'TCD' and Department of Primary Industries

(S 72/95, 19 December 2001, Deputy Commissioner Sorensen)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1.- 2. These paragraphs deleted.

REASONS FOR DECISION

Background

3. The applicant was formerly employed by the Department of Primary Industries (the DPI) at a country centre (the facility). The applicant is an expert on the cultivation of certain crops, and still has contact with the DPI as an independent consultant.

4. In July 1994, a casual female employee who worked on research projects conducted by the applicant, and by other researchers, lodged a complaint of sexual harassment against the applicant. I will refer to that person as 'the complainant'. The complainant alleged that the applicant had sexually harassed her on a number of occasions between late 1992 and mid-1994, and had also threatened to terminate her employment if she assisted staff employed on other projects at the facility. The complainant's employment on the applicant's projects was terminated by the applicant shortly after she made the harassment complaint.

5. The applicant was informed of an investigation into the complainant's allegations, and was eventually provided with formal particulars of those allegations under cover of a letter dated 29 September 1994 from the Director-General of the DPI. The applicant contends, however, that the Director-General's letter dated 29 September 1994 included allegations of which he had not previously been made aware by DPI investigators, and which were not included in diary notes kept by the complainant which were shown to the applicant. In any event, the applicant provided a detailed response to the allegations supplied with the Director-General's letter dated 29 September 1994.

6. The investigation of the complainant's allegations involved interviews with the applicant, the complainant, and officers of the facility, which were then compiled into a report by the investigation team. The report, which included copies of the records of interview as appendices, had been provided to the Director-General on 8 August 1994. The applicant was then, on 29 September 1994, provided with a document setting out particulars of alleged misconduct, to which he lodged a detailed response. On 14 November 1994, after considering the applicant's

response to the allegations, the Director-General found that the allegations were not substantiated, and that no disciplinary action should be taken against the applicant. The applicant resigned from the DPI in June 1995, and now operates a consultancy in the town where the facility is located which involves contact with DPI staff.

7. By way of an FOI application form dated 13 October 1994, the applicant sought access to the investigation report and associated documents created or received by the investigation team between 16 July and 13 October 1994.

8. By letter dated 2 November 1994, the applicant sought access to additional documents. The second application, which was in three separate parts, appears to fully encompass the documents requested by the applicant on 13 October 1994, and the DPI dealt with the two applications together. The applicant's final application was for the following documents:

> 1. *Request 1. All documents including reports, files, notes, correspondence, working papers, work diaries, computer printouts and discs, maps, plans, photographs, tape recordings and videotapes relating to* [the applicant] *from the 1st July 1994 to the time of making this application.*
>
> 2. *Request 2. Without limiting the generality of request number 1 above, all work diaries of past and present officers of the Department of Primary Industries ... relating to* [the applicant] *since 1st January 1990 to the time of this application.*
>
> 3. *Request 3. Without limiting the generality of request number 1, all reports, files, notes and correspondence created by or received by* [a number of named officers of the DPI] *relating to* [the applicant] *since 1st August 1993 to the time of this request.*

9. By letter dated 17 January 1995, Mr G McLeod, who was then the DPI's Manager, Access and Administrative Review, informed the applicant of his decision to give the applicant access to some 343 documents, but to refuse access to a further 796 documents relying upon s.40(c), s.41(1), s.42(1)(b), s.43(1), s.44(1), s.45(1)(c), s.46(1)(a) and s.46(1)(b) of the FOI Act.

10. The applicant sought internal review of Mr McLeod's decision by way of a letter dated 10 February 1995, in which the applicant addressed the public interest in disclosure of the documents in some detail.

11. By letter dated 7 March 1995, Mr J C Walthall, General Manager (Intensive Livestock Industry Services) informed the applicant that, on internal review, he had decided to disclose an additional 436 documents to him. Mr Walthall's decision did not refer to the remaining documents to which Mr McLeod had refused access, and

did not include in his decision any reasons for not disclosing those documents to the applicant.

12. By letter dated 29 March 1995, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Mr Walthall's decision. The applicant raised two grounds for review: the apparent upholding, by Mr Walthall, of Mr McLeod's decision that certain documents were exempt from disclosure, and the sufficiency of search by the DPI for documents which fell within the terms of the applicant's combined FOI access application.

External review process

13. Copies of documents containing matter in issue, accompanied by a schedule, were provided to me by the DPI. In a letter dated 7 April 1995, I requested the DPI to provide the applicant and myself with an adequate statement of reasons for its decision, on internal review, to refuse access to the matter that had been withheld from the applicant. That statement of reasons was received on 20 June 1995.

14. The Information Commissioner then wrote to the DPI, on 26 July 1996, requesting clarification of certain matters, and details of the searches carried out by the DPI to locate documents which fell within the terms of the applicant's FOI access application. The Information Commissioner also informed the DPI of his preliminary views with respect to the exemption provisions claimed for the matter in issue.

15. In its response dated 21 October 1996, the DPI said that it wished to rely on only three of the exemption provisions it had previously invoked, and that it was prepared to disclose some additional documents and parts of documents to the applicant. A conference was subsequently arranged between staff of my office and of the DPI to discuss the question of 'sufficiency of search' for documents which fell within the terms of the applicant's FOI access application. The applicant was advised of the outcome of that conference by way of a letter dated 19 December 1996. By letter dated 14 January 1997, the applicant provided clarification of the documents to which he still required access.

16. By letter dated 7 February 1997, the Information Commissioner informed the DPI of his further preliminary views on the matter in issue, and requested further advice on the DPI's 'sufficiency of search' for documents. Further advice was received under cover of a letter from the DPI dated 20 August 1997, accompanied by two statutory declarations, one from Ms I Cliffe, who was at that time the DPI's Acting Principal Consultant, Workforce Planning and Development, and one from Mr R Nielsen, a DPI staff counsellor. In that letter, the DPI advised that it wished to rely on additional sections of the FOI Act, and that it had changed its views on whether certain matter was exempt from disclosure under one or more sections of the FOI Act. The DPI did, however, agree to the disclosure of some additional documents and parts of documents. The DPI provided a further statutory declaration from Mr

C Adriaansen, an officer of the DPI, under cover of a letter dated 5 September 1997.

17. By letter dated 2 September 1997, the Assistant Information Commissioner authorised the DPI to disclose to the applicant the additional matter it was prepared to release. The Assistant Information Commissioner also wrote to the applicant on the same date, informing him of the additional matter to be disclosed to him. That matter is no longer in issue in this review.

18. By letter dated 3 September 1997, the Information Commissioner requested advice from the Executive Director, Office of the Public Service (the OPS), in relation to a number of documents which the DPI contended, in its letter dated 20 August 1997, were exempt from disclosure under s.43(1) of the FOI Act. Those documents comprised letters exchanged between the DPI's legal officers and the OPS, which, in the Information Commissioner's preliminary view, did not qualify for exemption under s.43(1) of the FOI Act. The OPS responded on 10 September 1997 saying that it had no objection to the disclosure of the letters. By letter dated 17 September 1997, the DPI was authorised to disclose those documents to the applicant. By letter dated 23 September 1997, the applicant was informed of the additional matter to be disclosed to him, and that matter is no longer in issue in this review. That letter also requested the applicant to provide further advice or evidence in relation to the issue of 'sufficiency of search' by the DPI for documents which fell within the terms of the applicant's FOI access application.

19. For some months, the applicant did not inspect the additional documents which the DPI had been authorised to disclose to him. However, on 10 July 1998 the applicant's solicitors informed me that the applicant had inspected the documents and requested copies from the DPI. As the applicant gave no indication, following inspection of the documents, as to whether he wished to continue to press for access to the matter then remaining in issue, copies of the DPI's submission dated 20 August 1997 with the accompanying statutory declarations of Ms Cliffe and Mr Nielsen, and the statutory declaration of Mr Adriaansen, were forwarded to the applicant under cover of a letter dated 29 July 1998. A schedule of documents, and copies of relevant cases, were also provided to the applicant.

20. The applicant responded on 27 October 1998 providing a submission and accompanying statutory declaration, in which the applicant asserted his entitlement to access to the matter then remaining in issue. That submission did not raise any 'sufficiency of search' issues, and accordingly this review has proceeded on the basis that the applicant has no further 'sufficiency of search' issues requiring determination by the Information Commissioner (or his delegate). Copies of the applicant's submission and statutory declaration were provided to the DPI, under cover of a letter from the Assistant Information Commissioner dated 10 November 1998. The DPI replied by letter dated 11 December 1998, stating that it wished to rely on its previous submissions and did not propose to lodge any further submissions or evidence in support of its case.

21. The matter in issue in this review refers to, or includes information obtained from, the complainant and a number of third parties. The DPI had maintained that all third parties involved (including the complainant) were, or would be, opposed to the disclosure of the matter in issue, and that disclosure would cause detriment of various kinds to the third parties. However, the matter in issue relates to events which, by that stage of the review, were some five years old, and there was no statement from a third party more recent than 1997 which indicated that third parties still objected to the disclosure of the matter in issue. The Assistant Information Commissioner therefore requested the DPI, by letter dated 2 June 1999, to provide contact addresses for a number of third parties so that their current views on disclosure of the matter in issue could be sought. The DPI provided those contact addresses in a letter dated 19 July 1999, in which the DPI expressed its concern at the prospect of any approach to its staff, and requested advance notification so that it could provide support. In the case of one third party, the DPI advised that any approach should be made through the third party's treating clinical psychologist. The DPI provided me with a letter dated 20 July 1999 from the DPI's Senior Consultant, Business Advisory Services (a qualified psychologist), and a letter dated 5 August 1999 from Dr F Walsh, a clinical psychologist who had seen the particular third party at the Department's request, both advising against direct contact with that third party.

22. In the meantime, the Information Commissioner had informed the applicant, by way of a letter dated 4 June 1999, of his preliminary view that a number of documents in issue qualified for exemption from disclosure under s.43(1) (the legal professional privilege exemption) of the FOI Act, as they were created for the sole purpose of seeking or providing legal advice. The applicant's solicitors advised my office, by letter dated 16 June 1999, that the applicant did not accept the Information Commissioner's preliminary view.

23. The DPI reconsidered its position with respect to a number of documents and parts of documents then remaining in issue, and informed me, by letter dated 29 November 1999, that it was prepared to disclose some additional matter to the applicant. By letter dated 6 December 1999 from the Assistant Information Commissioner, the applicant was informed of the additional matter to be disclosed to him, and that matter is no longer in issue in this review. The Assistant Information Commissioner also informed the applicant that certain matter which had not been disclosed, and which, in the Assistant Information Commissioner's view, clearly fell outside the terms of the applicant's FOI access application, would not be further considered. The applicant has not sought to contest the Assistant Information Commissioner's view in that regard, and that matter is no longer in issue.

24. On 7 January 2000, an officer of the DPI visited the facility to discuss with staff their views on disclosure of the matter in issue, and on consultation with the Information Commissioner's office. The DPI informed me that, despite the lapse of time since the events which are the subject of the documents in issue, staff had been

dismayed at the prospect of any additional disclosure. Certain staff members had become emotional, and, as a result, the DPI proposed to make available the services of a legal officer and staff counsellor to assist staff, if individual consultation was considered necessary for the purposes of this review.

25. On 29 March 2000, a member of my staff requested advice from the DPI on the location of the originals of documents containing the matter in issue, since one of the arguments advanced by the DPI in support of its contention that that matter was exempt turned on whether the original documents were contained in a Departmental record which related to the applicant (see paragraphs 50-69 below). As the documents on which Mr McLeod, Mr Walthall and the DPI's then FOI co-ordinator had relied were copies, and there was no indication on those copies of their original location, it was necessary for the DPI to recall all the files containing the original documents. These were inspected at the DPI's head office, by a member of my staff, on 12 July and 21 July 2000. As certain files containing relevant documents were created after decisions were made on the applicant's FOI access application, further inquiries were made of a member of the investigation team concerning the original location of those documents.

26. In a separate matter before the Information Commissioner, involving the DPI and another DPI employee from a different workplace (who had also been involved in a workplace disciplinary investigation), the DPI had obtained legal advice from the Crown Solicitor's office on the proper interpretation of certain provisions in regulations made under the *Public Service Act 1996* Qld (and the predecessors of those provisions). That advice concerned the issue of whether Departmental documents containing adverse comment about the conduct of an officer could be kept confidential from that officer. The DPI provided a submission dated 31 October 2000, based on the Crown Solicitor's advice, and indicated that it wished to rely on the submission in both this review and the other review.

27. By letter dated 25 May 2001, the Information Commissioner provided the applicant with a copy of the DPI's submission dated 31 October 2000 (subject to the deletion of the name of the applicant in the other review), and informed the applicant of his preliminary view that the bulk of the matter remaining in issue qualified for exemption from disclosure under s.40(c), s.43(1), s.44(1) or s.46(1) of the FOI Act.

28. Under cover of a letter dated 23 July 2001, the applicant provided a lengthy statutory declaration which contended that the matter in issue was not exempt from disclosure, and provided detailed evidence concerning the question of the public interest in disclosure of that matter. This was supplemented by a further statutory declaration dated 25 July 2001, and written submissions from the applicant's solicitors dated 26 July 2001. Copies of the applicant's submission and statutory declarations were provided to the DPI, under cover of a letter from the Assistant Information Commissioner dated 31 July 2001. The DPI replied by letter dated 16

August 2001, stating that it wished to rely on its previous submissions and did not wish to lodge any further material in response.

29. In making my decision, I have taken into account the following:

1. the contents of all documents forwarded to me as documents containing or comprising matter in issue in this review;
1. the applicant's letters applying for internal review and external review of the DPI's decisions, dated 10 February 1995 and 29 March 1995 respectively;
2. the DPI's statement of reasons dated 20 June 1995;
3. the DPI's submission dated 20 August 1997 and accompanying statutory declarations of Ms Cliffe and Mr Nielsen, dated 19 March 1997 and 19 May 1997 respectively;
4. the statutory declaration of Mr Adriaansen dated 2 September 1997;
5. the applicant's submission dated 27 October 1998 and his accompanying statutory declaration dated 27 October 1998;
6. the DPI's advice, received in July 2000, on the location of documents;
7. the DPI's submission (in relation to this and a separate review) dated 31 October 2000;
8. the applicant's statutory declarations dated 23 July and 25 July 2001, and submission dated 26 July 2001.

Application of s.43(1) of the FOI Act

30. Section 43(1) of the FOI Act provides:

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

31. Following the judgments of the High Court of Australia in *Esso Australia Resources Ltd v Commission of Taxation* (1999) 74 ALJR 339, the basic legal tests for whether a communication attracts legal professional privilege under Australian common law can be summarised as follows. Legal professional privilege attaches to confidential communications between a lawyer and client (including communications through their respective servants or agents) made for the dominant purpose of -

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

Legal professional privilege also attaches to confidential communications between the client or the client's lawyers (including communications through their respective servants or agents) and third parties, provided the communications were made for the dominant purpose of use, or obtaining material for use, in legal

proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.

32. In his letter dated 16 June 1999, the applicant argued that *"there were multiple purposes relating to the creation of such documentation. These documents may have come into existence for purposes relating to internal controls, maintenance of policies, compliance with legislation".* (I note that both this submission and the Information Commissioner 's preliminary view (see paragraph 22 above) proceeded on the basis that the 'sole purpose' test established by the High Court in *Grant v Downs* (1976) 135 CLR 674 was applicable, but the High Court has since decided, in *Esso v Commissioner of Taxation*, that the 'dominant purpose' test is applicable.)

33. Legal professional privilege may apply with respect to employee legal advisers of a government Department or statutory authority, provided there is a professional relationship of lawyer and client, which secures to the advice an independent character notwithstanding the employment. Important indicators are whether the legal adviser has been admitted to practice as a barrister or solicitor, and remains subject to the duty to observe professional standards and the liability to professional discipline: see *Re Potter and Brisbane City Council* (1994) 2 QAR 37, at pp.45-47, paragraphs 19-27, and the cases there cited. The DPI officers who provided (or were requested to provide) the advice which is in issue in this review were, at the time, admitted to practice as a barrister and a solicitor. I am satisfied that they had the required degree of independence in providing professional legal advice to the DPI in relation to the matters involving the applicant.

34. Useful analyses of the general principles of legal professional privilege can be found in *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at pp.245-246, and in *Dalleagles Pty Ltd v Australian Securities Commission* (1991) 4 WAR 325; 6 ACSR 498. In the former case, Lockhart J said (so far as relevant for present purposes):

> *Legal professional privilege extends to various classes of documents including the following:*
>
> *(a) Any communication between a party and his professional legal adviser if it is confidential and made to or by the professional adviser in his professional capacity and with a view to obtaining or giving legal advice or assistance; notwithstanding that the communication is made through agents of the party and the solicitor or the agent of either of them....*
>
> *(b) Any document prepared with a view to its being used as a communication of this class, although not in fact so used. ...*
>
> *.....*
>
> *(d) Notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications*

which are themselves privileged, or containing a record of those communications, or relate to information sought by the client's legal adviser to enable him to advise the client or to conduct litigation on his behalf.

(case citations omitted)

35. The Director-General, senior management of the DPI, and the investigating officers for the complainant's grievance, sought and received legal advice on the rights and obligations of the parties involved (including the DPI as the employing agency), and the proper procedures to be followed. I am satisfied, from my examination of the records of communications which the DPI contends are subject to legal professional privilege, that those communications were made for the sole purpose of seeking or providing legal advice on the application of relevant legislation and standards to the investigation of allegations made against the applicant by the complainant, and on the findings of that investigation. It follows that the 'dominant purpose' test is also satisfied, and I find that the documents recording those communications attract legal professional privilege, and qualify for exemption under s.43(1) of the FOI Act.

36. In his letter to the applicant dated 25 May 2001, the Information Commissioner identified a further document (not included in the schedule of documents claimed to be exempt under s.43(1) in the Information Commissioner's letter to the applicant dated 4 June 1999) which, in the Information Commissioner's preliminary view, also qualified for exemption from disclosure under s.43(1) of the FOI Act. That document is an electronic draft, prepared by one of DPI's staff lawyers, of a document intended to be sent by DPI to the applicant. The electronic draft is not identical to the final document sent to the applicant.

37. It is common for a client involved in some legal dispute, or in a matter in which the client is conscious of the need to take the correct legal steps, to seek professional legal advice or assistance in drafting the terms of a letter or other document which the client proposes (or is required) to forward to a third party. The draft letter or document prepared by a lawyer for consideration and adoption by the client may qualify as a confidential communication between lawyer and client made for the dominant purpose of providing professional legal advice or assistance (whereas the final form of the letter sent out by the client would not attract privilege - unless, of course, it is a confidential communication made to a third party for the dominant purpose of use, or obtaining material for use, in litigation).

38. I am satisfied that the electronic draft document now under consideration comprises a confidential communication to the DPI from one of its staff lawyers, that was made for the dominant purpose of providing professional legal advice or assistance to the DPI. I find that it is subject to legal professional privilege, and qualifies for exemption under s.43(1) of the FOI Act.

The other matter in issue

39. The DPI contends that the matter in issue in this review (apart from that matter which I have found to be exempt under s.43(1) of the FOI Act) is exempt from disclosure under s.40(c), s.41(1), s.42(1)(b), s.44(1), s.46(1)(a) or s.46(1)(b) of the FOI Act.

40. In its further statement of reasons dated 20 June 1995, the DPI contended that:

> *In an effort to preserve the integrity of DPI's sexual harassment complaints system, DPI has stressed to its staff the need for confidentiality in dealing with complainants, witnesses and persons against whom allegations of sexual harassment have been made. ... This reflects DPI's concern that release of documents relating to sexual harassment complaints could reasonably be expected to have a substantial adverse effect on the management or assessment of DPI personnel.*
>
> *Release of matter relating to sexual harassment complaints will directly diminish staff confidence in the complaints system's confidentiality processes. Release will discourage the adequate and timely reporting of circumstances and thereby encourage the continuation of circumstances contrary to the interests of individuals, good management of staff in DPI and the public service as a whole. Complainants, witnesses and other persons would be reluctant to participate in the complaints system if they believed their privacy may not be respected.*
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> *The entire investigation process depends heavily on accurate and reliable evidence being obtained. A fair and balanced investigation requires all witnesses to provide truthful and frank answers to investigators' questions. Failure to obtain accurate and reliable evidence would seriously jeopardise the investigation and a denial of natural justice is likely to occur if a fair and balanced investigation is not conducted.*
>
> .....
>
> *Many of the documents contain information identifying the parties to a complaint of sexual harassment, details of the complaint and statements of other personnel relating to that complaint. This information was obtained in circumstances where specific undertakings of confidence were given by officers investigating the complaints. The documents were kept in a secured location and access was limited to those with a 'need to know'. It is clear that all persons involved in this matter understood that the documents were being supplied, and would be retained, in confidential circumstances. If the documents were disclosed, there would be grounds for an action for breach of confidence against DPI.*

Certain matter contained in the documents relating to the sexual harassment complaint is inherently confidential. The information is of a sensitive and potentially personally embarrassing character, dealing as it does with emotive and inflammatory issues. Corporate Standard HR 8.003 requires departmental officers to give express undertakings of confidentiality when investigating sexual harassment complaints. The Corporate Standard also details the extent of the confidentiality of documents relating to sexual harassment complaints. At the time the confidential information was communicated, the persons communicating the information and the persons receiving the information were of the belief that the information was confidential. The documents have not lost their confidentiality.

41. Although the DPI has relied on other exemption provisions, it is principally concerned to protect the confidentiality of information provided to the investigators by staff of the facility. This, it contends, is essential to the effectiveness of processes or systems for the effective management of staff. The key exemption provisions, therefore, are s.46(1) and s.40(c) of the FOI Act. Since the need to keep faith with undertakings of confidentiality given to staff forms the main basis of the DPI's claim for exemption under s.40(c), much of the analysis of issues under s.46(1) (which I will deal with first) will also be relevant to the application of s.40(c).

Application of s.46(1) of the FOI Act

42. Section 46 of the FOI Act provides:

46.(1) *Matter is exempt if—*

(a) its disclosure would found an action for breach of confidence; or

(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.

(2) *Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless its disclosure would found an action for breach of confidence owed to a person or body other than -*

(a) a person in the capacity of —

(i) a Minister; or

(ii) a member of the staff of, or a consultant to, a Minister; or

(iii) an officer of an agency; or

(b) the State or an agency.

43. Parts of the matter remaining in issue are excluded from eligibility for exemption under s.46(1), by the operation of s.46(2), because they consist of matter of a kind mentioned in s.41(1)(a) of the FOI Act (principally, opinion recorded for the purposes of the DPI's deliberative processes, i.e., deciding what action to take in respect of the complaint against the applicant), and were obtained from persons in their capacities as officers of DPI. (See *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at p.292, paragraphs 35-36, and *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.70-71, paragraphs 27-32.) However, the balance of the matter in issue, which consists of factual matter rather than matter of a kind mentioned in s.41(1)(a), is not excluded from eligibility for exemption under s.46(1).

Elements of s.46(1)(a)

44. The test for exemption under s.46(1)(a) must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind the respondent agency not to disclose the information in issue. I am satisfied that there are identifiable plaintiffs (the third parties) who would have standing to bring such actions for breach of confidence.

45. There is no material before me which suggests that the third parties might be entitled to rely upon a contractual obligation of confidence. In relation to equitable obligations of confidence, the Information Commissioner explained in *Re "B"* that there are five cumulative requirements for protection in equity of allegedly confidential information:

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

2. the information in issue must have "the necessary quality of confidence"; i.e., the information must not be trivial or useless information, and it must have a degree of secrecy sufficient for it to be the subject of an obligation of conscience (see *Re "B"* at pp.304-310, paragraphs 64-75);

(c) the information 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) disclosure to the applicant for access would constitute an unauthorised use of the confidential information (see *Re "B"* at pp.322-324, paragraphs 103-106); and

(e) disclosure would be likely to cause detriment to the confider of the confidential information (see *Re "B"* at pp.325-330, paragraphs 107-118).

46. With respect to requirement (a) above, I am satisfied that the information claimed to be the subject of an obligation of confidence can be specifically identified.

47. As to requirement (b), there is one document in issue (comprising the complainant's diary entries recording alleged incidents of sexual (or other) harassment by the applicant) which appears to lack the necessary quality of confidence, as against the applicant. The material before me discloses that this document was shown to the applicant on 19 July 1994, although he was not permitted to have a copy. (I note that this was admitted at p.17 of the DPI's submission dated 20 August 1997.) In any event, it appears that the complainant's diary entries formed the basis of the document containing particulars of alleged misconduct, dated 29 September 1994, that was given to the applicant by the Director-General of the DPI. It appears that the document comprising the complainant's diary entries recording alleged incidents of sexual (or other) harassment by the applicant, does not have the necessary quality of confidence, as against the applicant, for its disclosure to the applicant to found an action for breach of confidence, and hence that it does not qualify for exemption under s.46(1)(a) of the FOI Act. (I note that I have made findings below that certain segments of this document do not qualify for exemption under s.46(1), s.40(c) or s.44(1): see paragraphs 69, 111, and 115, respectively, below; but that the balance of the document qualifies for exemption under s.44(1) of the FOI Act: see paragraphs 129-130 below.)

48. As to the balance of the matter in issue, I am satisfied that it is not trivial or useless information, and that it has the necessary quality of confidence. It is known only to a limited number of persons within the DPI, and otherwise has the necessary degree of secrecy/inaccessibility. There is nothing before me to indicate that the applicant knows the contents of the statements given by the third parties, or the diary entries obtained from them (other than the diary entries of the complainant referred to in the preceding paragraph). I find that the balance of the matter in issue has the necessary quality of confidence to found an action in equity for breach of confidence.

Requirement (c) to found an action in equity for breach of confidence

49. As indicated in its statement of reasons set out at paragraph 40 above, the DPI asserts that undertakings of confidential treatment were given to the suppliers of the information remaining in issue. However, since an obligation or understanding of confidence will be overridden by a legislative requirement for disclosure of

information, it will be convenient to consider, as a preliminary issue under this heading, the effect of certain regulations which required disclosure to a public service officer of a document concerning the performance of the officer which could reasonably be considered to be detrimental to the interests of that officer. The following discussion is also of relevance for the application of s.40(c) of the FOI Act (*cf.* paragraph 111 below).

Effect of the *Public Service Management and Employment Regulation*

50. At the time of the relevant investigation in 1994, the DPI was subject to the provisions of the *Public Service Management and Employment Act 1988* Qld (the PSME Act) and of the *Public Service Management and Employment Regulation 1988* (the PSME Regulation) made under that Act. Section 46 and s.65 of the PSME Regulation (which were renumbered as s.99 and s.103, respectively, in a subsequent reprint of the PSME Regulation) made provision for the disclosure to staff of certain documents:

> ***46.(1)*** *A report, item of correspondence or other document concerning the performance of an officer which could reasonably be considered to be detrimental to the interests of that officer, shall not be placed on any official files or records relating to that officer unless the officer has initialled the document and has been provided with—*
>
> *(a) a copy of the document; and*
>
> *(b) the opportunity to respond in writing to its contents within 14 days of receipt of the copy.*
>
> *...*
>
> ***65.(1)*** *At a time and place convenient to the department, an officer shall be permitted to peruse any departmental file or record held on the officer.*

51. At the time submissions were received from the DPI on the operation of the above regulations, s.46 and s.65 of the PSME Regulation had been superseded by s.15 and s.16, respectively, of the *Public Service Regulation 1997* (the PS Regulation), which have themselves been recently superseded by s.16B and s.16D of the amended PS Regulation.

52. Although the applicant might have been able to avail himself of the right conferred by s.65 of the PSME Regulation to inspect the documents in issue prior to his resignation from the DPI in 1995, s.65 of the PSME Regulation (and its successor provisions) could not assist him once he ceased to be an officer of the DPI. As the Information Commissioner observed in *Re Holt and Education Queensland* (1998) 4 QAR 310 at p.325, paragraph 50:

> *... Disclosure under s.103 of the PSME Regulation was required only when an officer elected to exercise the entitlement conferred by s.103. An*

equitable obligation of confidence binding the Department not to disclose certain information may subsist until such time as it is overridden by the application of a provision in a statute or delegated legislation obliging disclosure. Unless and until the equitable obligation has been overridden in that way, it must still be given effect to in the application of s.46(1)(a) of the FOI Act.

Therefore, s.65 of the PSME Regulation and its successor provisions cannot assist the applicant in the circumstances of this case.

53. However, the nature of the obligation imposed by s.46 of the PSME Regulation and its successor provisions (which required disclosure by the agency to an affected officer, without the need for any action by the affected officer to invoke the entitlement to disclosure) was capable of overriding an obligation or understanding of confidence, as explained by the Information Commissioner in the following extract from *Re Chambers and Department of Families Youth and Community Care; Gribaudo (Third Party)* (1999) 5 QAR 16 at paragraphs 22-25:

22. Further, from my examination of the record of interview with Ms Gribaudo, I am satisfied that it answers the description of a "document concerning the performance of an officer [the applicant]". It addresses issues concerning the way in which the applicant, as a manager, dealt with issues/complaints raised by, or on behalf of, the complainant. ... [At paragraph 30, the Information Commissioner observed that the document in issue included negative comments about the performance of the applicant, Mr Chambers, as a manager, and was therefore a document which could reasonably be considered to be detrimental to the interests of the applicant, within the terms of s.99 of the PSME Regulation. As noted above, s.46 of the PSME Regulation was renumbered as s.99 in reprints issued after 24 February 1995, but without any amendment to its terms.]…

23. ... Giving the words of s.99(1) of the PSME Regulation their natural and ordinary meaning, I consider that the Department was obliged to provide the applicant with a copy of the record of interview with Ms Gribaudo for initialing, prior to it being placed on the file relating to the investigation of the formal grievance lodged against the applicant and two other persons.

24. I should note that I have formed that conclusion as a step in the process of applying exemption provisions in the FOI Act to the matter in issue before me. I am not in a position to make a substantive ruling as to compliance or non-compliance with s.99(1) for any purpose other than considering the application of the FOI Act. I do so in this case merely to determine whether, in the terms I discussed in paragraph 49 of Re Holt & Reeves*, there was a legislative provision*

compelling disclosure of the document in issue, so as to override, by compulsion of law, any equitable obligation of confidence that might be thought to have been created by the conduct of the grievance investigators in promising confidential treatment of information supplied to them by witnesses. In my view, both the Departmental grievance investigators and Ms Gribaudo, as a union officer, ought reasonably to have known of the existence of s.99(1) of the PSME Regulation. The touchstone in assessing whether criterion (c) to found an action in equity for breach of confidence (see paragraph 13 above) has been satisfied, lies in determining what conscionable conduct requires of an agency in its treatment of information claimed to have been imparted to the agency in confidence. In my view, conscionable conduct on the part of an agency requires compliance with applicable legislative provisions. In the circumstances of this case, I consider that any understanding of confidential treatment, on which a case for exemption under s.46(1)(a) or s.46(1)(b) of the FOI Act could be based, was necessarily subject to the condition/exception that, or was necessarily overridden to the extent that, the information given to the grievance investigators by Ms Gribaudo could not be treated in confidence as against the applicant (nor the other subjects of the grievance, although that is not relevant for present purposes) beyond the time when disclosure to the applicant, in accordance with s.99(1) of the PSME Regulation, was required.

*25. I should note that, on pages 5 and 6 of its written submission dated 9 September 1998, the Department endeavoured to put an argument (albeit in somewhat equivocal terms) to the effect that legislative provisions comparable to s.99 of the PSME Regulation should not be construed as though they were intended to override equitable obligations of confidence (such as the Department contended had accrued with the promise by the grievance investigators to treat in confidence information provided to them by Ms Gribaudo). I consider that it is well established on the authorities (*Smorgon's case*, cited in the extract from* Re Holt and Reeves *which is reproduced at paragraph 19 above, is but one example) that legislative provisions requiring disclosure of particular information will, to the extent required for compliance with the particular legislative provision, override any equitable or contractual obligation of confidence attaching to information that is caught by the terms of the legislative provision (see also F. Gurry, Breach of Confidence, Clarendon Press, 1984, at p.359 and the cases there cited). ...*

54. Consistently with the approach taken in *Re Chambers*, I consider that any matter in issue which, under the terms of s.46(1) of the PSME Regulation as then in force,

the DPI was obliged to disclose to the applicant, cannot qualify for exemption under s.46(1) of the FOI Act.

55. However, in *Re Holt* at p.326 (paragraph 53), the Information Commissioner observed that there could be instances where the precise ambit of the word "performance" becomes a material issue in the interpretation and application of s.46 of PSME Regulation, and its successor provisions. In *Re Chambers*, the Information Commissioner held that the document in issue concerned the performance of an officer because it related to the performance of Mr Chambers' duties as a manager. In the present case, the DPI contends that the matter in issue does not concern the "performance" of the applicant, as that word should properly be construed in the context of s.46 of the PSME Regulation, and its successor provisions. The DPI has argued, in its submission dated 31 October 2000, that a distinction is properly to be drawn between the work performance of an officer (which was covered by s.46 of the PSME Regulation) and the personal conduct of an officer, which was not covered by s.46 of the PSME Regulation.

56. The word "performance" was not defined in the PSME Act or the PSME Regulation, nor in the PS Regulation or the *Public Service Act 1996* Qld (the PS Act). However, the DPI referred to s.25 of the PS Act, which provides:

> ***Principles of work performance and personal conduct***
>
> ***25***. *In recognition that public service employment involves a public trust, a public service employee's work performance and personal conduct must be directed towards—*
>
> ....
>
> *(e) improving all aspects of the employee's work performance; and*
>
> ....
>
> *(h) ensuring that the employee's personal conduct does not reflect adversely on the reputation of the public service.*

57. I also note that s.87 of the PS Act provides:

> ***Grounds for discipline***
>
> ***87.(1)*** *The employing authority may discipline an officer if the authority is reasonably satisfied that the officer has—*
>
> *(a) performed the officer's duties carelessly, incompetently or inefficiently; or*
>
> *(b) been guilty of misconduct;*
>
> ...

(2) *in this section—*

....

"misconduct" *means—*

(a) disgraceful or improper conduct in an official capacity; or
(b) disgraceful or improper conduct in a private capacity that reflects seriously and adversely on the public service.

58. In both of the above-quoted provisions, an employee's work performance is distinguished from an employee's conduct. The quoted provisions are consistent with the well-recognised distinction in human resources management between methods for dealing with performance concerns (diminished performance) in respect of an officer, and methods for dealing with improper conduct by way of disciplinary proceedings. That distinction was evident in the Public Sector Management Standard for Discipline, published by the Public Sector Management Commission (the PSMC) in July 1994. That Standard became effective for disciplinary actions initiated on or after 1 August 1994, and hence was not applicable to the disciplinary investigation initiated in respect of the applicant in July 1994, but is nevertheless indicative of the PSMC's understanding of the legislative framework in which disciplinary action was to be managed by public sector agencies like the DPI. In its treatment of the processes to be followed in taking disciplinary action, the Standard maintains a consistent distinction between the disciplinary process for unsatisfactory work performance (which was normally only to be implemented after an officer had failed to meet performance objectives under the process for managing diminished performance) and the disciplinary process for unacceptable official conduct or workplace behaviour. I note that, in respect of the latter (but not the former), the Standard evidences a concern (at p.19) to ensure that the conduct of an investigation, and the collection of relevant evidence, is not jeopardised by premature disclosure to the subject of the investigation.

59. Dictionary definitions of "conduct" and "performance" also differ:

1. *The New Shorter Oxford English Dictionary* (Clarendon Press, Oxford, 1993):

conduct ... Manner of conducting oneself; behaviour, esp. in its moral aspect.....
performance ... The execution or accomplishment of an action, operation, or process undertaken or ordered; the doing of any action or work; ... The carrying out or fulfilment of a command, duty, purpose, promise, etc.

1. *Collins English Dictionary Australian Edition* (3rd edition) (Harper Collins, Sydney, 1992):

   conduct ... the manner in which a person behaves; behaviour; ... to behave ... performance ... manner or quality of functioning ... .

60. I consider that, giving the words their ordinary meaning, there is a valid distinction to be drawn between an officer's performance of his/her duties of employment, and an officer's conduct. Moreover, there is considerable logic, in terms of the practical application of s.46 of the PSME Regulation, in making such a distinction. There are considerations of fairness to an officer, and public benefit in terms of promoting improved work performance by public servants, that favour prompt disclosure to officers of critical comment, or other detrimental information, concerning their performance of their duties of employment. However, if the detrimental information concerns alleged misconduct (perhaps even alleged criminal conduct), a requirement for prompt disclosure to the subject of the detrimental information is liable to facilitate that person taking action to destroy evidence, tamper with witnesses, or otherwise prejudice the investigation of the alleged misconduct. If the language of s.46 of the PSME Regulation permitted an interpretation that would avoid or minimise such obvious prejudice to the wider public interest (in having allegations of misconduct properly investigated, and appropriate action taken against transgressing officers), then I consider that it must logically be preferred to an interpretation that would involve the aforementioned prejudicial consequences. (I note that the entitlement conferred on officers by s.65 of the PSME Regulation, i.e., to peruse any departmental file or record held on the officer, did not allow for any distinction to be made between documents concerning an officer's performance and documents concerning an officer's conduct. However, in providing that the perusal should occur at a time convenient to the Department, s.65 allowed scope for a reasonable delay, thereby giving a Department an opportunity to prevent prejudice to an investigation of misconduct through premature disclosure to the subject of the investigation.)

61. There are liable to be cases where it is not easy (or indeed not possible) to make a clear distinction between detrimental information concerning an officer's performance of his/her duties of employment, and detrimental information concerning an officer's conduct.I consider that if a document is properly characterised as concerning an officer's performance of his/her duties of employment, it must fall within the terms of s.46 of the PSME Regulation, even if it also concerns the officer's conduct. (Thus, to take a straightforward example, a supervisor's report on an officer's failure to achieve required output targets would be a document concerning the officer's performance, even though the report attributed the poor performance to the officer's conduct in indulging in excessive alcohol intake at lunchtimes.) It will be a question in each case of deciding on the proper characterisation of the relevant information.

62. In its submission dated 31 October 2000, the DPI argued:

It is this agency's view that, as a general rule, performance issues concern an employee's employment affairs whereas conduct issues concern an employee's personal affairs. Performance issues are more likely to concern the employee's employment affairs because the employee is performing a duty or function of employment (albeit not satisfactorily). Conduct issues are more likely to concern the employee's personal affairs because the employee is acting in a capacity which is not sanctioned by the employer (for example, sexual harassment, vexatious complaints, inappropriate conduct of the employee away from the work environment). It is considered that this point was highlighted by the Information Commissioner in Re Stewart *at 261 and* Re NHL *at 446, where the Information Commissioner stated that conduct amounting to sexual harassment is not conduct that an employee is authorised to perform as an agent of the employer. It is therefore not performance related and s.15 of the PS Regulation does not apply.*

63. While the examples given in this passage are illustrative of the type of distinction that I consider should properly be drawn between an officer's performance and an officer's conduct in the application of s.46(1) of the PSME Regulation and its successor provisions, the distinction will not always be as clear cut as this passage suggests. If, for example, an officer loses his or her temper and abuses a difficult client of the agency during a work-related meeting, or a law enforcement officer uses excessive force in apprehending a wrongdoer, conduct issues will coincide or overlap with performance issues (and provided a document concerns the performance of an officer and could reasonably be considered to be detrimental to the interests of that officer, s.46 of the PSME Regulation required disclosure of the document to the officer). I also cannot see any value in trying to import the concept of "personal affairs" versus "employment affairs" (a distinction that frequently arises in the application of s.44(1) of the FOI Act) into the interpretation of s.46(1) of the PSME Regulation, as suggested in the above-quoted passage from the DPI's submission. Section 46(1) of the PSME Regulation, and its successors, state their own tests for when disclosure of detrimental information about an employee is required, and consideration of their application must be based on their own terms.

64. The solicitors for the applicant contend that the interpretation placed on s.46 of the PSME Regulation by the DPI is artificial and too restrictive. They contend that a reference to the performance of an officer must include all matters relating to the allegations concerning their client. They submit that it is not possible for such matters not to affect the performance of the officer concerned. (The applicant's solicitors also contend that the public interest considerations favouring disclosure to their client of the matter in issue weigh against such an interpretation, but I cannot accept that that is a relevant consideration in the interpretation of a legislative instrument of general application.) For the reasons indicated in paragraphs 55-63 above, I do not agree.

65. I note that the current successor provisions to s.46 of the PSME Regulation (i.e., those contained in Part 2, Division 6 of the PS Regulation) make specific provision to avoid prejudice to an investigation of alleged wrongdoing by a public service employee. They also make clear that the disclosure obligations in respect of "detrimental employee records" extend to documents "about the employee's work performance, work conduct or work history" (see s.16(1)(a) of the PS Regulation). I consider that this affords support for the interpretation of s.46 of the PSME Regulation that I have preferred above, in that it maintains a distinction between work performance and work conduct, and it indicates that disclosure obligations in respect of detrimental information about an employee's work conduct are appropriate once proper safeguards have been put in place in terms of legislative exceptions to avoid prejudice to a relevant investigation (see s.16(2)(c), (d) and (e), and s.16B(3), of the PS Regulation).

66. The new provisions of the PS Regulation will govern disclosure obligations in respect of "detrimental employee records" about both work performance and work conduct, created or received in agencies subject to the application of the PS Act and the PS Regulation, after the date of commencement of the amended provisions in Part 2, Division 6 of the PS Regulation. My observations in this case on the meaning of "performance" in s.46 of the PSME Regulation will only be relevant in respect of documents created or received in agencies subject to the application of the PSME Act and the PS Act prior to the date of commencement of the amended provisions in Part 2, Division 6 of the PS Regulation.

67. The information concerning the applicant which forms the bulk of the matter remaining in issue relates principally to the applicant's behaviour towards other staff of the facility, in particular the complainant. The complainant had alleged that the applicant sexually harassed her on a number of occasions, and most of the information concerning the applicant's behaviour relates to his interactions with the complainant and with other members of staff. In summary, it comprises information provided by the complainant; statements about what third parties observed or were told in relation to the alleged incidents of sexual harassment; third parties' opinions of the applicant and the complainant; and statements about third parties' own interactions with the applicant.

68. In the present case, I consider that only two counts (count 3 and count 19) in the Director-General's document dated 29 September 1994 setting out "particulars of alleged misconduct under s.29 of the [PSME Act]" deal with matters concerning the applicant's work performance, and that the remaining 17 counts alleging harassment/sexual harassment deal with conduct on the applicant's part that does not concern his work performance. The material gathered by the investigators relating to those 17 counts did not, in my view, comprise information concerning the performance of the applicant within the terms of s.46 of the PSME Regulation. Therefore, any obligation of confidence that might otherwise attach to that material was not overridden by the disclosure obligation in s.46 of the PSME Regulation.

69. I consider that the only parts of the matter remaining in issue which were subject to the disclosure obligation in s.46 of the PSME Regulation consist of that information obtained by the DPI investigators, concerning counts 3 and 19, which could reasonably be considered to be detrimental to the applicant's interests, and which was placed on any official file or record relating to the applicant. That matter was described in the schedule which accompanied the Information Commissioner's letter to the applicant dated 25 May 2001 as matter which, in the Information Commissioner's preliminary view, was not exempt from disclosure to the applicant. Consistently with the reasoning set out in the extract from *Re Chambers* at paragraph 53 above, I find that that matter cannot qualify for exemption under s.46(1) of the FOI Act.

Circumstances in which the matter in issue was communicated

70. The submission and statutory declarations received from the DPI in 1997 provided evidence of the circumstances under which staff provided information during the 1994 investigation of the complainant's allegations against the applicant. In his statutory declaration dated 2 September 1997, Mr Adriaansen stated that:

> *During my preparation of a background report into a series of issues relating to* [the applicant] *and* [the complainant]*, I held discussions with several staff members at DPI ... during these discussions I gave an undertaking to these staff that any matters which they raised or discussed with me would be treated as confidential.*
>
> *Similarly, while preparing this background report and gathering information requested by the investigating party, I requested access to the diaries of* [third parties] *... and that in gathering this information from the diaries of* [third parties] *I again gave each of these officers an undertaking that this information would be treated in the strictest confidence. ...*
>
> *I also declare that, in preparing this background report, I was given an undertaking of confidentiality from Mr Frank van Schagen, then Regional Director of DPI, that this background report was solely for the use of Mr van Schagen and other members of the investigating party, in their investigation of the allegations made against* [the applicant].

71. Ms Cliffe, in her statutory declaration dated 18 March 1997, stated that:

> *The confidence of staff in management suffers if management is not able to deal with these matters* [i.e. complaints of sexual harassment] *in confidence. There is a strong concern that disclosure could prejudice the future supply of information.*

This would lead to DPI not being able to investigate complaints and allegations by all parties. Unresolved allegations and complaints are not only not conducive to good management of staff but can easily lead to gross inefficiencies in the workplace. ...

If the complainant chooses to pursue formal resolution of their complaint, a formal investigation of the allegations occurs. As part of these investigations, statements are generally taken from the complainant and any witnesses. ...

In some situations where personal interests outweigh the public interest - such as where a person wishes to provide information to the investigation in confidence, then the alleged harasser is provided with the substance of the allegations, but the statement is kept confidential.

72. The solicitors for the applicant contend that the DPI did not categorically assert that confidentiality exists. They contend that the Information Commissioner should require the DPI to clearly set out all the facts and circumstances upon which the informants and the DPI investigators conducted the investigations so that the exemption is properly made out.
I acknowledge that the resolution of this review has been somewhat protracted, and that there has been an exchange of significant amounts of written submissions and evidence between the parties. However, in making its submission, the solicitors for the applicant appear to have overlooked the clear statement in Mr Adriaansen's statutory declaration (provided to the solicitors under cover of my letter dated 29 July 1998) that, in respect of his discussions with staff members at the facility, and his obtaining access to relevant diary entries made by staff members, he gave undertakings to treat the information supplied by staff members in the strictest confidence.

73. In any event, express assurances of confidentiality are not a pre-requisite to a finding that information was communicated in circumstances that import an equitable obligation of confidence binding on the recipient of the information. The touchstone in assessing whether requirement (c) to found an action in equity for breach of confidence 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. That is to be determined by an evaluation of all the relevant circumstances attending the communication of that information to the agency. The relevant circumstances will include (but are not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and circumstances relating to its communication of the kind referred to by a Full Court of the Federal Court of Australia in *Smith Kline and French Laboratories (Aust) Limited & Ors v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at pp.302-3: see *Re "B"* at pp.314-316, paragraph 82.

74. The relevant circumstances in the present case were that an investigation was being undertaken of potentially serious allegations of misconduct against a work colleague with whom the suppliers of information were required to continue to interact on a daily basis, for the purpose of effectively undertaking their duties of employment. The information sought by investigators was of a highly sensitive nature, and there was potential for recriminations and resentments (potentially disruptive of efficient and effective work performance at the facility) to be created or exacerbated if the information was not treated in confidence, at least so far as the purposes for which the information was provided, and the action to be taken in respect of it, would permit.

75. When the relevant circumstances are analysed in conjunction with the evidence that express assurances of confidential treatment were given to suppliers of information, I am satisfied that the information supplied to the DPI was received in circumstances which imported an equitable obligation of confidence binding the DPI not to use or disclose the information, without the consent of the information suppliers, except where disclosure was necessary for the purposes of the proper conduct of the investigation for which the information was obtained, and of any subsequent action taken by the DPI as a consequence of the findings/outcome of the investigation. (I should note, consistently with paragraph 43 above, that while this obligation of confidence extended even to matter of a kind mentioned in s.41(1)(a) of the FOI Act, s.46(2) precludes that matter from qualifying for exemption under s.46(1)(a); see, however, paragraphs 90 and 110 below.)

76. Although the express assurances of confidential treatment given to information suppliers were apparently not subject to any express conditions or exceptions, I consider that, having regard to the very purposes for which the information was sought and given, there must necessarily have been implicit exceptions permitting limited disclosure, comparable to those explained by the Information Commissioner in *Re McCann and Queensland Police Service* (1997) 4 QAR 30 at pp.53-54, paragraph 58:

> *I consider that there are three main kinds of limited disclosure which, in the ordinary case, ought reasonably to be in the contemplation of parties to the communication of information for the purposes of an investigation relating tolaw enforcement. Unless excluded, or modified in their application, by express agreement or an implicit understanding based on circumstances similar to those referred to in the preceding paragraph, I consider that the following should ordinarily be regarded as implicitly authorised exceptions to any express or implicit mutual understanding that the identity of a source of information, and/or the information provided by the source, are to be treated in confidence so far as practicable (consistent with their use for the purpose for which the information was provided) -*
>
> *(a) where selective disclosure is considered necessary for the more effective conduct of relevant investigations …;*

(b) where the investigation results in the laying of charges, which are defended, and, in accordance with applicable rules of law or practice ... the prosecutor must disclose to the person charged the evidence relied upon to support the charges; and

(c) where selective disclosure is considered necessary -

(i) for keeping a complainant ... informed of the progress of the investigation; and

(ii) where the investigation results in no formal action being taken, for giving an account of the investigation, and the reasons for its outcome, to a complainant ... .

77. The language of exception (b) above contemplated a criminal investigation. The comparable exception in a disciplinary/grievance investigation would be where disclosure is necessary to accord procedural fairness to a person whose rights or interests would be adversely affected by the findings/outcome of the investigation, including a person who is subsequently charged with a breach of discipline. As the Information Commissioner explained in *Re Chambers* at p.23, paragraph 17:

In my view, it is not ordinarily a wise practice for an investigator to give witnesses a blanket promise of confidentiality, since the common law requirements of procedural fairness may dictate that the crucial evidence (and, apart from exceptional circumstances, the identity of its provider(s)) on which a finding adverse to a party to the grievance may turn, be disclosed to that party in order to afford that party an effective opportunity to respond. I do not see how it could ordinarily be practicable to promise confidential treatment for relevant information supplied by the parties to a grievance procedure (i.e., the complainant(s) and the subject(s) of complaint) who should ordinarily expect their respective accounts of relevant events to be disclosed to the opposite party (and perhaps also to relevant third party witnesses) for response. Sometimes investigators may be tempted to promise confidentiality to secure the co-operation of third party witnesses, in the hope of obtaining an independent, unbiased account of relevant events. Even then, however, procedural fairness may require disclosure in the circumstances adverted to in the opening sentence of this paragraph.

78. In my view, it would have been preferable if the investigators had made it clear to staff who supplied information that any undertakings of confidentiality were necessarily conditional, and that, if the applicant was to be subject to disciplinary action for misconduct on the basis of particular information provided by the complainant or third parties, that information would have to be disclosed to the applicant in order to give him a fair opportunity to respond.

79. However, as it turned out (given the course which the investigation took), the occasion did not arise for that condition or exception to the obligation of confidence to operate. After the investigators obtained the information in issue, the applicant was given the Director-General's letter dated 29 September 1994 setting out particulars of alleged misconduct, and the applicant was invited to respond. No information had been obtained from third parties that was directly supportive of the allegations of sexual harassment contained in that document, so procedural fairness did not require disclosure of the statements (or relevant parts thereof) obtained from third parties. It is arguable that evidence obtained from the complainant to support the allegations ought to have been disclosed to the applicant, but I consider that the provision to the applicant of the comprehensive particulars of alleged misconduct was sufficient to comply with the requirements of procedural fairness in the particular circumstances of this case. After considering the applicant's detailed response, the Director-General decided that the allegations of misconduct were not substantiated and no further action would be taken against the applicant. It did not become necessary to disclose the information in issue to the applicant in order to accord him procedural fairness, and hence the information remains subject to an obligation of confidence.

80. With the exception of the matter referred to in paragraphs 43, 47 and 69 above, I find that the matter remaining in issue was communicated in confidence, and in such circumstances as to fix the DPI with an equitable obligation of confidence binding the DPI not to use or disclose the information in a way not authorised by the suppliers of the information.

81. With regard to the matter referred to in paragraph 69 above, much, if not all of it is in the nature of deliberative process matter which is excluded from exemption under s.46(1) by virtue of s.46(2). In addition, any understanding or obligation of confidence was overridden by the disclosure obligation under s.46 of the PSME Regulation, and, as explained at paragraphs 53-54 and 69 above, that matter cannot qualify for exemption under s.46(1) of the FOI Act.

Unauthorised use of the information

82. The third parties still object to the disclosure to the applicant of the matter remaining in issue. I am satisfied that disclosure of the matter remaining in issue would be an unauthorised use of that information.

Detriment to the confider of the information

83. In *Re "B"* (p.327, paragraph 110), the Information Commissioner said that "detriment" can be understood in a non-pecuniary sense, and can include embarrassment, loss of privacy or fear. The Information Commissioner also cited the following passage from *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 256:

I think it would be a sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way.

84. I am satisfied that disclosure of the matter remaining in issue would cause detriment to the third parties of one or more of the kinds described above.

85. I therefore find that the matter remaining in issue, with the exception of that matter identified at paragraphs 43, 47 and 69 above, qualifies for exemption from disclosure under s.46(1)(a) of the FOI Act.

Application of s.40(c) of the FOI Act

86. 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.*

87. The Information Commissioner explained and illustrated the correct approach to the interpretation and application of s.40(c) of the FOI Act in *Re Pemberton and The University of Queensland* (1994) 2 QAR 293, *Re Murphy and Queensland Treasury* (1995) 2 QAR 744, *Re Shaw and The University of Queensland* (1995) 3 QAR 187, and *Re McCann*. In applying s.40(c) of the FOI Act, I must determine:

1. whether any adverse effects on the management or assessment by the DPI of its personnel could reasonably be expected to follow from disclosure of the matter in issue; and

2. if so, whether the adverse effects, either individually or in aggregate, constitute a substantial adverse effect on the management or assessment by the DPI of its personnel. The adjective "substantial" in the phrase "substantial adverse effect" means grave, weighty, significant or serious (see *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663, at pp.724-725, paragraphs 148-150).

If the above requirements are satisfied, I must then consider whether the disclosure of the matter in issue would nevertheless, on balance, be in the public interest.

88. In *Re "B"* at pp.339-341 (paragraphs 154-160), the Information Commissioner analysed the meaning of the phrase "*could reasonably be expected to*", by reference to relevant Federal Court decisions interpreting the identical phrase as used in exemption provisions of the *Freedom of Information Act 1982* Cth. In particular, the Information Commissioner said in *Re "B"* (at pp.340-341, paragraph 160):

> *The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.*

The ordinary meaning of the word "expect" which is appropriate to its context in the phrase "could reasonably be expected to" accords with these dictionary meanings: "to regard as probable or likely" (Collins English Dictionary, Third Aust. ed); "regard as likely to happen; anticipate the occurrence ... of" (Macquarie Concise Dictionary, 3rd Rev. ed 1988); "Regard as ... likely to happen; ... Believe that it will prove to be the case that ..." (The New Shorter Oxford English Dictionary, 1993).

89. I accept that the investigation by an agency of complaints of misconduct about officers of that agency is an aspect of the management or assessment by that agency of its personnel.

90. There is no qualification on the character of the information that is eligible for exemption under s.40(c), of a kind similar to that imposed by s.46(2) on the type of information that is eligible for exemption under s.46(1) of the FOI Act: see paragraph 43 above. Thus, matter of a kind mentioned in s.41(1)(a) of the FOI Act is not excluded from eligibility for exemption under s.40(c) of the FOI Act.

91. The DPI contends that all of the matter in issue (apart from that matter which I have found to be exempt under s.43(1) of the FOI Act) is exempt from disclosure under s.40(c) of the FOI Act, because its disclosure could reasonably be expected to have a substantial adverse effect on the management by the DPI of its personnel, as it would:

1. diminish the effectiveness of the DPI's sexual harassment complaint system;
2. cause disruption to the work of the ...;
3. be in breach of express undertakings of confidentiality given to staff in the course of obtaining information during the investigation;
4. severely undermine the trust of its staff in the DPI's grievance investigation and personnel management processes, and so seriously impair its ability to manage the facility and its other workplaces.

92. The submission and statutory declarations received from the DPI in 1997 provided evidence of the circumstances under which staff provided information during the

investigation (see paragraphs 70-76 above). That material also dealt with the concerns of third parties at the prospect of disclosure of their statements and identities. It is clear from that material that the passage of time since the investigation by the DPI of the complainant's allegations had not alleviated the concerns of staff at the possible consequences of such disclosure. Further information received from the DPI in January 2000 indicated that that situation had not appreciably altered, and that a significant part of the third parties' concerns are stated to be due to their belief that information given to the investigators was given in confidence.

93. In the circumstances of this case, I am satisfied that any unwarranted breach of assurances or understandings of confidential treatment given to, or held by, staff who supplied information to the DPI investigators, after the substantive complaint has been resolved with no action taken against the applicant, could reasonably be expected to have a substantial adverse effect on the management or assessment by the DPI of its personnel, through the apparent breach of trust involved, and by making it more difficult to obtain full and frank co-operation in similar investigations in the future.

94. It is clear from the material lodged by the DPI that there was considerable tension within the ... at the time of the investigation, in its aftermath, and when staff became aware that the applicant was seeking access to documents under the FOI Act. Despite the fact that the applicant resigned from the DPI in 1995, he still has professional contact with officers of the facility in his capacity as a private consultant. The applicant has stated, in his various submissions, that he has cordial working and social relationships with various staff of the facility. That may well be case. Other staff, however, have indicated that they have negative views concerning the applicant, are not comfortable about contact with the applicant, and are fearful of what action the applicant may take if he obtains access to their statements and identities. Those concerns may or may not be reasonably based. I am of the view, however, that disclosure of further matter concerning the applicant's relationships with staff of the facility, and their opinions of the applicant as a person, would do nothing to lessen any existing tension, and could reasonably be expected to heighten that tension, with a consequent deterioration in the effective functioning of the workplace.

95. I am mindful that the facility fulfils a specific role within the DPI, for the benefit of the State's primary producers and economy, and that any action which would tend to disrupt the performance of that role in the most efficient and effective manner would be contrary to the interests of the DPI and the State. In that category I would include the souring of relationships between staff of the facility and DPI management, and between staff and the applicant in his role as an expert consultant in the area.

96. For the reasons stated in paragraphs 91-95 above, I find that disclosure of the information supplied to DPI investigators in 1994 could reasonably be expected to

have a substantial adverse effect on the management by the DPI of its personnel. It is necessary therefore to consider whether disclosure would, on balance, be in the public interest.

Public interest balancing test

97. During the course of this review, the applicant has provided lengthy submissions and statutory declarations in support of his contention that the public interest can only be served by full disclosure of the matter in issue in this review. In summary, the applicant contends that:

1. the DPI's investigation of the complainant's allegations of sexual harassment was not properly conducted in accordance with recognised processes, and full disclosure of the matter remaining in issue will enable him to understand how the DPI conducted its investigation and prepared the report from which were drawn the 19 counts which he was required to answer;
2. the DPI may have arrived at further adverse conclusions which have not been disclosed to him;
3. the nature and number of the allegations against him changed over time, and the final 19 counts communicated to him on 29 September 1994 were different from several previous versions;
4. he has never been given an opportunity to understand or properly respond to the final 19 counts of alleged harassment/sexual harassment;
5. although all 19 counts against him were found to be "not substantiated", and no further action was taken, management and other staff of the DPI believe that he was in fact guilty of sexually harassing and unfairly dismissing the complainant;
6. he should have been found "not guilty", as the allegations against him were clearly false and possibly supported by fabricated diary entries made by the complainant to support her claims;
7. he cannot put the incident behind him until he is aware of the contents of all statements and allegations made by staff who were interviewed in the course of the investigation;
8. he does not understand why, in matter which has already been disclosed to him, there are comments to the effect that he has used sexist or otherwise inappropriate language or behaviour;
9. other staff of the facility were jealous of his professional abilities and success, or annoyed by his criticisms of poor work practice or behaviour, and attempted to "get back at" him during the investigation;
10. his denials of the allegations and statements in his defence were not properly recorded or considered by the investigation team or DPI management;
1. there appears to have been some irregularity in appointing one of the members of the investigation panel;
2. although no formal action was taken against him by the DPI, his resignation from the DPI followed on from the investigation because of what he saw as victimisation and the lack of a future in the DPI for him.

98. The applicant contends that full disclosure of the matter in issue in this review will clarify the above points for himself, and prevent the DPI from subjecting other staff to the distress of a poorly conducted and possibly tainted investigation.

99. I have the advantage, necessarily denied to the applicant and his solicitors (see s.87(1) of the FOI Act) of having examined the matter in issue, and several things are clear from that examination.

100. The applicant has been given access to the records of his own interviews with DPI investigators, and is therefore aware of the substance of the material available to the DPI investigators that was thought worthy of being put to the applicant for a response. He has also been given access to those documents and parts of documents which set out how the DPI proceeded in its investigation. They may not contain the detail which the applicant seeks, or explain the process to his satisfaction, but I do not consider that the matter which has been withheld from the applicant will perform that function. Nor is it capable of further explaining to the applicant the reasons for certain decisions by the investigators which he considers inappropriate (such as conducting a second interview with the complainant to clarify certain matters).

101. The applicant was provided with a final list of 19 counts of alleged harassment/sexual harassment following interviews with the complainant and other staff. Those 19 counts set out the nature of the alleged incidents of harassment, and the times and places at which they allegedly occurred. The applicant provided a very lengthy submission in response, with a number of supporting documents, which set out his case in considerable depth. Access to the statements and diary entries of other staff would not have been of any substantial assistance to the applicant in preparing that submission, as they would neither have proved nor disproved the complainant's or the applicant's accounts of what allegedly occurred (or did not occur). Nor will the matter remaining in issue reveal anything about the reasons for the changes which the applicant alleges occurred in the number and nature of the counts of alleged harassment/sexual harassment to which he was required to respond.

102. The DPI found the allegations against the applicant were "not substantiated", apparently due to the lack of corroborative evidence in support of either party. The applicant contends that he should have been found "not guilty", and that this fact should have been clearly communicated to staff at the facility, to remove any doubt in their minds. My understanding of the usual practice that prevailed in public service disciplinary proceedings at that time is that the only finding to be made by the Chief Executive Officer (or his delegate) after consideration of the investigators' report and any material put forward by the subject of the investigation, was whether the allegations were substantiated or not substantiated. (If the former, the subject of the investigation would be notified in writing and given the opportunity to make submissions regarding the proposed disciplinary action.) In any event, the merits of the conclusions reached by the DPI in the

outcome of that 1994 investigation are not within my jurisdiction to review. On the material before me, however, that finding was open to the DPI to make, as it was largely a case of the complainant's word against the applicant's as to whether the alleged incidents of sexual harassment did or did not occur, and whether the applicant dismissed or threatened to dismiss the complainant for improper reasons.

103. There is no indication in the matter remaining in issue that other staff attempted to "get back at" the applicant through information provided to the investigators. Some of that information is not unfavourable to the applicant, although some makes it clear that there were staff who had no particular liking for the applicant as an individual, and expressed that opinion. A personal opinion concerning a colleague is, however, just that: a personal opinion which the holder may or may not choose to share with the subject of it for various reasons.

104. I note that the applicant continues to be associated with the facility in a professional capacity, and that he has social contact with some members of its present and former staff. The submissions of the applicant and the DPI indicate that they find this state of affairs satisfactory. I am not persuaded, however, that relations between the applicant and the DPI would be assisted by the disclosure of private opinions which, on the evidence before me, were not determinative in DPI's decision not to take disciplinary action against the applicant some seven years ago.

105. The matters discussed by the applicant in his response to the 19 counts indicate that the applicant was already aware that there were likely to be persons who would hold negative opinions of him. The applicant has addressed most of the points raised in the matter remaining in issue in that submission, and in his submissions in the course of this review.

106. The DPI took no action against the applicant as a result of the investigation, and the applicant was free to continue his employment with the DPI. There is no indication in the matter remaining in issue that management of the DPI in general, or of the facility in particular, held an adverse view of the applicant as a result of the investigation. That may or may not have been the case, but disclosure of the matter remaining in issue would not assist the applicant in that respect.

107. The applicant is already aware of the conclusions reached by the DPI in relation to the allegations of sexual harassment and of unfair dismissal - that is, that they were not substantiated by the investigation. He is also aware that, as a result of information provided to the investigators, they reached the conclusion that the applicant engaged in behaviour or conversation which could be considered sexist or inappropriate. It is clear from the applicant's own submissions, however, that he is already aware of incidents which could lead to that conclusion and has addressed them. There are no other conclusions reached by the DPI concerning the applicant of which he has not been made aware.

108. While the applicant has a considerable personal interest in the full disclosure of the matter remaining in issue, I am not convinced that the public interest is best

served by disclosure of matter which the DPI was not under any statutory obligation to disclose to the applicant. The DPI contends that disclosure of any of the matter remaining in issue would be contrary to the public interest as it would disrupt the work of the facility (including the present acceptable working relationships between the applicant and staff of the facility); would cause personal distress to staff and former staff of that facility; and would impair the future ability of the DPI to conduct workplace investigations and to properly manage its staff in similar situations.

109. The applicant contends that the level of interaction that he presently has with the facility is not as great as suggested by the DPI. He does however acknowledge that he has a degree of professional interaction with the facility. One might expect that, after the passage of a number of years, there would be less concern on the part of all those involved about revisiting this issue. However, this is clearly not the case so far as the applicant is concerned, and the information that has been provided to me by the DPI satisfies me that there are staff of the facility who would also be greatly concerned at revisiting this issue, particularly if that took the form of disclosing information which was provided to the DPI pursuant to assurances of confidential treatment.

110. I am not satisfied that disclosure of the matter remaining in issue (other than the matter identified at paragraph 69 above) would, on balance, be in the public interest. I therefore find that it is exempt matter under s.40(c) of the FOI Act. My finding in this regard extends to the information supplied to DPI investigators which was excluded from eligibility for exemption under s.46(1)(a) because it was matter of a kind mentioned in s.41(1)(a) of the FOI Act.

111. At paragraph 69 above, I held that the information provided to DPI investigators that related to counts 3 and 19 of the particulars of alleged misconduct dated 29 September 1994, could not have been the subject of an obligation of confidence binding on the DPI because of the overriding legislative obligation to disclose that information to the applicant under s.46 of the PSME Regulation. That regulation formed part of the legislative framework for personnel management and assessment under which the DPI was obliged to operate in 1994. I am unable to accept that disclosure to the applicant, under the FOI Act, of information that the DPI was required to disclose to the applicant under regulations which governed the performance of its personnel management functions, could reasonably be expected to have a substantial adverse effect on the management or assessment by the DPI of its personnel. I therefore find that the matter in issue referred to in the first sentence of this paragraph does not qualify for exemption under s.40(c) of the FOI Act.

Application of s.44(1) of the FOI Act

112. Sections 44(1) and 44(2) of the FOI Act provide:

44.(1) *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

(2) *Matter is not exempt under subsection (1) merely because it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to a document is being made.*

113. In applying s.44(1) of the FOI Act, the first question to ask is whether disclosure of the matter in issue would disclose information concerning the personal affairs of a person other than the applicant for access. If that is the case, a public interest consideration favouring non-disclosure is established, and the matter in issue will be exempt, unless there are public interest considerations favouring disclosure which outweigh all identifiable public interest considerations favouring non-disclosure.

Personal affairs matter

114. In *Re Stewart and Department of Transport* (1993) 1 QAR 227, the Information Commissioner discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations) as it appears in the FOI Act (see pp.256-257, paragraphs 79-114, of *Re Stewart*). In particular, he said that information concerns the "personal affairs of a person" if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:

1. family and marital relationships;
2. health or ill health;
3. relationships and emotional ties with other people; and
4. domestic responsibilities or financial obligations.

Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, to be determined according to the proper characterisation of the information in question.

115. I note at the outset that the matter identified at paragraph 69 above which relates to counts 3 and 19 from the particulars of alleged misconduct given to the applicant on 29 September 1994, is properly to be characterised as information concerning employment affairs, rather than the personal affairs of any person: see *Re Pope and Queensland Health* (1994) 1 QAR 616 and *State of Queensland v Albietz* (1996) 1 Qd R 215, at pages 221-222. Hence it cannot qualify for exemption under s.44(1) of the FOI Act.

116. The DPI contends that a significant amount of the matter remaining in issue is exempt from disclosure under s.44(1) of the FOI Act, as it refers or relates to allegations of sexual harassment; to personal relations and interactions between

members of the staff at the facility; and to the health or wellbeing of certain staff members. The DPI contends that matter of that kind is not matter which concerns the employment affairs of the relevant staff members.

117. On the other hand, the solicitors for the applicant contend that this exemption should not apply in relation to matters which are incidental to the investigation of the applicant. They contend that only matter which is not connected with the workplace and the allegations which were investigated is covered by s.44(1). They contend that, as these matters went to the very core of the information gathered, it could not be the intention of the legislation for the information not to be disclosed. They state that the information in issue is not merely the personal affairs of the persons concerned, and that I must have regard to the matters investigated when deciding what does, and does not, relate to the personal affairs of the persons concerned. The solicitors for the applicant also referred to the evidence of the applicant in support of his contention that disclosure of the matter in issue would be in the public interest.

118. In *Re NHL and the University of Queensland* (1996) 3 QAR 436 (at p.446, paragraph 29), the Information Commissioner observed that there is a relevant distinction to be drawn between information which concerns an employee as an individual, rather than an employee as an agent or representative of his/her employer, and that some information in the former category may fall within the meaning of the phrase "personal affairs", as it is understood in the context of s.44(1) of the FOI Act. The Information Commissioner also held that conduct amounting to sexual harassment would not be conduct that an employee is authorised to perform as agent or representative of his or her employer.

119. In my view, what may be described as personal or social relationships between members of staff at the facility (including the telling of jokes, playing pranks on friends or colleagues, and informal socialising) are matters which ordinarily concern the personal affairs of the staff members involved.

120. In his letter to the applicant dated 25 May 2001, the Information Commissioner identified several categories of information which, in his preliminary view, was properly to be characterised as information concerning the personal affairs of staff members, and which was therefore *prima facie* exempt from disclosure under s.44(1) of the FOI Act:

A) allegations that the applicant sexually harassed the complainant;
B) allegations that the applicant sexually harassed, or made sexually discriminatory comments about, other female staff;
C) details of interactions between various staff, including the applicant, other than in the performance of workplace duties;
D) details of the emotional or physical health of staff other than the applicant, and of assistance sought by those staff; and

E) personal information about other staff (including date of birth, private address/telephone number, income/hours of casual work, family circumstances, political opinions, personal values or beliefs).

121. From my examination of the information in categories D and E, I am satisfied that it is information which only concerns the personal affairs of individuals other than the applicant, and which is, therefore, *prima facie* exempt from disclosure to the applicant under s.44(1) of the FOI Act.

122. Based on my examination of the matter in issue, I am satisfied that the information in categories A, B and C above is properly to be characterised as information concerning the personal affairs of both the applicant and other staff. The Information Commissioner discussed the concept of information concerning "shared personal affairs", and the application to it of s.44(1) of the FOI Act, in *Re "B"* at pp.343-345 (paragraphs 172-178). At paragraph 176, the Information Commissioner said:

> *176 Thus, if matter relates to information concerning the personal affairs of another person as well as the personal affairs of the applicant for access, then the s.44(2) exception to the s.44(1) exemption does not apply. The problem here arises where the information concerning the personal affairs of the applicant is inextricably interwoven with information concerning the personal affairs of another person. The problem does not arise where some document contains discrete segments of matter concerning the personal affairs of the applicant, and discrete segments of matter concerning the personal affairs of another person, for in those circumstances:*
>
> *(a) the former will fall within the s.44(2) exception;*
> *(b) the latter will be exempt under s.44(1) (unless the countervailing public interest test applies to negate the* prima facie *ground of exemption); and*
> *(c) s.32 of the FOI Act can be applied to allow the applicant to have access to the information concerning the applicant's personal affairs, by the provision of a copy of the document from which the exempt matter has been deleted.*
>
> *Where, however, the segment of matter in issue is comprised of information concerning the personal affairs of the applicant which is inextricably interwoven with information concerning the personal affairs of another person, then:*
>
> *(a) severance in accordance with s.32 is not practicable;*
> *(b) the s.44(2) exception does not apply; and*
> *(c) the matter in issue is* prima facie *exempt from disclosure to the applicant according to the terms of s.44(1), subject to the*

application of the countervailing public interest test contained within s.44(1).

123. Applying those principles to the matter in issue in the present case, I have reached the conclusion that the information identified in categories A, B and C above which concerns the applicant's personal affairs is inextricably interwoven with information concerning the personal affairs of other staff, with the result that—

5. severance in accordance with s.32 is not practicable;
6. the s.44(2) exception does not apply; and
7. the information is *prima facie* exempt from disclosure to the applicant, in accordance with the terms of s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.44(1).

Public interest balancing test

124. Because of the way in which s.44(1) of the FOI Act is worded and structured, the mere finding that information concerns the personal affairs of a person other than the applicant for access must always tip the scales against disclosure of that information (to an extent that will vary from case to case according to the relative weight of the privacy interests attaching to the relevant information in the particular circumstances of any given case), and must decisively tip the scales if there are no public interest considerations which tell in favour of disclosure of the information in issue. It therefore becomes necessary to examine whether there exist public interest considerations favouring disclosure, and if so, whether they outweigh all public interest considerations favouring non-disclosure.

125. The applicant contends that disclosure would be in accordance with the intent of the FOI Act as it is expressed in s.6, which provides:

> ***6.*** *If an application for access to a document is made under this Act, the fact that the document contains matter relating to the personal affairs of the applicant is an element to be taken into account in deciding*
>
> *(a) whether it is in the public interest to grant access to the applicant; and*
>
> *(b) the effect that the disclosure of the matter might have.*

126. Since the category A, B and C matter concerns the personal affairs of the applicant (as well as a number of other staff), the applicant is entitled to whatever assistance can be obtained from s.6 of the FOI Act. However, the Information Commissioner's comments in *Re KBN and Department of Families, Youth and Community Care* (1998) 4 QAR 422 at p.437 (paragraph 58) are relevant in this context:

> *58. The relaxation (effected by s.6 of the FOI Act) of the general principle of viewing release under the FOI Act as "release to the*

> *world at large" is ordinarily appropriate, in the case of an application for access to matter concerning the personal affairs of the access applicant, because the access applicant is ordinarily the appropriate person to exercise control over any use or wider dissemination of information (obtained under the FOI Act) which concerns the personal affairs of the access applicant. However, that rationale carries less weight where the information in issue concerns the 'shared personal affairs' of the access applicant and another individual, because in such situations each individual concerned should have a measure of control over the dissemination of information which concerns their personal affairs, and the access applicant should not be put in a position to control dissemination of information concerning the personal affairs of the other affected individual unless such an outcome would, on balance, be in the public interest.*

127. I have discussed the public interest in disclosure to the applicant of the matter remaining in issue, at paragraphs 97 to 109 above. I note again, however, that in the course of this review, the DPI has disclosed to the applicant a large number of documents, and parts of documents, which explain the processes employed by the DPI investigating team in 1994, and the conclusions that were reached based upon its investigations. Those documents include the substance of pertinent information given by staff of the facility (without identifying the sources of particular information or opinions) upon which the investigating team based its conclusions. I find that the public interest considerations identified by the applicant have been essentially satisfied by the past disclosures of information to the applicant, and that the public interest in protecting the privacy of information concerning the personal affairs of individuals other than the applicant outweighs any public interest considerations favouring disclosure to the applicant of the category A, B and C matter.

128. The DPI contends that disclosure of information supplied to DPI investigators would be an unwarranted intrusion into sensitive matters which are still capable of causing distress to a number of present and former staff of the facility, and of seriously impairing the likelihood of willing participation by staff in any future grievance investigations. As I have indicated at paragraphs 91-96 above, I am satisfied that there is a reasonable expectation of such a result, and of impairment to the efficient and effective functioning of the facility. These are also public interest considerations which weigh against disclosure.

129. Included in the category A matter are the complainant's diary notes (referred to at paragraph 47 above) and her records of interview with the investigators. Apart from the segments which relate to counts 3 and 19 of the particulars of alleged misconduct given to the applicant on 29 September 1994 (and which I have held do not qualify for exemption under s.46(1)(a), s.40(c) or s.44(1) of the FOI Act), the complainant's diary notes and records of interview with the investigators comprise

information concerning the shared personal affairs of the applicant and the complainant, which is *prima facie* exempt from disclosure to the applicant under s.44(1) on the basis explained above. The complainant's diary notes were shown to the applicant some seven years ago in the course of the investigation, but the applicant does not have a copy of them. The fact that they were previously shown to the applicant arguably reduces, to some extent, the weight of the privacy interest telling against disclosure to the applicant. However, the complainant's diary notes and records of interview comprise a record of alleged events of considerable sensitivity to the complainant, and the weight to be accorded to the complainant's privacy interest in protecting that information from disclosure to the world at large remains high. This is significant given that, if the applicant were to obtain access to those documents under the FOI Act, there would be no legal impediment (other than any applying under the general law) to his further use or dissemination of their contents. Given that the public interest considerations claimed to favour disclosure to the applicant have, in my view, been satisfied by the provision to him of the particulars of alleged misconduct dated 29 September 1994, I am not satisfied that there currently exist public interest considerations favouring disclosure to the applicant of the complainant's diary notes and records of interview which are sufficiently strong to warrant a finding that disclosure to the applicant of the information in those documents which concerns the complainant's personal affairs, would, on balance, be in the public interest.

130. On balance, and taking account of the additional matter which the DPI disclosed to the applicant in the course of this review, I find that the public interest considerations favouring disclosure of the category A, B and C matter are not sufficiently strong to outweigh the public interest considerations favouring non-disclosure, and I find that the category A, B and C matter therefore qualifies for exemption under s.44(1) of the FOI Act.

131. Section 6 of the FOI Act does not apply to the category D and E matter, because that matter solely concerns the personal affairs of individuals other than the applicant. Further, I am not satisfied, on the material before me, that disclosure of the category D and E matter would add anything to the applicant's understanding of the allegations made against him or of the processes employed by the DPI to investigate those allegations. I am not satisfied that there are public interest considerations of any substantive weight favouring disclosure of the category D and E matter. I find that disclosure of the category D and E matter would not, on balance, be in the public interest, and that it qualifies for exemption under s.44(1) of the FOI Act.

DECISION

132. I decide to vary the decision under the review (being the decision made by Mr Walthall on behalf of the DPI on 7 March 1995) in so far as it concerns the matter remaining in issue, by finding that:

1. the matter referred to in paragraphs 35 and 36 above qualifies for exemption from disclosure to the applicant under s.43(1) of the FOI Act;
2. the matter referred to in paragraph 69 above does not qualify for exemption from disclosure under the FOI Act, and the applicant is entitled to have access to it;
3. the balance of the matter remaining in issue qualifies for exemption from disclosure to the applicant under either one or more of s.40(c), s.44(1) or s.46(1)(a) of the FOI Act.