider that equity would permit that breach to be compounded by a further disclosure of the information in written form: *cf. G v Day* [1982] 1 NSWLR 24, where the Supreme Court of New South Wales was prepared to restrain the publication of confidential information (the identity of an informant in a sensitive police investigation) notwithstanding a prior unauthorised publication of that information (by way of a brief mention in a television news report).

18. On the other hand, if, having regard to all the relevant circumstances, the disclosure by Mr Grimley was not an unconscionable use of information claimed to have been communicated in confidence, then the fact that the information had previously been communicated to the applicant (in circumstances involving no breach of an equitable obligation of confidence) would mean that no protection was available in equity from disclosure to the applicant of the same information in written form. Thus, in the particular circumstances of this case, the fate of the disclosed comments depends on the application of criterion (c).

Whether circumstances import an equitable obligation of confidence

19. In his statutory declaration dated 15 June 1998, Mr Mellon stated:

> *I was approached ... by Rod Supple of the* [QBFP] *to provide a report on the suitability of Mr Milan Kupr for employment as a field officer within that section.*
>
> *I agreed that I would provide a report but only on the basis that the information would remain confidential. Mr Supple stated "don't worry about that, mate, it will stay with me."*

> *Without that assurance of confidentiality, I would not have provided the report that was subsequently provided to Mr Supple. ...*

20. In a communication dated 7 November 1997, Mr Withnell stated:

> *I have held a longstanding personal belief that referees reports were always provided in confidence.*
>
> *In relation to this particular report I was contacted by Mr Rod Supple from the* [QBFP] *to advise he was faxing me the requested report and informed that it would remain strictly confidential.*

21. In a letter to me from Mr Withnell's legal representative, dated 23 June 1998, it was stated that Mr Withnell maintained that, at all times, he understood the report he supplied to the Department was confidential, and, had he been aware of any requirements concerning disclosure of the information provided, he would not have written a report. (I note that, in the same letter, the concession was made that, since the relevant contents of his report had been communicated to the applicant, Mr Withnell saw no point in maintaining his objection to the release of the report to the applicant.)

22. In Mr Supple's statutory declaration, concerning the circumstances in which the reports were obtained from Mr Withnell and Mr Mellon, Mr Supple stated:

> - *It is difficult to recall the exact conversations. However, both people would have been asked if they would complete the report. After a positive response to that question, there was a conversation about how the completed reports should be returned. Both people were advised that the reports were to be used by QBFP only and the reports should be returned to me.*

23. While it is not clear that Mr Supple gave an express assurance to Mr Mellon or Mr Withnell that the reports he sought from them would be treated in confidence as against the applicant, I am satisfied that he made comments which led both Mr Mellon and Mr Withnell to believe that their reports would be treated in confidence.

24. On the other hand, when interviewed by a member of my staff on 16 February 1998, Mr Supple said that before contacting Mr Withnell, he sought advice from an equity officer about whether it was permissible to do so (Mr Withnell not having been nominated by the applicant as a referee). The equity officer informed Mr Supple that the QBFP could go to persons other than nominated referees, provided that anything adverse said by those persons was put to the applicant to allow a response, in order to accord procedural fairness. There is no evidence that any qualification or exception of that kind was conveyed to Mr Withnell, or to Mr Mellon. Indeed, the evidence and submissions (see paragraph 41 below) lodged on behalf of the Department indicate that it was (and apparently remains) the understanding of relevant officers that it was the QBFP's policy to promise confidential treatment of referee reports in order to obtain candid assessments of applicants for appointment to positions involving law enforcement responsibilities, but that they were also obliged to provide shortlisted candidates for appointment with the substance of any adverse comments by referees, and invite them to respond, so as to accord procedural fairness. These propositions are essentially irreconcilable. Yet the understanding of relevant Departmental officers

appears to have been that the promise of confidential treatment of referee reports could be complied with by refusing to provide access to the reports themselves, notwithstanding that adverse comments in the reports were to be communicated orally to the subjects of the reports.

25. In my view, equitable principles relating to the protection of confidential information apply to the information *per se*, irrespective of the particular form in which it is communicated. It is simply not the case, for instance, that equity would not afford a remedy against an employee who orally communicated to his employer's competitor some confidential information communicated by the employer to the employee in confidence (e.g., a secret technical process, or a valuable list of special requirements of customers), whereas it would afford a remedy against an employee who passed on the same information in a written document.

26. The issue then arises as to whether the conduct and comments of Mr Supple (which gave Mr Mellon and Mr Withnell cause to understand that their reports would be treated in confidence) imposed a binding obligation upon the QBFP not to disclose the reports to the applicant, which obligation continues to bind the Department today. The issue is similar to that which I had to consider in *Re Hamilton and Queensland Police Service* (1994) 2 QAR 182, and the following extract from that case sets out statements of principle which I consider are also applicable in the circumstances of the present case:

> *41. In paragraph 139 of my decision in* Re "B", *I stated as follows:*
>
> > 139. There will be cases where the seeking and giving of an express assurance as to confidentiality will not be sufficient to constitute a binding obligation, for example if the stipulation for confidentiality is unreasonable in the circumstances, or, having regard to all of the circumstances equity would not bind the recipient's conscience with an enforceable obligation of confidence (see paragraphs 84 and 85 above). ...
>
> *42. In paragraph 85 of* Re "B", *I had referred in particular to Lord Denning MR's statement in* Dunford & Elliott Ltd v Johnson & Firth Brown Ltd *[1978] FSR 143 at p.148, which bears repeating in this context:*
>
> > If the stipulation for confidence was unreasonable at the time of making it; or if it was reasonable at the beginning, but afterwards, in the course of subsequent happenings, it becomes unreasonable that it should be enforced; then the courts will decline to enforce it; just as in the case of a covenant in restraint of trade.
>
> *I remarked in* Re "B" *that, despite the different wording, this dictum probably equates in substance, and in practical effect, to the emphasis in the judgments of the Federal Court of Australia in* Smith Kline & French Laboratories (Aust) Ltd and Others v Secretary, Department of Community Services & Health *(1990) 22 FCR 73 (Gummow J), (1991) 28 FCR 291 (Full Court), that the whole of the relevant circumstances must be taken into account before a court determines that a defendant should be fixed with an enforceable obligation of confidence.*

43. *I also referred in* Re "B" *(at paragraph 83) to the suggestion by McHugh JA in* Attorney-General (UK) v Heinemann Publishers *(1987) 75 ALR 353 at p.454 that special considerations apply where persons outside government seek to repose confidences in a government agency:*

> ... when ... a question arises as to whether a government or one of its departments or agencies owes an obligation of confidentiality to a citizen or employee, the equitable rules worked out in cases concerned with private relationships must be used with caution. ...

44. *An illustration of this is afforded by the result in* Smith Kline & French *where Gummow J refused to find that the first respondent was bound by an equitable obligation not to use confidential information in a particular way, because the imposition of such an obligation on the first respondent would or might clash with, or restrict, the performance of the first respondent's functions under a relevant legislative scheme. (The relevant passages are set out at paragraphs 80 and 81 of* Re "B"*, and see also my remarks at paragraph 92 of* Re "B"*.)*

45. *Another illustration of this principle, in my opinion, is the fact that government officials empowered to make decisions which may adversely affect the rights, interests or legitimate expectations of citizens are ordinarily subject to the common law duty to act fairly, in the sense of according procedural fairness, in the exercise of such decision-making powers (see, for example,* Kioa v West *(1985) 159 CLR 550; 60 ALJR 113, relevant extracts from which are reproduced at paragraph 28 of my reasons for decision in* Re McEniery and the Medical Board of Queensland [(1994) 1 QAR 349]*). Circumstances may be encountered where the duty to accord procedural fairness clashes with an apparent duty to respect the confidentiality of information obtained in confidence, for example, where a government decision-maker proposes to make a decision which is adverse to the rights or interests of a citizen, on the basis of information obtained in confidence from a third party. This seems to me to be precisely the situation in which the QPS found itself when it proposed to refuse Mr Hamilton's applications to join the QPS, after having regard to confidential information obtained from confidential sources.*

46. *Ordinarily, I do not think that decisions relating to the initial recruitment of persons as employees of government agencies would attract the application of a legal duty to accord procedural fairness (unless special circumstances were present) before an application for employment is refused (see* R v The Commissioner of Police, ex parte Boe *[1987] 2 Qd R 76, especially per Macrossan J at p.100;* Attorney-General (NSW) v Quin *(1990) 64 ALJR 327 per Dawson J at p.352;* Cole v Cunningham *(1983) 49 ALR 123 at p.128). On a common sense view, the practicalities and the resource implications, when scores (or even hundreds) of applications may be received for an advertised vacancy, tell against such a requirement. (There is ample precedent, however, to indicate that a duty to accord procedural fairness ordinarily applies to decisions relating to*

promotion, transfer, or termination of employment, of persons who have previously gained appointment as public officials; although the required procedure may vary according to the dictates of fairness in the particular case.) ...

...

48. There is, of course, a degree of flexibility about what the obligation to accord procedural fairness may require in a particular context. In Kioa, *Mason J said (at ALJR p.127):*

> ... the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, that is, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations ... .

49. In Re McEniery *I said (at paragraph 31):*

> 31. What constitutes the observance of fair procedures will vary according to the exigencies of particular cases, but ordinarily the duty to act fairly requires that a person be given an effective opportunity to know the substance of the case against the person, including in particular the critical issues or factors on which the case is likely to turn (*cf. Kioa* per Mason J at p.128-9) so that the person is given an effective opportunity of dealing with the case against him or her.

50. Although a statutory obligation to accord procedural fairness is applicable, I do not think that fairness requires that every unsuccessful applicant for a position as a police recruit is entitled to know the basis on which an adverse decision is proposed to be made and to be given an opportunity to address it. However, in the situation where an applicant otherwise meets all criteria for selection as a police recruit, and it is proposed to refuse the application on the basis of adverse material obtained from a third party, I think the better view is that procedural fairness requires that the applicant be informed of the substance of the adverse material and be given an opportunity to answer it.

27. I must therefore consider whether there was a duty to accord procedural fairness in this case, and, if so, what degree of disclosure (if any) of adverse comments from third parties, that duty required.

28. Selection for appointment to the public service is, and was at the time of the applicant's application for appointment as a Field Officer with the QBFP, governed by the *Public Service Act 1996* Qld, s.78(1) and (2) of which provide:

> ***78.(1)*** *Selection of an eligible person for appointment as a public service employee must be based on merit alone.*
>
> ***(2)*** *In deciding the relative merits of applicants, the following matters must be taken into account—*
>
> *(a) the extent to which each applicant has abilities, aptitude, skills, qualifications, knowledge, experience and personal qualities relevant to the carrying out of the duties in question;*
>
> *(b) if relevant—*
>
> *(i) the way in which each applicant carried out any previous employment or occupational duties; and*
>
> *(ii) the extent to which each applicant has potential for development.*

29. The reports in issue in this case were provided to the QBFP as part of the selection process for a Field Officer position for which Mr Kupr was an external applicant. The material before me (including a record of Mr Grimley's answers to questions put to him by a member of my staff) indicates that the purpose of interviewing applicants for the position was to establish a pool of persons, ranked in accordance with an 'order of merit' list, from whom to select Field Officers over a twelve month period. The advertising of vacancies of this kind is liable to attract hundreds of applicants, and Mr Grimley has stated that that was the case in this instance. The process followed by the QBFP was to select a shortlist of candidates (who, based on the information contained in their written applications, appeared to satisfy the selection criteria to a higher degree than others) for interview by a selection panel. Reports were obtained from previous employers or supervisors of the shortlisted candidates. At interview, the panel members checked with the candidates whether the persons nominated in their applications were actually their past employers or supervisors, and made it clear that past employers or supervisors would be asked to provide a report. An 'order of merit' list was prepared ranking candidates according to their relative merit in meeting the selection criteria. This was determined by an evaluation of each shortlisted candidate's job application and prior experience, interview performance, and referee reports.

30. The procedure outlined above was followed in the selection process involving the applicant. He was asked at the interview whether he had objections to his referees or previous supervisors being contacted. (I note that the applicant has argued that Mr Withnell was not an appropriate person from whom to seek a report, as Mr Withnell had not directly supervised the applicant's work, and the applicant had not been advised that Mr Withnell would be contacted.) Reports were obtained from Mr Withnell and Mr Mellon. Mr Grimley stated to a member of my staff that the applicant had adequately met the selection criteria at the interview stage, and would have been "well placed" in the 'order of merit' list for a Field Officer position. However, after consideration of the two adverse referee reports, the applicant's position on the 'order of merit' list dropped.

31. At the time when the applicant applied, and was interviewed, for the Field Officer positions, the Public Sector Management Commission (PSMC) Standard for Recruitment and Selection (since replaced by Office of Public Service Directive 5/97) was in force, and had the legal force of a statutory instrument of binding effect (according to its tenor) in its

application to the Department (see s.4.14(2) of the *Public Sector Management Commission Act 1990* Qld and s.132(2) of the *Public Service Act 1996* Qld). The PSMC Standard set out "principles" and "guidelines" for recruitment and selection. It is reasonable to expect that Departmental officers involved in the selection process would have been aware of the terms of the PSMC Standard (and Mr Grimley has confirmed this).

32. The PSMC Standard was a lengthy document which set out a number of core principles, supported and explained in guidelines. The distinction between principles and guidelines was explained in the PSMC Standard (at p.8, part 3.3) as follows:

> ***3.3 PRINCIPLES AND GUIDELINES***
>
> *The principles of this standard:*
>
> - *form a framework for Queensland public sector recruitment and selection practices*
> - *detail the fundamental requirements for the minimum acceptable practices to be used*
> - *are mandatory and must be followed*
> - *are supported by guidelines which clarify how the principles should be implemented in most circumstances. Agencies may alter the guidelines in order to ensure best management practice occurs in the particular situation.*

33. The principles set out in the PSMC Standard contained no stated requirement for disclosure to an applicant of referee reports, or adverse comments by a referee. The only mandatory principle in the PSMC Standard, which directly referred to referee reports, was the following (at p.10 and p.41):

> *Reference checks shall be used in arriving at the selection recommendation and shall be undertaken, at least, in relation to the preferred applicant or applicants. They shall be obtained from referees with first-hand knowledge of performance relevant to the selection criteria, preferably supervisors, and be undertaken as an assessment against the selection criteria.*

34. In the guidelines relating to this principle, the following statements appeared (at pp.43-44, part 7.6.2):

> *If an applicant is reluctant to nominate a supervisor as a referee or to provide further referees, the applicant should be informed of their right to respond to adverse comments. ...*
>
> *...*
>
> ***Referee Reports***
>
> *Referee reports may be obtained over the telephone or in writing. The accuracy of a report taken over the telephone should be confirmed with the referee and recorded. Referees should be informed that their comments will be*

> *made available to the applicant upon request, and also that they may be made available to any authorised person, or those having entitlements under the provisions of the* Freedom of Information Act 1992 *or the judicial review processes.*
>
> *An applicant should be given the opportunity to respond to adverse comments made by a referee which may significantly affect the selection committee's deliberations. In these circumstances the applicant may nominate more referees or furnish additional documentation to support their application.*

35. I consider that it is also material to note the final paragraph of part 7 of the PSMC Standard (at p.53):

> *As a minimum, information must be provided in the selection documentation regarding the decision-making process to satisfy the requirements of the* Judicial Review Act 1991.
>
> *This information should:*
>
> - *demonstrate that natural justice has been applied to all individual applicants throughout the selection process*
> - *demonstrate that decision-making was based on an open and bias-free assessment of applicants*
> - *enable an applicant to understand how and why the decision was made, so that they are satisfied with the fairness of the decision.*

36. I observe that the PSMC Standard expressly contemplated that referee reports, obtained for recruitment and selection processes to which the Standard applied, were not ordinarily to be obtained on the basis that they would be treated in confidence as against the subject of the report (notwithstanding the limitations that 'open referee reports' are considered to have, in some quarters: see *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at paragraphs 29-63 and 127-140). However, since that indication appeared in a guideline (not requiring mandatory observance) rather than a principle, it was open to the QBFP to adopt a different practice "in order to ensure best management practice occurs in the particular situation".

37. At the meeting of 16 February 1998 between a member of my staff and Mr O'Brien and Mr Supple of the Department, both Departmental officers said that it was a policy within the QBFP not to strictly comply with the guidelines concerning the disclosure of referee reports, and that any referee reports supplied to the QBFP were treated in confidence. They said that this practice was adopted because the QBFP was a law enforcement body, and that it was imperative that the past performance and integrity of applicants for positions as compliance officers were able to be carefully scrutinised. Mr Supple said that the process adopted by the QBFP was similar to that used by the Queensland Police Service in its recruitment process.

38. According to the tenor of the PSMC Standard, it was open to the QBFP to adopt a practice of receiving referee reports, in respect of applicants for Field Officer positions, on the basis that a report would be treated in confidence as against the subject of the report. (The PSMC Standard also allowed (at p.7, part 3.1) for the PSMC to exempt specific categories of employees or agencies from specific parts of the Standard, but there is no indication in the material before me that the QBFP had ever sought such an exemption in respect of its Field

Officer positions.) It is also clear, on the material before me, that it was the understanding of Mr Supple and Mr Grimley that the QBFP was obliged to disclose to a shortlisted applicant for employment (i.e., one who was selected for interview, after the initial culling process contemplated in the PSMC Standard) any adverse comments in a referee report, and to give the shortlisted applicant an opportunity to respond. This exception was apparently not conveyed to Mr Mellon or Mr Withnell, who were led to believe that their reports would be treated in confidence. There is some inconsistency between promising confidentiality to referees for the stated purpose of obtaining candid assessments, while operating under a procedure that obliges disclosure to the subject of the reference of adverse comments (which, in some instances, the promise of confidentiality might have induced a referee to include in the report). If it is an agency's understanding that the recruitment and selection procedures which it follows, or the duty to accord procedural fairness, require that adverse comments in a referee report be disclosed to a shortlisted applicant, then, in fairness to the referee, this condition/exception to a promise of confidential treatment of the referee report should be communicated to the referee when the report is requested.

39. The language used in the PSMC Standard (see, for example, the extract quoted at paragraph 35 above) strongly suggested that the legal requirements of natural justice/procedural fairness were regarded as applying to recruitment and selection processes to which the Standard applied. The Standard applied both to the recruitment of external applicants, and to the promotion of existing public sector officers, and did not differentiate in its application to either category. However, the cases referred to in paragraph 46 of *Re Hamilton* (reproduced in the extract set out at paragraph 26 above) indicate that, while a common law duty to accord procedural fairness ordinarily applies in respect of decisions relating to promotion of existing public sector officers, it would not ordinarily apply to the initial recruitment of external applicants for appointment. Thus, for example, at the stage of culling external applicants to produce a shortlist of candidates for interview, I do not consider that an agency has a legal duty to accord procedural fairness, such as might require the disclosure of adverse comments in a referee report, or require that an applicant be given a hearing before a decision is made not to shortlist that applicant.

40. However, there were indications in the language of the PSMC Standard that, once an applicant for employment has been shortlisted and given the opportunity of a hearing (at a selection interview) to press his/her claims for selection, the process should be conducted so as to comply with the requirements of natural justice/procedural fairness. Thus, for example, the first sentence quoted from the PSMC Standard at paragraph 34 above, refers to an applicant for appointment having a "right" to respond to adverse comments in a referee report.

41. Certainly, the Department appears to have entertained no doubt that it was obliged to disclose to the applicant the adverse comments in the referee reports. In its written submission dated 29 June 1998, the Department argued:

> *Your investigations seem to indicate that certain parts of the referee reports were disclosed to the applicant during the recruitment and selection process. It must be made clear that any disclosure during the recruitment and selection process was as a direct result of the application of natural justice principles.*

> *I do not intend to embark upon a recitation of natural justice principles here and now, but this agency considers that under the rules of natural justice it was obliged to disclose certain essential elements of the adverse material to the applicant and to provide the applicant with an opportunity to comment on the adverse material. This is the context of the disclosure to the applicant.*
>
> *It is this agency's understanding that the rules of natural justice do not require actual documents to be disclosed to an affected person (in this case, the applicant): see* Re E and Legal Aid Office Queensland [(1996) 3 QAR 239]. *Disclosure of the essential elements of the adverse material will satisfy the principles of natural justice. In this particular instance, this agency considers that it owed an obligation to the applicant (during the recruitment and selection process) to disclose the essential elements of the adverse material. This obligation does not derogate from the agency's need to maintain the integrity and confidentiality of the recruitment and selection process, particularly in obtaining referee reports: see* Re Hamilton and Queensland Police Service *(1994) 2 QAR 182.*
>
> *It must also be remembered that the Queensland Boating and Fisheries Patrol (QBFP) is a law enforcement arm of government and, as such, an onerous duty is placed upon it to ensure that its law enforcement recruits are beyond reproach. The best way to discharge this onerous duty is through referee reports. Therefore, the QBFP must maintain referee reports' confidentiality.*
>
> *The fact that certain essential elements of the referee reports were verbally disclosed to comply with one aspect of the law (natural justice) should not derogate from this agency's ability to enforce another aspect of the law (equitable obligation of confidence or breach of confidence) to protect the confidentiality of the referee reports. Therefore, in the circumstances, this agency is of the view that it owes an obligation to the referees to maintain the confidentiality of their reports.*

42. As I have commented above, the Department has attempted in its submission to maintain a distinction (which I consider ill-founded and untenable under the legal principles relating to breach of confidence) between disclosure of confidential information by oral communication, and disclosure of the same information in a written document. In my view, either Mr Grimley breached equitable obligations of confidence owed by the Department to Mr Mellon and Mr Withnell, respectively, when he read out to the applicant the adverse comments in their referee reports, or else that disclosure did not, in all the relevant circumstances, constitute an unconscionable use of information received in confidence, in which case disclosure of the same information in written form (to the same person) would not found an action for breach of confidence.

43. While the issue is not free from doubt, I consider that, by the time Mr Kupr reached the stage of having been allotted a "well placed position" on the 'order of merit' list after consideration of his application for employment and his performance at the selection interview, the Department was required to accord him procedural fairness prior to lowering his position on the 'order of merit' list by reference to adverse comments made by third parties (i.e., by Mr Mellon and Mr Withnell in their referee reports). In making that finding, I have had regard to s.78 of the *Public Service Act*, the language of the PSMC Standard, and

the fact that, notwithstanding the suggestion that the PSMC Standard may not have been complied with in every detail, the evidence discloses that the QBFP followed a practice, in respect of shortlisted applicants who were the subject of adverse comment in referee reports, of making them aware of the adverse comments, and permitting them to respond. It would have been unfair to Mr Kupr for the QBFP not to have followed its usual practice in that regard, and it is clear from Mr Grimley's evidence that he considered that it would have been unfair to Mr Kupr to lower his position on the 'order of merit' list, without giving him an opportunity to answer the adverse comments. I consider that, in the circumstances, the duty to accord procedural fairness merely required that Mr Kupr be given an effective opportunity to know the substance of the adverse comments, and to answer them (see *Re "B"* at p.319, paragraph 93, and *Re McEniery and Medical Board of Queensland* (1994) 1 QAR 349, at pp.361-363, paragraphs 27-33).

44. The touchstone in assessing whether criterion (c) to found an action in equity for breach of confidence (see paragraph 11 above) has been satisfied, lies in determining what conscionable conduct requires of an agency in its treatment of information claimed to have been communicated in confidence. In the particular circumstances of this case, I do not consider that equity would have restrained the Department from disclosing to Mr Kupr the substance of the adverse comments in the referee reports. There may be some room for argument as to whether Mr Grimley went too far in disclosing significant parts of the reports in an almost verbatim manner and linking the comments to particular referees. However, reasonable minds will differ about the best way to convey the substance of adverse comments to a person (so as to permit the person an effective opportunity to respond), and I do not believe that equity would have restrained Mr Grimley from (or penalised him for) disclosing the adverse comments in the way he did.

45. Having examined the referee reports, I am satisfied that Mr Grimley conveyed the substance of the adverse comments to the applicant in a manner that satisfied the requirements of procedural fairness. I do not consider that there was any necessity to reveal to the applicant the undisclosed comments, such as might have qualified or overridden the understanding given by Mr Supple to the referees that their reports would be treated in confidence. I find that there is an equitable obligation binding the Department to keep the undisclosed comments confidential. However, I find that there is now no equitable obligation of confidence which binds the Department to refrain from disclosing to the applicant the parts of the referee reports which record the disclosed comments. Those parts do not qualify for exemption under s.46(1)(a) of the FOI Act.

Unauthorised use of information

46. Mr Mellon has objected to disclosure of any part of his report to the applicant. I therefore find that disclosure to the applicant of the undisclosed parts of his report would constitute an unauthorised use of the information.

47. On the other hand, Mr Withnell has withdrawn his objection to disclosure. The Department is not subject to a continuing equitable obligation of confidence if the supplier of the confidential information has expressly released the recipient (i.e., the Department) from the obligation (see *Re "B"* at pp.323-324, paragraph 105; *Re Pemberton* at p.343, paragraph 104). Since disclosure to the applicant would not amount to an unauthorised use, no part of Mr Withnell's report qualifies for exemption under s.46(1)(a) of the FOI Act.

Detriment

48. I find that disclosure of the undisclosed parts of Mr Mellon's report would cause detriment to Mr Mellon of one or more of the types described in *Re "B"* at pp.326-327, paragraph 111, so as to satisfy criterion (e) set out at paragraph 11 above.

Summary of Findings

49. There is no occasion in the present case to consider the application of any of the defences to an equitable action for breach of confidence discussed in *Re "B"* at pp.330-335, paragraphs 119-134. Nor is s.46(2) of the FOI Act applicable, since Mr Mellon does not come within the terms of paragraph (a) or (b) of s.46(2). I therefore find that disclosure of the undisclosed comments in Mr Mellon's report would found an action for breach of confidence, and that they comprise exempt matter under s.46(1)(a) of the FOI Act. Mr Withnell's report, and the disclosed comments in Mr Mellon's report, do not qualify for exemption under s.46(1)(a) of the FOI Act.

Application of s.46(1)(b)

50. Section 46(1)(b) of the FOI Act provides:

> ***46.(1)*** *Matter is exempt if—*
>
> ...
>
> *(b) it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*

51. In *Re "B"* (at pp.337-341, paragraphs 144-161), I considered in detail the elements which must be established in order for matter to qualify for exemption under s.46(1)(b) of the FOI Act. In order to satisfy the test for *prima facie* exemption under s.46(1)(b), three cumulative requirements must be established:

(a) the matter in issue must consist of information of a confidential nature;

(b) that was communicated in confidence; and

(c) the disclosure of which could reasonably be expected to prejudice the future supply of such information.

If the *prima facie* ground of exemption is established, it must then be determined whether the *prima facie* ground is displaced by the weight of identifiable public interest considerations which favour the disclosure of the particular information in issue.

52. The first two requirements for exemption under s.46(1)(b) are similar to the second and third criteria to found an action in equity for breach of confidence (see paragraph 11 above). As to the first requirement, it is clear that the disclosed comments can no longer be properly characterised an "information of a confidential nature" *vis-à-vis* the applicant.

53. I explained the test imposed by requirement (b) above in *Re "B"* at pp.338-339 (paragraphs 149-153) of which the following paragraphs present an adequate summary for present purposes:

> *152 I consider that the phrase "communicated in confidence" is used in this context to convey a requirement that there be mutual expectations that the information is to be treated in confidence. One is looking then for evidence of any express consensus between the confider and confidant as to preserving the confidentiality of the information imparted; or alternatively for evidence to be found in an analysis of all the relevant circumstances that would justify a finding that there was a common implicit understanding as to preserving the confidentiality of the information imparted.*
>
> *153 The matters discussed at paragraphs 103 and 104 above concerning the scope or extent of an obligation of confidence will also be relevant to the extent of the mutual understanding as to confidence for the purposes of s.46(1)(b), i.e. it is a question of fact whether in the circumstances it was or must have been the intention of the parties that the recipient should be at liberty to divulge the information to a limited class of persons which may include a particular applicant for access under the FOI Act. Likewise the matters discussed at paragraphs 105 and 106 above concerning the confider authorising the disclosure of information previously communicated in confidence are also relevant here.*

54. The evidence before me establishes that, while there may have been a mutual understanding that the referee reports supplied to the Department by Mr Mellon and Mr Withnell were communicated in confidence, the Department's understanding was always subject to an exception/condition arising from the Department's obligation to disclose to the applicant any adverse comments in the reports. It is unfortunate that this exception/condition, as it was understood by the Department, was not expressly conveyed to Mr Mellon and Mr Withnell. However, disclosure of certain parts of the reports has occurred in accordance with that exception/condition, and I find that there is no continuing mutual understanding that the disclosed comments were communicated in confidence.

55. With respect to the undisclosed comments in Mr Withnell's report, I find that the withdrawal of Mr Withnell's objection to disclosure means that there is no continuing mutual understanding that those comments were communicated in confidence. I therefore find that Mr Withnell's report, and the disclosed comments from Mr Mellon's report, do not qualify for exemption under s.46(1)(b).

Application of s.40(c)

56. Section 40(c) of the FOI Act provides:

> ***40.*** *Matter is exempt matter if its disclosure could reasonably be expected to—*
>
> *...*

> *(c) have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; ...*
>
> *unless its disclosure would, on balance, be in the public interest.*

57. I considered the application of s.40(c) of the FOI Act in *Re Pemberton, Re Murphy and Queensland Treasury & Ors* (1995) 2 QAR 744, *Re Shaw and The University of Queensland* (1995) 3 QAR 107, and *Re McCann and Queensland Police Service* (1997) 4 QAR 30. The focus of this exemption provision is on the management or assessment by an agency of the agency's personnel. If I am satisfied that any adverse effects could reasonably be expected to follow from disclosure of the matter in issue, I must then determine whether those adverse effects, either individually or in aggregate, constitute a substantial adverse effect on the management or assessment by the QBFP of its personnel. For reasons explained in *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 (at pp.724-725, paragraphs 148-150), I consider that, where the Queensland Parliament has employed the phrase "substantial adverse effect" in s.40(c) of the FOI Act, it must have intended the adjective "substantial" to be used in the sense of grave, weighty, significant or serious.

58. I do not consider that the selection process which occurred in this case can be described as part of the management or assessment by the Department of its personnel. A selection process applied to an external applicant does not fall within the terms of s.40(c), as any adverse effect on that process would not be an adverse effect on the management or assessment by the agency of the agency's personnel.

59. In any event, the matter in issue which I have found does not qualify for exemption under s.46(1) of the FOI Act has either been disclosed to the applicant already, by an officer of the Department in the course of the selection process, or is information in respect of which the referee (Mr Withnell) no longer objects to disclosure. I cannot see how disclosure of that information could reasonably be expected to have a substantial adverse effect on the management or assessment of personnel. I therefore find that Mr Withnell's report, and the disclosed comments in Mr Mellon's report, do not qualify for exemption under s.40(c) of the FOI Act.

Conclusion

60. I set aside the decision under review (being the decision of Mr J R Dulley on behalf of the respondent dated 20 May 1997). In substitution for it, I decide that -

(a) the undisclosed comments in Mr Mellon's referee report comprise exempt matter under s.46(1)(a) of the FOI Act;

(b) the signatures of the referees, and of Mr Grimley, are exempt matter under s.44(1) of the FOI Act; and

(c) the balance of the matter in issue is not exempt from disclosure to the applicant under the FOI Act.

.....
F N ALBIETZ
INFORMATION COMMISSIONER