Perkins and Queensland Rail

(S 58/98, 22 September 2000, Information Commissioner Albietz)

(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, who is a former police officer, applied for the position of Ticket Inspector with Queensland Rail, which had advertised in November 1997 to fill a number of vacancies. There were some 400 applicants, of whom seven were finally appointed as Ticket Inspectors. The applicant's written application was assessed by an interview panel consisting of Queensland Rail officers and an independent psychologist, and the applicant completed the psychological tests which all applicants were required to undertake. He was not, however, offered an interview, and was advised in January 1998 that the panel's decision not to interview him was influenced by adverse information about his conduct and character while he was a police officer.

4. That information was disclosed to the panel by two panel members (also former police officers), and their adverse views of the applicant's character were independently confirmed by two external referees who were contacted by the panel. Both the external referees had been members of the Queensland Police Service (the QPS). Neither of them is, or was at the time of the selection process, employed by Queensland Rail.

5. The applicant subsequently applied, by letter dated 10 February 1998, for *"copies of any documents about myself and documents relating to other applicants for this position* [of Ticket Inspector] *used in assessing their suitability for this position"*. The applicant then specified 21 categories of documents to which he required access, or questions which he wanted Queensland Rail to answer, in relation to his application for the position of Ticket Inspector. I will refer to his application for that position as the "job application".

6. Ms K Sadler, Queensland Rail's FOI Co-ordinator, informed the applicant of her decision on his FOI access application by letter dated 25 March 1998. Ms Sadler decided that the applicant should be given access to a number of documents and parts of documents, including a copy of his own job application, but refused access to other documents or parts of documents on the grounds that they were exempt from disclosure under s.41, s.44 or s.46 of the FOI Act.

7. Ms Sadler also informed the applicant that Queensland Rail considered certain documents to be outside the scope of the FOI Act, as they were documents received or brought into existence by Queensland Rail (which is a government owned corporation) in the course of carrying out its commercial activities (that is, the recruitment and selection of staff for its CityTrain network).

8. By letter dated 3 April 1998, the applicant requested an internal review of Ms Sadler's decision. The internal review decision was made by Mr B Scheuber, the Deputy Chief Executive of Queensland Rail, who informed the applicant of his decision and reasons for decision in a detailed letter dated 15 April 1998. Mr Scheuber decided that a number of additional documents should be disclosed to the applicant, but confirmed Ms Sadler's decision that other documents and parts of documents were exempt from disclosure under s.41, s.44 or s.46 of the FOI Act, and that certain other documents did not exist. Mr Scheuber also informed the applicant that Queensland Rail had not undertaken searches for documents relating to previous recruitment and selection processes, as to do so would be an unreasonable diversion of the resources of Queensland Rail, in view of the number of documents that it would need to examine.

9. The applicant then applied to my Office on 28 April 1998 for review of Mr Scheuber's decision, under Part 5 of the FOI Act.

External review process

10. Copies of the documents in issue were obtained and examined, and a member of my staff met with Queensland Rail to discuss the exemption claims made for the documents in issue, and the applicant's claims that further responsive documents should exist. Despite Ms Sadler's advice to the applicant, in her initial decision on his FOI access application, that certain documents were not subject to the application of the FOI Act, Queensland Rail agreed to deal with the documents in issue as if they were subject to the FOI Act.

11. Contact was then made with the applicant, and with two third parties ("the external referees") who provided referee reports about the applicant to Queensland Rail during the selection process. The applicant indicated that he might be prepared to withdraw his claim for access to certain matter, but that he wished to obtain access to the rest of the matter in issue, including the information provided by the third parties.

12. Following discussions with the participants in this review, and after further inquiries had been made by Queensland Rail, I informed the applicant (by letter dated 15 March 1999) of my preliminary views about the matter to which he still wished to pursue access. The applicant replied (by letter dated 29 March 1999) that he no longer required access to certain matter, but that he still wanted the rest of the matter in issue, including details of any previous applicants for positions with

Queensland Rail who had failed to gain employment because of adverse referee checks.

13. Further discussions were held with Queensland Rail, which agreed to disclose some additional segments of matter to the applicant, but maintained its claim that the remaining matter was exempt from disclosure. Queensland Rail also provided details to support its claim that it would require a substantial and unreasonable diversion of its resources to undertake searches for documentation about referee checks on previous applicants.

14. By letter dated 22 March 2000, I informed the applicant of my preliminary view that Queensland Rail was entitled to refuse to deal with that part of his FOI access application which related to the assessment of, or referee checks on, previous applicants. On the same date, I wrote to Queensland Rail, informing it of my preliminary view with respect to certain other matter then remaining in issue. The applicant did not accept my preliminary view that Queensland Rail was entitled to refuse to conduct further searches. However, Queensland Rail accepted my preliminary views with respect to certain segments of matter, and agreed to disclose that matter to the applicant.

15. By letter dated 8 June 2000, I informed the applicant that Queensland Rail was prepared to disclose additional matter. I also informed the applicant of my preliminary view with respect to one document still remaining in issue, and repeated my preliminary view that the balance of the matter remaining in issue was exempt from disclosure. In the event that he did not accept my preliminary views, I invited the applicant to provide a final submission in relation to the matter remaining in issue. Nothing further has been received from the applicant, and the following matter therefore remains in issue:

1. the names of applicants for previous positions who were unsuccessful because of adverse information about their integrity;
2. the names of unsuccessful applicants for Ticket Inspector positions (where they appear on pp.34-41, 44-49, 50-70, 85-99, 125-126) and the addresses of applicants for those positions (where they appear on pp.34-41);
1. two records of telephone conversations with third parties who provided referee reports about the applicant (pp.102-103);
2. a file note of a meeting of the selection panel (p.101).

16. In reaching my decision on the matter remaining in issue, I have had regard to:

1. the documents containing the matter in issue;
2. the initial and internal review decisions by Queensland Rail;
3. the applicant's requests for internal review and external review;
4. submissions by the applicant dated 29 March 1999 and 4 April 2000;
5. submission by Queensland Rail dated 7 April 2000, and oral advice from Queensland Rail about its searches for documents; and

6. telephone interviews with two third parties.

Application of s.28(2) of the FOI Act

17. Section 28(2) of the FOI Act provides:

> ***(2)*** *If—*
>
> *(a) an application is expressed to relate to all documents, or to all documents of a specified class, that contain information of a specified kind or relate to a specified subject matter; and*
>
> *(b) it appears to the agency or Minister dealing with the application that the work involved in dealing with the application would, if carried out—*
>
> *(i) substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions; or*
>
> *(ii) interfere substantially and unreasonably with the performance by the Minister of the Minister's functions;*
>
> *having regard only to the number and volume of the documents and to any difficulty that would exist in identifying, locating or collating the documents within the filing system of the agency or the office of the Minister;*
>
> *the agency or Minister may refuse to deal with the application.*

18. The applicant sought access to a "*list of other applicants who have applied for employment with Queensland Rail with the reason being given that they are unsuccessful in obtaining employment because 'their personal integrity is in question'"*. Mr Scheuber informed the applicant, in his internal review decision, that *"[i]t would take a considerable amount of time and resources to review every applicant for every position within Queensland Rail to ascertain on what occasions such a finding was made."* In the early stages of this review, the applicant was prepared to abandon his claim for access to that matter, but he then requested access to details of applicants for Ticket Inspector positions only.

19. Queensland Rail was asked to provide an estimate of the amount of work involved in locating documents containing the information sought by the applicant. Queensland Rail informed my Office that there is no list containing that information, and that information of that kind cannot be produced from any computer database maintained by Queensland Rail. It would therefore be necessary to do a manual search of stored documents, relating to positions which were of

interest to the applicant, for any references to the exclusion of a particular person from consideration on the grounds specified by the applicant. Queensland Rail also advised my Office that it does not require its selection panels to include information of that kind in selection reports, and that it would be necessary to check all documents for each relevant position, in case any file notes or other comments had been recorded elsewhere by panel members.

20. To identify previous applications for Ticket Inspector positions which have been retained by Queensland Rail, it would be necessary to manually search through a large volume of stored job application documents. Those documents include both Ticket Inspector positions and other positions advertised by Queensland Rail, both internally and externally. Queensland Rail estimates that in the two years prior to the applicant's FOI access application (from early 1996 to early 1998), there were 2,803 positions advertised internally within Queensland Rail, and 3,042 positions advertised externally. Although Queensland Rail informed my Office that it was not possible to set out the number of applicants for each vacancy, some positions attracted over 1,000 applicants. Applications are bundled and stored when the selection process is completed.

21. Unsuccessful applications are usually kept by Queensland Rail for no longer than six months (except upon request), and if there was any information of the kind required by the applicant in older documents, it would no longer exist. Even six months' worth of applications, however, would involve an estimated 1,200-1,300 positions, some of which may have attracted up to 1,000 individual applications. Queensland Rail has advised that it would be necessary to search through this volume of documents manually to locate documents relating to selection of applicants for Ticket Officer positions, and then to examine all of those documents individually to determine whether they contained information of the kind sought by the applicant.

22. Having regard to the number and volume of the documents requested, and, in particular, to the difficulties that would exist in identifying, locating or collating the documents within Queensland Rail's filing system, I am satisfied that requiring Queensland Rail to locate the information requested by the applicant would substantially and unreasonably divert the resources of Queensland Rail from the performance of its functions.

23. I therefore find that Queensland Rail is entitled to refuse to deal with that part of the applicant's FOI access application, in accordance with s.28(2) of the FOI Act.

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

24. Section 44(1) of the FOI Act provides:

> ***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.*

25. In applying s.44(1) of the FOI Act, one must first consider whether disclosure of the matter in issue would disclose information that is properly to be characterised as information concerning the personal affairs of a person. If that requirement is satisfied, a *prima facie* public interest favouring non-disclosure is established, and the matter in issue will be exempt, unless there exist public interest considerations favouring disclosure which outweigh all identifiable public interest considerations favouring non-disclosure, so as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.

26. In my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, I identified the various provisions of the FOI Act which employ the term "personal affairs", and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) as it appears in the FOI Act (see pp.256-257, paragraphs 79-114, of *Re Stewart*). In particular, I said that information concerns the "personal affairs of a person" if it concerns the private aspects of a person's life. 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.

Names of unsuccessful applicants

27. In my decision in *Re Baldwin and Department of Education; Others* (1996) 3 QAR 251, I found at pp.257-260 (paragraphs 16-23) that the fact that a person has unsuccessfully applied for a position of employment is information concerning the personal affairs of that person. At pp.259-260 (paragraphs 22-23) of *Re Baldwin*, I said:

> *Subject to that proviso, I consider that the fact that a person has applied for a position of employment is information which concerns that person's personal affairs, within the meaning of s.44(1). If the application is successful, however, the person's employment in the new position will become, in effect, a matter in the public domain (and in the case of an appointment to a government agency, a matter of public record) and the fact that the person applied for the position could no longer be regarded as information about a private aspect of the person's life.*
>
> *For an unsuccessful applicant, on the other hand, the fact of the making of the application for employment would remain information which concerns the personal affairs of the unsuccessful applicant, and hence would be* prima facie *exempt under s.44(1) of the Act, subject to the application of the public*

interest balancing test incorporated within s.44(1). In my opinion, the name of the unsuccessful applicant, and any information in his or her application documents (or in agency documents assessing the merits of his or her application) the disclosure of which could identify the unsuccessful applicant, will ordinarily be prima facie *exempt under s.44(1) of the FOI Act.*

28. On that basis, I find that the names of unsuccessful applicants for the position of Ticket Inspector, where they appear in the documents in issue, comprise information concerning the personal affairs of those individuals, which is therefore *prima facie* exempt from disclosure under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.44(1).

29. In the applicant's submissions in his letter dated 29 March 1999, he stated that he needed the names of the unsuccessful applicants in order to determine whether any of them failed to obtain a position on the basis of a referee report which called their integrity into question (that is, whether any other applicant failed to obtain an interview or appointment for the same reason as himself).

30. Having viewed the documents in issue, it is clear that disclosure of the names of unsuccessful applicants would not help the applicant to understand the process by which Queensland Rail eliminated applicants from further consideration. There is nothing in the documents in issue to indicate that any other applicant was not considered further because his or her integrity was called into question, or because an officer of Queensland Rail knew something which was adverse to that applicant. A negative comment by a referee about one applicant who was selected for interview is recorded in the selection report, but that comment relates to the applicant's ability to learn and undertake tasks within the workplace, not to his integrity or character.

31. There is a public interest in ensuring that agencies adopt, and follow, fair and reasonable procedures for the selection and appointment of staff. There is also a public interest in giving applicants who have not been successful in obtaining positions the opportunity of feedback on why their applications were unsuccessful. The applicant argues that allowing him access to the identities of other unsuccessful applicants - presumably so that he can question them about the reasons for their lack of success - would advance those public interests.

32. I am not convinced, however, that either of the above public interests is strong enough in this case to outweigh the public interest in maintaining the personal privacy of persons who have been unsuccessful in obtaining particular positions or appointments. Disclosure of that information may be embarrassing to the persons concerned, and in an extreme case could jeopardise their current employment. In any event, there is nothing before me to indicate that contact with those persons would advance the applicant's understanding of the reasons for the selection panel's refusal to further consider him for employment as a Ticket Inspector.

33. On balance, I find that the public interest in the maintenance of privacy, for information concerning the personal affairs of persons other than the applicant, is not outweighed by any competing public interest considerations favouring disclosure, and that the names of unsuccessful applicants are therefore exempt matter under s.44(1) of the FOI Act.

Private addresses

34. At pp.260-261 (paragraph 88) of *Re Stewart*, I said that:

> *The address at which a person chooses to reside and make their home seems to me to fall within that zone of domestic affairs which is clearly central to the concept of "personal affairs". A business address would be materially different.*

35. In *Re Pearce and Queensland Rural Adjustment Authority and Others* (Information Commissioner Qld, Decision No. 99008, 4 November 1999, unreported), at paragraph 38, I stated that information concerning an individual's residential address is information the dissemination of which (whether by publication in a telephone directory or otherwise) is something that individual should be entitled to control. I find that disclosure of the addresses of successful applicants for the position of Ticket Inspector (whose names have already been disclosed to the applicant) would reveal information concerning the personal affairs of those persons. Therefore, those segments of matter are *prima facie* exempt from disclosure under s.44(1) of the FOI Act.

36. I also consider that the private addresses of unsuccessful applicants are *prima facie* exempt from disclosure. Although the applicant has not been granted access to the names of unsuccessful applicants (which I have found are exempt matter under s.44(1) of the FOI Act) disclosure of the addresses of those persons would disclose the fact that persons living at those addresses had unsuccessfully applied for a particular position of employment with Queensland Rail, and those persons could be specifically identified by approaches to the occupants at those addresses.

37. I consider that disclosure of the private addresses of other applicants for employment with Queensland Rail would not help the applicant to understand the selection process employed by Queensland Rail in respect of himself. On balance, I find that the public interest in the maintenance of privacy, for information concerning the personal affairs of persons other than the applicant, is not outweighed by any competing public interest considerations favouring disclosure, and that the residential addresses of other applicants for employment with Queensland Rail are therefore exempt matter under s.44(1) of the FOI Act.

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

38. Pages 102 and 103 are file notes recording information provided by people outside Queensland Rail, who were consulted about the applicant's suitability for the position. Those two documents are considered by Queensland Rail as referee reports, and the names of those referees, and the information they provided, are claimed by Queensland Rail to be exempt matter under s.46(1) of the FOI Act.

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

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

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

41. I am satisfied that there are specifically identifiable plaintiffs (the two external referees) who would have standing to bring an action in equity for breach of confidence. In *Re "B"*, I indicated that there are five cumulative criteria that must be satisfied in order to establish a case for protection in equity of information claimed to have been provided in confidence:

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

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

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

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

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

42. I am satisfied that the information which is claimed to be exempt from disclosure can be specifically identified. It is the information on pp.102-103 of the documents in issue.

43. I am also satisfied that the information is known only to the referees and to a limited number of persons within Queensland Rail. I am satisfied that the applicant is not aware of the identities of the third parties, or of the details of the information supplied to Queensland Rail by the third parties, although he is aware that it is adverse information about his conduct and character, at different times and in different locations, while he was a serving police officer.

44. The connection of a person's identity with the imparting of confidential information can itself be secret information capable of protection from disclosure under principles of equity: see *G v Day* (1982) 1 NSWLR 24; *Re "B"* at pp.335-336 (paragraph 137); *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at pp.344-345 (paragraphs 108-110); *Re McCann and Queensland Police Service* (1997) 4 QAR 30, at paragraph 28. The applicant may guess at the identities of the referees, or at incidents during his career as a police officer to which the referees may have referred, but there is no indication that the applicant has actual knowledge of the identity of either of the referees, or of the information they provided. I therefore find that matter which would disclose the identities of the referees, or information supplied by the referees, retains the necessary quality of confidence to satisfy criterion (b) above.

45. Both referees have stated that they provided the information comprising the matter in issue in accordance with an express assurance of confidential treatment given by the selection panel member who contacted them. Although there is no contemporaneous record of what was said to the referees by that panel member, I am satisfied that both referees were given assurances that their comments and their identities would be treated in confidence as against the applicant. It must then be assessed whether there was anything in the circumstances attending the communication of the information in question, including the uses of that information, that ought reasonably to have been in contemplation (given the purposes for which the information was supplied), which would tell against Queensland Rail being conscience-bound to honour the assurances of confidential treatment given to the referees.

46. In some circumstances, an agency's legal duty to observe the requirements of procedural fairness, or some other legal duty requiring disclosure of information, may (to the extent required for compliance with the legal duty) override even an express promise of confidential treatment. However, in *Re Hamilton and*

Queensland Police Service and Queensland Police Service (1994) 2 QAR 182 at p.196 (paragraph 46), I observed:

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

47. In *Re Kupr and Department of Primary Industries* (Information Commissioner Qld, Decision No. 99006, 27 September 1999, unreported) at paragraph 39, I said:

> *39. ... However, the cases referred to in paragraph 46 of* Re Hamilton *... indicate that, while a common law duty to accord procedural fairness ordinarily applies in respect of decisions relating to promotion of existing public sector officers, it would not ordinarily apply to the initial recruitment of external applicants for appointment. Thus, for example, at the stage of culling external applicants to produce a shortlist of candidates for interview, I do not consider that an agency has a legal duty to accord procedural fairness, such as might require the disclosure of adverse comments in a referee report, or require that an applicant be given a hearing before a decision is made not to shortlist that applicant.*

48. In the latter case, Mr Kupr had been interviewed and was in a "well placed position" on the "order of merit" list. His position on that "order of merit" list was then lowered because of adverse comments made by two external referees. In those circumstances, and considering the relevant legislative instruments that applied to the case, I found that procedural fairness dictated that Mr Kupr was entitled to be informed of, and to be given an opportunity to respond to, the substance of those adverse comments before any decision was made to lower his position on the "order of merit" list.

49. In the present case, the position of the applicant in the selection process was significantly less advanced than that of Mr Kupr. Queensland Rail had received

some 400 applications for the position of Ticket Inspector. It selected approximately 90 of those applicants for testing, narrowed the field to 23 for interview, and recommended only seven for appointment. The applicant was selected for testing, and had completed the required tests, but he was not selected for interview. There were a number of other candidates who scored highly on the initial aptitude/ability tests who were not among the seven successful applicants selected for appointment. A successful score on the tests did not guarantee a subsequent offer of employment.

50. At the time the applicant applied for the Ticket Officer position, Queensland Rail had an Employee Relations Policy for Recruitment and Selection (the Policy) which set out the process to be followed in the recruitment of staff in terms of selection methodology and techniques, shortlisting, interviews and referee checks. Section 5.12.2 of the Policy provided:

> *A member of the selection panel may have personal first-hand knowledge regarding an applicant's ability to meet the Key Selection Criteria or the requirements of the position. This information may be used appropriately and within certain bounds.*
>
> *In these situations, the following points must be considered:-*
>
> 1. *personal first-hand knowledge of an applicant's work performance must be used with caution because of the potential to either advantage or disadvantage the applicant because of the availability of more thorough or detailed information;*
>
> 2. *second hand information cannot be used in the selection process;*
>
> 3. *use of information provided by a member of the selection panel must be documented as part of the selection process.*
>
> *In any circumstances where personal first-hand knowledge which the panel believes will impact upon the selection decision exists, it cannot be considered until validated in one of the following ways:-*
>
> 1. *at the initial interview,*
> 2. *through a secondary interview,*
> 3. *by contacting additional referees,*
> 4. *by requesting the applicant to provide additional documentation,*
> 5. *by obtaining additional relevant documented information.*

51. It appears that the applicant was orally informed of the selection panel's decision not to proceed with his application, and that the reason for that decision was that two members of the panel had personal knowledge of him which gave rise to a question about his integrity. A subsequent letter to the applicant confirmed that there was some doubt as to whether the applicant could undertake all aspects of the

position due to integrity issues, and informed the applicant that personal knowledge held by two panel members had been supported by referees who also had personal knowledge of the applicant.

52. I am satisfied that Queensland Rail had no legal obligation to accord procedural fairness to the applicant in terms of disclosing adverse comments. I find that there was, and is, an equitable obligation binding Queensland Rail to keep confidential the identities of the two external referees and the information they supplied. Criterion (c) above is therefore satisfied.

53. I am also satisfied, in light of the continuing objections of the two referees, that disclosure to the applicant of their identities and comments would be an unauthorised use of that information. Criterion (d) above is therefore satisfied.

54. In respect of criterion (e) above, I find that disclosure of the identities and comments of the two referees could cause detriment to them, in the form of loss of privacy and possible exposure to recrimination.

55. The applicant contends that Queensland Rail may have obtained the information contained in the file notes unlawfully. I do not find anything unlawful, or improper, in an agency seeking referee reports from persons of its own choosing to validate (or dispel) concerns which it may have about an applicant's suitability for a position of employment, particularly when that agency acts in accordance with the requirements of its own established policy in doing so.

56. An agency is not prohibited from approaching persons other than an applicant's nominated referees if it wishes to obtain further information about that applicant, or to verify its impressions of the applicant's ability or suitability for a position of employment. No information about an applicant, other than the fact that he or she has applied for a position of employment with the agency, need be provided to a referee of the agency's choosing, and there is no evidence that Queensland Rail gave any personal information concerning the applicant to the two persons it approached, despite his contention that his privacy had been breached by Queensland Rail's actions.

57. The applicant also raised the issue of whether the referees approached by Queensland Rail exist; or, if they do exist, that they have acted improperly in providing information to Queensland Rail as serving police officers are not permitted to give references. The applicant has been informed, on several occasions, that a member of my staff has spoken to both persons. Neither currently serves as a police officer in Queensland. Both referees clearly recalled the applicant. Both stated that they had doubts about the applicant's integrity as a police officer, based on their recollections of him at two different times and in two different locations.

58. I am satisfied that the notes of discussions with the two referees record communications given, and received, in confidence from two third parties who were in a position to comment upon certain periods of the applicant's service with the QPS.

59. I therefore find that the file notes of discussions with the two external referees, comprising pp.102-103 of the documents in issue, are exempt matter under s.46(1)(a) of the FOI Act.

Application of s.41(1) of the FOI Act

60. Section 41 of the FOI Act provides:

> ***41.(1)*** *Matter is exempt matter if its disclosure—*
>
> *(a) would disclose—*
>
> *(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or*
>
> *(ii) a consultation or deliberation that has taken place;*
>
> *in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and*
>
> *(b) would, on balance, be contrary to the public interest.*

61. A detailed analysis of s.41 of the FOI Act can be found in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.66-72, where, at p.68 (paragraphs 21-22) I said:

> *21. Thus, for matter in a document to fall within s.41(1), there must be a positive answer to two questions:*
>
> *(a) would disclosure of the matter disclose any opinion, advice, or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, (in either case) in the course of, or for the purposes of, the deliberative processes involved in the functions of government? and*
>
> *(b) would disclosure, on balance, be contrary to the public interest?*
>
> *22. The fact that a document falls within s.41(1)(a) (ie. that it is a deliberative process document) carries no presumption that its disclosure would be contrary to the public interest. ...*

62. An applicant for access is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; an applicant is entitled to access unless an agency can establish that disclosure of the relevant deliberative process matter would be contrary to the public interest. In *Re Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206, I said (at paragraph 34):

> *The correct approach to the application of s.41(1)(b) of the FOI Act was analysed at length in my reasons for decision in* Re Eccleston, *where I indicated (see p.110; paragraph 140) that an agency or Minister seeking to rely on s.41(1)(a) needs to establish that specific and tangible harm to an identifiable public interest (or interests) would result from disclosure of the particular deliberative process matter in issue. It must further be established that the harm is of sufficient gravity when weighed against competing public interest considerations which favour disclosure of the matter in issue, that it would nevertheless be proper to find that disclosure of the matter in issue would, on balance, be contrary to the public interest.*

63. Page 101 is a document which records the opinions of two panel members, and the subsequent deliberations of the selection panel, in the course of considering the claims of applicants to be offered interviews for official positions within Queensland Rail. It is my view that the selection panel's consideration of the merits of applicants for appointment to such positions is part of a deliberative process involved in the functions of government, in that it is an essential part of the process of selecting persons who are qualified and suitable to be employed in publicly-funded positions. I therefore find question (a) above can be answered positively.

64. I informed Queensland Rail, in my letter dated 22 March 2000, that while I had formed the preliminary view that p.101 was matter of a kind referred to in s.41(1)(a) of the FOI Act, it was possible to identify some public interest considerations which favoured disclosure to the applicant. In its reply to that letter, dated 4 April 2000, Queensland Rail submitted that:

> 1. *Your letter refers to "legal requirements of procedural fairness".* [The applicant] *is not and was not a QR employee. With respect, I have been unable to find any support for the proposition that consideration of employment positions for non-employees applying for positions within a commercial organization are subject to the rules of natural justice. In short, there appears to be no "legal requirement" consideration.*
>
> 2. *Your letter states that the material on* [the applicant]*"is maintained on the records of QR and … may be available for future reference in dealings with* [the applicant]*". That is not the case. The file note appears on the file relating to "Position 28178" - Ticket Inspector positions advertised on 15 November 1997. These files are only kept for a period of twelve months from the date of appointment. In the normal course this file would already*

have been destroyed and the material would not have been available for "future reference".

3. *The writers of the memorandum were being open in their reasons for rejecting* [the applicant]'s *application. They were always at liberty to only make their comments verbally, without any fear of external future consideration. However, they committed their views to writing to record their concerns, believing that this document would remain confidential.*

   QR has substantive policies dealing with recruitment and selection of employees. QR encourages members of selection panels to be open in their reasoning for selection of candidates. This is clearly in QR's interests and the interests of the applicants. It is also in QR's interests to be able to review the decision-making process if a candidate requests feedback. If panel members are only prepared to give their reasons verbally to other panel members, QR management will not be able to provide feedback to unsuccessful candidates or review the decisions of the panel.

   If panel members do not commit their reasons, views or considerations to writing, particularly in cases where they know an applicant, QR is not able to assess or review the reasons for a panel's decision. This will result in panellists' considerations only being given verbally which will lead to greater secrecy within the selection process, not openness and accountability.

   QR is committed to operating within a fair and open selection and recruitment process. However, to safeguard the process for future participants, it is necessary to provide confidentiality in certain cases.

65. I recognise the force of Queensland Rail's arguments concerning the public interest in maintaining the supply of information to Queensland Rail concerning applicants for positions within that agency. Such information may come from a variety of sources, including external referees and individual selection panel members. I also accept that, given the nature of the information provided, disclosure of p.101 could reasonably be expected to influence some selection panel members to refrain from providing adverse information about particular applicants in the future, representing a specific and tangible harm to the public interest in maintaining the efficient operation of Queensland Rail's selection procedures.

66. There is also, of course, a public interest in enhancing the accountability of Queensland Rail in relation to its selection procedures, and in maintaining the fairness and impartiality of those procedures for the benefit of all applicants. I raised with Queensland Rail the applicant's concerns at the possibility that information adverse to him (which may not even be relevant to his ability to fulfil other positions in Queensland Rail, or in other government agencies) might be

available to selection panels considering future applications for employment by the applicant. Queensland Rail has indicated (at point 2 above) that that is not the case.

67. Balancing the factors favouring non-disclosure of the information recorded in p.101 against those factors favouring disclosure, I have reached the conclusion that disclosure would, on balance, be contrary to the public interest, and that p.101 is therefore exempt from disclosure under s.41(1) of the FOI Act.

DECISION

68. I vary the decision under review (being the decision of Mr Scheuber on behalf of Queensland Rail dated 15 April 1998), by finding that:

3. Queensland Rail is entitled, under s.28(2) of the FOI Act, to refuse to deal with that part of the relevant access application that seeks access to all documents which would disclose the names of applicants for previous positions who were unsuccessful because of adverse referee reports;

4. the names of unsuccessful applicants (where they appear on pp.34-41, 44-49, 50-70, 85-99, 125-126) and the addresses of all applicants (where they appear on pp.34-41) are exempt from disclosure under s.44(1) of the FOI Act;

3. pp.102-103 are exempt from disclosure under s.46(1)(a) of the FOI Act; and

5. p.101 is exempt from disclosure under s.41(1) of the FOI Act.