'LSN' and Department of Main Roads

(S 42/00, 21 January 2002, Assistant Commissioner Shoyer)

(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, 'LSN', was employed by the Department of Main Roads (the DMR) and Queensland Transport on a number of short term contracts of temporary employment, the last of which expired in June 1999. In March 1999, another employee of the DMR (to whom I will refer as 'the complainant') made a complaint (subsequently treated by the DMR as a Stage 1 Grievance) that the applicant had made several unwelcome approaches to her, and that she wished him to be instructed not to approach her again. Although the applicant stated that he did not believe he had harassed the complainant, and had not intended to distress her, the applicant sent the complainant a letter of apology.

4. The complainant and the DMR management were of the view that the matter had been resolved at this point. The applicant remained dissatisfied, however, as the complainant had refused to agree to a meeting with him to resolve the matter, and as notes of the matter remained on a confidential file. The applicant also believed that gossip about the incident was circulating among DMR staff, and that his chances of obtaining permanent employment with the DMR or Queensland Transport would be prejudiced. The applicant was assured by DMR management that that was not the case.

5. In May 1999, a number of DMR employees attended a lunch at which the grievance was mentioned. The applicant was informed of this and made approaches to various DMR employees to find out the source of comments about himself and the complainant. The applicant also made approaches to the complainant which caused some disruption in the work place, and expressed his dissatisfaction with the way in which the DMR had handled both the complainant's original grievance and the applicant's subsequent concerns.

6. The DMR retained Ms Jenny Walker of The Consultancy Bureau to undertake *"a staff grievance investigation into the facts surrounding allegations made by* [the applicant] *that an harassment allegation levelled at him by* [the complainant] *had been poorly handled by management and that this had resulted in the situation being widely discussed among staff who had nothing to do with the case"*. Ms Walker carried out her investigation in June 1999 and presented a report to the DMR.

7. The applicant was dissatisfied with the outcome of the investigation, and made numerous approaches to DMR officers to obtain further information and to dispute Ms Walker's findings. The DMR had not renewed the applicant's temporary contract when it expired on 30 June 1999, and declined to enter into further discussions with the applicant. The applicant then applied under the FOI Act, by letter dated 24 November 1999, for access to a range of documents, including a copy of Ms Walker's report and supporting documentation.

8. By letter dated 24 January 2000, Ms Narelle Hall, the Acting Manager (Administrative Law) at the DMR, informed the applicant that she had decided to grant him access to 253 pages of documents in full, and to a further 42 pages (including parts of Ms Walker's report) subject to the deletion of some exempt matter. Ms Hall refused access to a further 204 pages.

9. By letter dated 27 January 2000, the applicant sought internal review of Ms Hall's decision. The DMR's Acting Director (Legal and Legislation Branch), Mr Peter O'Sullivan, informed the applicant that he had decided to affirm Ms Hall's decision that some documents and parts of documents were exempt from disclosure under s.43(1), s.44(1) or s.46(1)(a) of the FOI Act.

10. By letter dated 21 February 2000, the applicant applied for review, under Part 5 of the FOI Act, of Mr O'Sullivan's decision.

External review process

11. Copies of the documents in issue, and of documents which had already been disclosed to the applicant by the DMR, were obtained and examined. The applicant was then contacted by a member of my staff in relation to those documents and parts of documents which the DMR contended were subject to legal professional privilege, and hence exempt under s.43(1) of the FOI Act. The applicant advised that he did not wish to pursue access to that matter, which, accordingly, is no longer in issue in this review.

12. At a meeting with representatives of the DMR on 7 June 2000, the DMR declined to disclose any further matter to the applicant, as the matter remaining in issue comprised statements and notes (or summaries of those) by the complainant and other third party witnesses. When consulted under s.51 of the FOI Act, the third parties had all objected to the disclosure of that matter to the applicant, on the basis that they had provided the information in confidence.

13. A member of my staff contacted the complainant and the other third parties. Several third parties agreed to the disclosure of their statements, subject to the deletion of some segments of matter which the third parties contended concerned the personal affairs of persons other than the applicant. The complainant, and the rest of the third parties, maintained their objections to disclosure.

14. By letter dated 22 June 2000, I provided the DMR with details of matter to the disclosure of which third parties no longer objected, and requested the DMR's advice on whether it was prepared to disclose that matter to the applicant. The DMR advised me, by letter dated 26 June 2000, that it now wished to claim that that matter was exempt from disclosure under s.40(c) of the FOI Act.

15. I note that the applicant (in his submission dated 9 October 2000) objected to the DMR invoking reliance on s.40(c). He contended that the DMR could not rely on new grounds of exemption not used in the decision under review, and cited the s.81 onus provision in support of his contention. However, s.81 merely provides that the DMR has the onus of establishing that its decision (i.e., to refuse access) was justified. Section 81 does not confine the agency to reliance on the same grounds as were used in its decision under review to justify the refusal of access. The exercise of the Information Commissioner's review jurisdiction is the occasion for a fresh exercise of administrative power in which the Information Commissioner (or his delegate) is required to reach the correct decision required by law, on the material before the Information Commissioner (or his delegate):

cf. Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409 at p.419. As the Information Commissioner explained in *Re "NKS" and Queensland Corrective Services Commission* (1995) 2 QAR 662 (at p.665, paragraph 5):

> *... I am empowered to make a fresh decision as to the correct application of the provisions of the FOI Act to any documents (or parts of documents) of the respondent agency or Minister, which fall within the terms of the applicant's FOI access application and to which the applicant has been refused access under the FOI Act. In the course of a review under Part 5, the respondent agency or Minister may, in effect, abandon reliance on the grounds previously given in support of the decision under review, in whole or in part, whether by making concessions to the applicant (which mean that some matter is no longer in issue) or by arguing fresh grounds to support a refusal of access to matter in issue.*

16. The Deputy Information Commissioner wrote to the applicant on 23 August 2000 conveying his preliminary view that the matter in respect of which several third parties had withdrawn their objections to disclosure did not qualify for exemption, but that the remainder of the matter in issue in this review qualified for exemption from disclosure under s.40(c) or s.44(1) of the FOI Act.

17. The applicant had previously provided a lengthy submission, dated 16 June 2000, following his discussions with a member of my staff. He had also sought an interview with the same member of staff on 18 August 2000, when he had raised a number of issues of concern to him. In his letter dated 23 August 2000, the Deputy Information Commissioner addressed some of the matters raised by the applicant, and invited the applicant to lodge a further submission on the application of the exemption provisions discussed in the Deputy Information Commissioner's letter. The applicant lodged three further submissions, dated 19 September, 26 September, and 9 October 2000.

18. In a letter to the DMR dated 23 August 2000, the Deputy Information Commissioner informed the DMR of his preliminary view that the matter in respect of which third parties had withdrawn their objections to disclosure, summaries of that matter, and the names of those third parties where they occurred elsewhere in the matter remaining in issue, did not qualify for exemption under the FOI Act. The DMR advised this Office, in a facsimile which was sent and received on 15 September 2000, that it would be disclosing to the applicant that day the matter which, in the Deputy Information Commissioner's preliminary view, did not qualify for exemption from disclosure. That matter is no longer in issue in this review. The DMR also advised, however, that one third party had withdrawn his consent to the disclosure of his statement, and that the DMR would therefore not be disclosing that document.

19. On 21 September 2000, a member of my staff telephoned that third party, who confirmed the withdrawal of his consent to the disclosure of his statement. The third party was invited to apply to become a participant in the review. The third party said that he first wished to discuss the issues involved in the review and, at a subsequent meeting, the third party advised that he did wish to participate in the review if it appeared likely that his statement would be found not to qualify for exemption from disclosure.

20. By letter dated 4 January 2001, I informed the third party of my preliminary view that the statement did not qualify for exemption from disclosure, with the exception of a small amount of matter which concerned the personal affairs of the third party and others. The DMR advised me, in a facsimile transmission dated 14 February 2001, that the third party

no longer wished to be a participant in the review, and that he had withdrawn his objection to the disclosure of the bulk of his statement (i.e., apart from the personal affairs matter). I have authorised disclosure of that statement (File B, folios 45-49) subject to the deletion of the personal affairs matter.

21. The matter remaining in issue in this review is contained in the following documents (page numbers in italics contain only some segment/s of matter claimed to be exempt):

File A p.*17*
File B pp.*6*, *8*, 10, 11, 12, 13, 14, *15*, *18*, 20, 21, 22, 23, 24, 25, 34, 35, 36, 37, 38, *46, 47, 48*, 57, 58, 59, *60*, 93, 94, 95, 96, 97, 98, *104,* 105*, 106*, *112, 113, 117, 118, 119, 120, 121, 122, 123, 124, 125, 127*
File C pp.*43, 49*
File D pp.*23, 49, 52, 54, 55*, 57, *65, 66, 67,* 68, 75
File E p.*32*
File H p.*2*
File I p.*6.*

22. In reaching my decision, I have taken into account the material referred to above, and had regard in particular to the contents of the matter remaining in issue, and the contents of the matter that has already been disclosed to the applicant.

Issues raised by the applicant

23. In his various submissions, the applicant has raised a number of issues relating to the conduct of this review, and the powers and functions of the Information Commissioner. I have already addressed one of those issues at paragraph 15 above. Several other issues were satisfactorily addressed by the Deputy Information Commissioner in his letter to the applicant dated 23 August 2000, and I need not repeat them here.

24. In his letter to the applicant dated 23 August 2000, the Deputy Information Commissioner indicated that the FOI Act does not require an agency to answer questions, or to respond to requests for information, other than by disclosing information recorded in documents that were already in existence at the date of lodgment of an FOI access application. In his letter dated 26 September 2000, the applicant sought clarification of this statement, pointing to s.10 of the FOI Act, which provides that a person is entitled to apply under the FOI Act for access to a document regardless of when the document came into existence. The effect of s.10 is to make it clear that the right to apply for access to documents under the FOI Act is not limited by reference to the age of the document. However, the language of s.10 also makes it clear that the entitlement is to apply for access to documents that have already come into existence at the time the application for access is made. The right of access to documents of an agency that is conferred by s.21 of the FOI Act is confined to documents that already exist, in the possession or control of the relevant agency, at the time at which the relevant FOI access application is lodged with the agency: see *Re Price and Nominal Defendant* (1999) 5 QAR 80 at page 88, paragraph 14; and *Re Birrell and Victorian Economic Development Corporation* (1989) 3 VAR 358 at page 378. In any event, the point that the Deputy Information Commissioner was making was that the DMR was not required, under the FOI Act, to create new documents in response to questions posed by the applicant.

25. In his letter dated 19 September 2000, the applicant contended that considerations of procedural fairness required that he be given access to a letter from the DMR to my office dated 26 June 2000. (In his letter dated 26 September 2000, the applicant made a similar

comment in relation to a letter from the DMR dated 16 June. I take it this was a mistaken reference to the letter dated 26 June 2000 because there is no DMR letter dated 16 June.) However, the DMR letter dated 26 June 2000 did no more than raise a claim for exemption under s.40(c), as an adjunct to the DMR's previous reliance on s.46(1). No additional argument or evidence in support of the s.40(c) exemption claim was put forward with the DMR's letter dated 26 June 2000. The Deputy Information Commissioner subsequently considered the material before him and, by letter dated 23 August 2000, informed the applicant of the basis for his preliminary view that the matter remaining in issue qualified for exemption under s.40(c) or s.44(1) of the FOI Act. I am satisfied that the applicant has been afforded an effective opportunity to respond to the points raised by the Deputy Information Commissioner with regard to the application of s.40(c) of the FOI Act to the matter remaining in issue.

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

26. 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.*

27. 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 and Queensland Police* (1997) 4 QAR 30. In applying s.40(c) of the FOI Act, I must determine:

(a) whether any adverse effects on the management or assessment by the DMR of its personnel could reasonably be expected to follow from disclosure of the matter in issue; and

(b) if so, whether the adverse effects, either individually or in aggregate, constitute a substantial adverse effect on the management or assessment by the DMR 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.

28. In *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 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).

29. The focus of s.40(c) is on the management or assessment by an agency of the agency's personnel. The matter in issue in this review was created in response to complaints made by the applicant about the way in which the DMR's management dealt with the complainant's grievance and subsequent events. I accept that the investigation of grievances is an aspect of the management by an agency of its personnel. I must therefore consider whether disclosure of the matter in issue could reasonably be expected to have a substantial adverse effect on the management by the DMR of its personnel.

Substantial adverse effect

30. A number of statements made to Ms Walker, various notes and memos which preceded Ms Walker's investigation, and references in Ms Walker's report to the information in those documents, have been disclosed to the applicant with the consent of the officers concerned. The third parties who provided the remaining statements have not consented to the release of those statements, or of references to their identities and to the content of their statements contained in other documents, and the DMR continues to object to the disclosure of any of the matter in issue. The DMR stated, in its initial and internal review decisions, that the matter in issue is exempt from disclosure as it was obtained in confidence, and the third parties who provided statements continue to have an expectation that they will not be disclosed.

31. In *Re Chambers and Department of Families, Youth and Community Care; Gribaudo (Third Party)* (1999) 5 QAR 16, the Information Commissioner said (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.

32. Ms Walker was an experienced investigator who did not give the third party witnesses a blanket assurance of confidential treatment of their identities, or of the information they supplied. However (as the Deputy Information Commissioner informed the applicant in the second full paragraph on p.4 of his letter dated 23 August 2000), Ms Walker has confirmed that she assured the third party witnesses that their identities, and the information they supplied, would be treated in confidence as far as possible, given the purpose for which the information was being sought. Ms Walker was investigating the applicant's grievance, and she must have contemplated that it might become necessary to put some information obtained from third party witnesses to the applicant for response, and that it would be necessary to give an account of the outcome of her investigation to the applicant.

33. I consider that the nature and sensitivity of the information supplied by the third party witnesses, and their apprehension over the applicant's abusive or intimidating behaviour following the initial complaint against the applicant of sexual harassment (this conduct by the applicant is referred to in Ms Walker's report, in parts that have been disclosed to the applicant), also support the conclusion that it was mutually understood by the third party witnesses, Ms Walker, and the DMR, that the identities of the third party witnesses, and the information they supplied, would be treated in confidence so far as possible, given the purposes for which the information was provided (i.e., such information would not be disclosed, without the consent of the third party witnesses, except where disclosure was necessary for the proper conduct of the investigation for which the information was obtained, and of any subsequent action taken by the DMR as a consequence of the findings/outcome of the investigation).

34. The applicant has in fact been given access to a significant amount of Ms Walker's report, and to some of the material on which it was based. Details of the complainant's grievance against the applicant have not been included in that matter (as the DMR contends that they are exempt from disclosure under s.44(1) of the FOI Act), but Ms Walker's report was not commissioned for the purpose of determining the merits of those allegations. Despite the applicant's repeated assertions that the DMR and Ms Walker found him "guilty" of harassing the applicant prior to the making of her initial complaint, neither made any such finding.

35. I consider that the matter which has already been disclosed to the applicant has been sufficient to give the applicant a satisfactory account as to why his grievance was not upheld. Disclosure of additional matter at this stage would be contrary to the conditional understandings of confidence held by the third party witnesses, and could reasonably be expected to reduce staff confidence in the DMR's grievance investigation system (especially with respect to complaints of harassment) and damage the reputation of management, particularly in terms of being able to give and maintain assurances of confidentiality in sensitive staff management areas. For that reason, I find that disclosure of the matter remaining in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by the DMR of its personnel.

36. There is before me evidence of abusive or intimidating behaviour by the applicant. Details of the applicant's behaviour towards the complainant and other officers after the complainant lodged her grievance have been provided to the applicant, and the applicant

has been given the opportunity to respond. In general, the applicant's account of events - both before and after the complainant lodged her grievance - is similar to those of the complainant and of third parties, although the complainant gives more details than the applicant of contact between them.

37. On the applicant's own admission, as well as on the evidence of various third parties, the applicant has spoken and written abusively to Ms Walker and to various officers of the DMR, including the complainant. Despite the length of time which has elapsed since the complainant's grievance and Ms Walker's investigation (more than two years) the applicant is still clearly aggrieved at a number of persons. The DMR has informed my Office that staff continue to maintain concerns about the potential for contact with the applicant and that the applicant made an unwelcome telephone call to one of the officers whose statement was disclosed to him, as recently as May 2001. In my view, there are reasonable grounds for expecting that disclosure of additional matter could result in the applicant making unwanted approaches to other officers of the DMR.

38. The DMR's duty of care towards its employees includes taking reasonably practicable steps to protect them from foreseeable risks of abusive or intimidating behaviour. This is particularly so if that behaviour is the result of something officers have been required or expected to do as officers of the DMR (in this case, co-operating in the investigation of the applicant's grievance against the DMR).

39. In the particular circumstances of this case, I consider that the disclosure of material which could reasonably be expected to subject officers of the DMR to unwelcome approaches by the applicant could reasonably be expected to have a substantial adverse effect on the management by the DMR of its staff, by eroding the confidence of officers of the DMR in its management.

40. I find that disclosure of the matter remaining in issue could reasonably be expected to have a substantial adverse effect on the management by the DMR of its personnel, so that it is *prima facie* exempt from disclosure to the applicant under s.40(c) of the FOI Act. I must therefore determine whether such disclosure would, on balance, be in the public interest.

Public interest balancing test

41. In his application for external review of the DMR's decision, and in his submissions to this Office dated 16 June, 19 September, 26 September and 9 October 2000, the applicant set out in detail the reasons for his belief that the public interest requires the disclosure to him of the matter remaining in issue. In his submission dated 16 June 2000, the applicant raised 53 points which he believed demonstrated a public interest in the full disclosure of the matter in issue, and repeated those points, with some minor variations, in his other submissions and in discussions with a member of my staff. Most of those 'public interest' arguments were in fact questions about the reasons for the DMR's actions and Ms Walker's findings. It is clear, from my examination of the matter remaining in issue, that even full disclosure of all that matter would not answer most of the questions posed by the applicant.

42. Points 1-47 of the 16 June 2000 submission responded to aspects of Ms Walker's report, pointing out alleged errors in the report or failings on the part of Ms Walker and the DMR. The other points referred to more general issues. At the end of each point, the applicant identified what he regarded as a public interest consideration favouring disclosure of the matter in issue. The applicant's later submissions expanded or elaborated on the points raised in the submission dated 16 June 2000, or raised procedural issues concerning the

conduct of this external review. I do not consider that the circumstances of this case warrant my attempting to address each point individually. In summary, the applicant's main public interest arguments favouring disclosure were that:

(a) the applicant has not been properly informed of the reasons for being "found guilty" of having harassed the complainant;

(b) the DMR holds information which incorrectly states that the applicant harassed the complainant and the applicant needs to correct that information, and to take legal action against people the applicant believes have defamed him;

(c) the applicant has not been properly informed of the reasons for Ms Walker's conclusion that the DMR acted properly in its handling of both the complainant's grievance against the applicant, and of the applicant's complaints against the handling by the DMR of his concerns;

(d) the DMR and Ms Walker acted improperly by coercing officers into providing statements, and in promising that information would be kept confidential; and

(e) the DMR committed a breach of confidence by disclosing to the applicant the name of another officer who had made a complaint of harassment and, in consequence, none of the matter remaining in issue in this review can be confidential.

43. As to (a), there is no evidence in the matter remaining in issue, or in the matter which has been disclosed to the applicant, that the DMR made any findings that the applicant had harassed the complainant. The DMR appears to have acted as an intermediary between the complainant and the applicant to secure an undertaking from the applicant not to further approach the complainant. Ms Walker's findings on the applicant's subsequent behaviour towards the complainant and other officers of the DMR have already been disclosed to the applicant.

44. As to (b), it is certainly true that a major object of the FOI Act is to enable citizens to seek correction or amendment of government-held information relating to their personal affairs, if the information is inaccurate, incomplete, out-of-date or misleading. However, a precondition to an applicant's right to seek correction or amendment (conferred by s.53 of the FOI Act) is that the applicant must have obtained access (whether under the FOI Act or otherwise) to a document containing the information sought to be corrected or amended. If a citizen is reliant on first obtaining access under the FOI Act to information believed to require correction, the citizen has to face the fact that Parliament has seen fit (for the purpose of avoiding prejudice to certain essential public interests) to provide that access may be refused under the FOI Act to information which is exempt matter under the FOI Act. Those essential public interests include the prevention of a substantial adverse effect on the management or assessment by an agency of its personnel, and protection of the privacy of information concerning the personal affairs of individuals other than the applicant for access. The public interest in the applicant having an opportunity to seek correction of information about him that might be inaccurate *et cetera* must be weighed in the balance with all other considerations favouring disclosure and non-disclosure, and in that regard I note that the applicant has already been given access to the substance of the information which is adverse to him. I also note that the applicant has already provided the DMR with a number of statements setting out his version of the events which were the subject of Ms Walker's report, and of his relations with the complainant and his behaviour towards her and other persons.

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45. The applicant also contends that there is a public interest in him receiving access to information which will allow him to pursue defamation actions against one or more of the people who provided information. In *Re Willsford and Brisbane City Council* (1996) 3 QAR 368, the Information Commissioner said (at pp.372-373, paragraphs 16-18):

> *16. I consider that, in an appropriate case, there may be a public interest in a person who has suffered, or may have suffered, an actionable wrong, being permitted to obtain access to information which would assist the person to pursue any remedy which the law affords in those circumstances (*cf. Re Cairns Port Authority and Department of Lands *(1994) 1 QAR 663 at pp.713-714, paragraphs 103-104; p.717, paragraph 120; and p.723, paragraph 142). ...*
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> *17. The mere assertion by an applicant that information is required to enable pursuit of a legal remedy will not be sufficient to give rise to a public interest consideration that ought to be taken into account in the application of a public interest balancing test incorporated into an exemption provision in the FOI Act (*cf. Re Alpert and Brisbane City Council *(Information Commissioner Qld, Decision No. 95017, 15 June 1995, unreported) at paragraph 30). On the other hand, it should not be necessary for an applicant to prove the likelihood of a successful pursuit of a legal remedy in the event of obtaining access to information in issue. It should be sufficient to found the existence of a public interest consideration favouring disclosure of information held by an agency if an applicant can demonstrate that -*
>
> *(a) loss or damage or some kind of wrong has been suffered, in respect of which a remedy is, or may be, available under the law;*
> *(b) the applicant has a reasonable basis for seeking to pursue the remedy; and*
> *(c) disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing.*
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> *18. The existence of a public interest consideration of this kind would not necessarily be determinative - it would represent one consideration to be taken into account in the weighing process along with any other relevant public interest considerations (whether weighing for or against disclosure) which are identifiable in a particular case. On the other hand, it would ordinarily be true to say (to the extent that a decision-maker under the FOI Act is able to make an objective assessment of these matters from the material put forward by an applicant to establish (a), (b) and (c) above) that the greater the magnitude of the loss, damage or wrong, and/or the stronger the prospects of successfully pursuing an available remedy in respect of the loss, damage or wrong, then the stronger would be the weight of the public interest consideration favouring disclosure which is to be taken into account in the application of a public interest balancing test incorporated in an exemption provision of the FOI Act.*

46. The information remaining in issue was provided by persons who were under a legal duty to comply with their employer's requirement for co-operation with the grievance investigation. The information was provided in good faith on an occasion of qualified

privilege. I do not consider that any substantial weight should be accorded to this public interest consideration said to favour disclosure to the applicant.

47. As to point (c) from paragraph 42 above, I consider that the material disclosed to the applicant to date (including significant extracts from Ms Walker's report) has adequately disclosed to the applicant the steps undertaken by the DMR in dealing with the complainant's original complaint and the applicant's grievance concerning the handling of the complaint. The applicant does not consider that these issues have been dealt with well by the management of the DMR. This is made clear by the 47 points of issue that he has taken with Ms Walker's report in the attachment to his letter dated 16 June 2000. The fact that he has been able to raise so many issues gives some indication of the extent of disclosure which has already taken place. I am not satisfied that disclosure of the matter remaining in issue would add in any significant way to the applicant's understanding of the way Ms Walker and the DMR handled these matters.

48. The applicant has claimed that procedural fairness obliged the DMR to give him a complete copy of Ms Walker's report, and of the information on which Ms Walker based her findings.

49. The circumstances under which the common law duty to comply with the rules of procedural fairness (or natural justice) arises are outlined in the case of *Kioa v West* (1985) 159 CLR 550 where, at p.582, Mason J stated:

> *It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it:* Twist v Randwick Municipal Council *(1976) 136 CLR at p.476:* Heatley v Tasmanian Racing and Gaming Commission *(1977) 137 CLR 487 at pp.498-499:* FAI Insurances Ltd v Winneke *(1982) 151 CLR 342 at pp.360, 376-377:* Annamunthodo v Oilfields Workers' Trade Union *(1961) AC 945. The reference to 'right or interest' in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.*

50. In this case, although the applicant strenuously disagrees with Ms Walker's conclusions, and the manner in which she conducted her investigation, there was no recommendation that action should be taken against the applicant. If the DMR had terminated the applicant's contract early, or brought any disciplinary charges against the applicant on the basis of Ms Walker's report, it may well have been necessary to disclose to the applicant any parts of the report (and the evidentiary material on which those parts were based) on which the DMR had relied to take action against him. This was not the case, however.

51. Ms Walker found that the DMR had acted properly in its handling of the complainant's grievance and the applicant's subsequent complaints, a finding with which the applicant disagrees. As it was the applicant's complaints of adverse treatment which led the DMR to commission Ms Walker to undertake her investigation, the applicant was entitled to an explanation of the reasons for Ms Walker's findings, and arguably to an opportunity to register his objections to those findings (although the applicant's contract of temporary employment expired very shortly after Ms Walker's report was presented to the DMR).

52. I consider that the additional matter which has been disclosed to the applicant in the course of this review has adequately informed the applicant of the reasons for the DMR's actions, and of the basis for Ms Walker's findings, and that any applicable duty on the DMR to explain to the applicant why his grievance was not upheld has been sufficiently discharged. The applicant's contentions about the merits of the interpretation Ms Walker placed on the information available to her, or of the actions of the DMR, are outside the scope of this review.

53. As to point (d) from paragraph 42 above, I have seen no evidence that officers were coerced into making statements, or pressured to reveal inappropriate information. As should be clear from my comments at paragraphs 32-33, I do not consider that there was anything improper, in the particular circumstances of this case, in giving assurances to the third party witnesses that their identities, and the information they provided, would be treated in confidence as far as possible, given the purposes for which the information was obtained.

54. As to point (e) from paragraph 42 above, it is arguable that the DMR may have made an error in disclosing to the applicant the name of another person who had made a complaint of harassment. The fact that the DMR may have made such a mistake is, however, no justification for expecting the DMR to commit other breaches of confidentiality.

55. I acknowledge that there is a general public interest consideration favouring disclosure of documents that enhance the accountability of the DMR for the way it carries out its personnel management functions. I also consider that there is a public interest in a person having access to information held by a government agency which is adverse to that person, and that the applicant is entitled to whatever assistance can be obtained from s.6 of the FOI Act, 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.*

(But see the reservation expressed by the Information Commissioner in *Re "KBN" and Department of Families, Youth and Community Care* (1998) 4 QAR 422 at p.437, paragraph 58 about the application of s.6 to information that also concerns the personal affairs of individuals other than the applicant for access.)

56. Weighing against disclosure of the matter remaining in issue is the public interest consideration raised by satisfaction of the test for *prima facie* exemption under s.40(c) of the FOI Act. Disclosure that could reasonably be expected to have a substantial adverse effect on the management of agency personnel would clearly be detrimental to the operations of the DMR, and therefore be contrary to the public interest in the efficient and effective operations of government. There is a strong public interest in the continuing ability of an agency to effectively manage its personnel functions. This includes the ability to investigate grievances and complaints as fully as possible, and to protect staff from abuse or intimidation if they have co-operated with an investigation. Further, much of the matter in issue concerns the personal affairs of the complainant or other persons who provided information to Ms Walker. I recognise a public interest consideration favouring non-disclosure of matter of that kind.

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57. In weighing the competing public interest considerations identified above, I consider that the extent of the information given to the applicant to date has largely satisfied the public interest considerations favouring disclosure, and I am not satisfied that disclosure of the matter remaining in issue would, on balance, be in the public interest. I find that the matter remaining in issue qualifies for exemption from disclosure under s.40(c) of the FOI Act.

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

58. 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.*

59. 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 public interest considerations favouring non-disclosure.

60. 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, the Information Commissioner 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:

- family and marital relationships;
- health or ill health;
- relationships and emotional ties with other people; and
- domestic responsibilities or financial obligations.

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

61. I find that the following segments of information, in documents which have already been disclosed in part to the applicant, solely concern the personal affairs of third parties, and are *prima facie* exempt from disclosure under s.44(1) of the FOI Act:

File A	p.17 (comment about the health of an officer)
File B	p.6 (comment about the health of an officer) pp.18, 47, 48, 60 (comments about officers' emotional reactions or private activities)
File D	p.49 (comment about the health of an officer)

62. I am not satisfied that any of the public interest considerations favouring disclosure discussed at paragraphs 42-57 above apply to the particular matter identified in the preceding paragraph with sufficient strength (when weighed against the public interest in protecting the privacy of information concerning the personal affairs of other individuals, and the other public interest

considerations favouring non-disclosure that are discussed above) to warrant a finding that disclosure of that information would, on balance, be in the public interest. I find that that information is exempt matter under s.44(1) of the FOI Act.

DECISION

63. I decide to vary the decision under review (being the decision made on behalf of the DMR on 4 February 2000 by Mr P O'Sullivan) by finding that the matter in issue identified in paragraph 21 is exempt matter under s.40(c) of the FOI Act, and that the matter in issue identified in paragraph 61 above is exempt matter under s.44(1) of the FOI Act.