"MIKE" and Queensland Police Service

(S 79/01, 30 June 2002, Deputy Information Commissioner)

(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. For a brief period in January-February 1999 the applicant attended a private school (the College). There were concerns expressed by College staff about his behaviour, and by him about his treatment at the College. As a result, he left after a few weeks. The applicant and his mother subsequently made complaints to the Queensland Police Service (the QPS) and the Queensland Crime Commission (the QCC) concerning allegations of mistreatment, including assaults by staff and students. The QPS investigated the complaints, but no charges were brought.

4. The applicant sought access under the FOI Act to documents of the QPS relating to its investigation. The QPS consulted the College and the QCC, which both raised objections to disclosure of matter to the applicant. By letter dated 24 November 2000, Acting Inspector Chapman decided to give the applicant access to a large number of documents but refused access to some matter on the basis that it was exempt under s.42(1)(e), s.46(1)(b) or s.44(1) of the FOI Act. That decision was affirmed on internal review by Assistant Commissioner G J McDonnell: see letter dated 13 February 2001.

5. By letter dated 29 March 2001, the solicitors for the applicant sought review by the Information Commissioner, under Part 5 of the FOI Act, of Assistant Commissioner McDonnell's decision.

External review process

6. The documents in issue were obtained and examined. During informal negotiations, a member of my staff consulted with the former Principal of the College and other staff, who agreed that their statements and reports could be provided to the applicant subject to the deletion of certain identifying matter. However, I subsequently received a notice from the College dated 30 October 2001, signed by the staff, withdrawing their consent, and objecting to the disclosure of information to the applicant, on the basis that it had been provided to the QPS in confidence.

7. By letters dated 15 February and 20 February 2002, Assistant Commissioner Shoyer informed the College (and through it, the staff), and the QPS, respectively, of his

preliminary view that none of the matter in issue was exempt from disclosure to the applicant under s.46(1)(b) of the FOI Act, and very little was exempt under s.44(1) of the FOI Act. In response, I received a submission dated 6 March 2002 on behalf of the College, the staff and two organisations concerned with management of the College, and a submission dated 18 April 2002 from the QPS.

8. By letter dated 11 April 2002, Assistant Commissioner Shoyer informed the applicant of his preliminary view that certain matter was exempt under s.44(1) of the FOI Act. The applicant's solicitors accepted that preliminary view, and that matter is no longer in issue in this review. The applicant's solicitors also confirmed that the applicant did not require access to identifying details of any staff members accused of misconduct by the applicant or his mother. I will provide to the QPS, with these reasons for decision, copies of relevant pages from the documents in issue on which I have marked the matter which is no longer in issue as a result of these concessions.

9. The QPS had decided that a QCC report (folios 4-6) was exempt from disclosure to the applicant under s.42(1)(e) of the FOI Act. Assistant Commissioner Shoyer consulted the Crime and Misconduct Commission (the successor to the QCC), which accepted his preliminary view that parts of the report were exempt under s.44(1) of the FOI Act, and did not object to disclosure of the balance of the report. The QPS then indicated that it was prepared to disclose the relevant parts of the report in accordance with the concessions made by the CMC, except for one additional paragraph that it contends is wholly exempt under s.44(1) of the FOI Act: see QPS letter dated 18 April 2002.

10. The QPS contended that I should consult two persons named in that paragraph prior to disclosure of any part of the paragraph. The paragraph records allegations made by the applicant's mother which have not been substantiated. They are allegations of a very serious nature. However, I do not consider that they are so far removed from allegations of a similar nature about which the College and its staff have been consulted, as to warrant further consultation. The College and its staff have had an opportunity to make submissions concerning the application of s.44(1) of the FOI Act to matter which raises allegations of this nature and have done so in the submission dated 6 March 2002.

11. In making this decision, I have taken into account the following material:

    1. the contents of the matter in issue
    2. letter to QPS from the College dated 9 November 2000
    3. initial QPS decision dated 24 November 2000
    4. QPS internal review decision dated 13 February 2001
    5. application for external review dated 29 March 2001
    6. letter from the College and staff dated 30 October 2001
    7. submissions of QPS dated 28 February and 18 April 2002
    8. submissions on behalf of College and staff dated 6 March 2002.

12. The matter remaining in issue is listed in the attached schedule. Folios 4-6 are a QCC Information Report relating to a complaint made by the applicant's mother. The balance of

the matter in issue concerns the QPS investigation. Folios 26-36 and 40-46 comprise the response of the College to a letter from the QPS investigator seeking information from the College about the allegations. This response was co-ordinated by the former Principal of the College. It includes statements from a number of staff who are alleged to have acted inappropriately, along with records concerning the applicant's care and behaviour at the College, and general comments about the College. Also in issue are records of the allegations made, and parts of QPS reports concerning the progress of the investigation.

13. The QPS contended that information provided by the College and its staff is exempt matter under s.46(1)(b) and s.44(1) of the FOI Act. The College submitted that the statements and other information were given voluntarily and in confidence. The College submitted that the matter in issue is exempt under s.41(1)(b) and s.42(1) of the FOI Act, although it did not specify which paragraph of s.42(1) it relied upon.

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

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

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

15. Matter will be exempt under s.46(1)(b) if:

(a) it consists of information of a confidential nature;

1. it was communicated in confidence;

2. its disclosure could reasonably be expected to prejudice the future supply of such information; and

3. the weight of the public interest considerations favouring non-disclosure equals or outweighs that of the public interest considerations favouring disclosure.

(See *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.337-341; paragraphs 144-161.)

Information of a confidential nature

16. I am satisfied that much of the information supplied by the College and staff is not known to the applicant, and has the necessary degree of secrecy/inaccessibility to satisfy criterion (a) above.

17. In his initial decision, Acting Inspector Chapman decided that there was an understanding of confidentiality extending to the identities of those who supplied information. The College, and the staff who supplied statements, were the subject of allegations of wrongdoing of one type or another, made by the applicant as a complainant to the QPS. In those circumstances, the applicant/complainant would appreciate, and indeed expect, that steps would be taken by the QPS to obtain responses to his allegations from the College, and from the individual staff members, who were the subjects of the allegations. In the circumstances, I am not satisfied that the fact that the College and individual staff members provided information to the QPS, is itself information that has the necessary quality of confidence, as against the applicant. Nor am I satisfied that the identity of the College, and the identities of the staff members who provided information to the QPS, comprise information of a confidential nature, as against the applicant.

Communicated in confidence

18. The following is a summary of relevant principles with respect to the second requirement to establish exemption under s.46(1)(b), taken from the Information Commissioner's decisions in *Re "B"* at pp.338-339 (paragraphs 149-153) and *Re McCann and Queensland Police Service* (1997) 4 QAR 30 at paragraphs 21-24, 33-34 and 57-58:

    9. The phrase "communicated in confidence" is used in the context of s.46(1)(b) to convey a requirement that there be mutual expectations that the relevant information is to be treated in confidence.

    10. The first question is whether there is reliable evidence of an express consensus (for example, the seeking and giving of an express assurance, written or oral, that the relevant information would be treated in confidence) between the supplier and the recipient as to confidential treatment of the information supplied.

    11. If there is no evidence of an express consensus, the relevant circumstances attending the communication of the information in issue must be examined to ascertain whether they evidence a need, desire or requirement, on the part of the supplier of the information, for confidential treatment, which, in all the relevant circumstances, the supplier could reasonably expect of the recipient, and which was understood and accepted by the recipient, thereby giving rise to an implicit mutual understanding that confidentiality would be observed.

    12. If there was an express or implicit mutual understanding that information would be treated in confidence, it may also be necessary to construe the true scope of the confidential treatment required in the circumstances, e.g., whether it was or must have been the intention of the parties that the recipient should be at liberty to disclose the information to a limited class of persons, or to disclose it in particular circumstances; see,

for example, the usual implicit exceptions to an understanding that confidential treatment would be accorded to information conveyed for the purposes of a police investigation, that are identified in *Re McCann* at paragraph 58.

13. An obligation or understanding of confidence is ordinarily owed by the recipient of the information for the benefit of the supplier of the information. This means that the supplier may waive the benefit of the obligation or understanding of confidence, including waiver by conduct of the supplier that is inconsistent with a continued expectation of confidential treatment on the part of the recipient.

19. In his initial decision, Acting Inspector Chapman stated that the investigating officer, Detective Sergeant Hurrell, had informed the Principal of the College that statements "would not be released to any person unless the investigation proceeded further and charges were preferred". He indicated that the Principal informed the investigating officer that there were "reservations in providing statements" if the applicant could obtain them: see QPS file note of conversation between Mr Lovi of the QPS and Detective Sergeant Hurrell dated 11/2/00. The College and staff have submitted that the information was given in confidence, but have lodged no evidence to support this claim.

20. 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.*

21. In my view, these comments are applicable *mutatis mutandis*, and perhaps with even greater force, to information supplied by a complainant, and by the subjects of investigation, in the context of a police investigation where the identities of the complainant and of the subjects of investigation are known to each other.

22. In his report dated 13 September 1999, DS Hurrell stated:

5. I then contacted [the then Principal] *of this College and made arrangements to visit him I advised him of the complaint.*

6. I was subsequently advised by him that he had contacted their solicitor, Arthur Browne, and had been advised by him that they would respond to allegations in statement form.

…

13. On 23 August 1999 I handed to [matter claimed to be exempt] *a report outlining all allegations to that time. He advised me that he would deal with it as soon as possible.*

…

15. I subsequently received statements, notes and a plan of the school from [matter claimed to be exempt].

23. There is nothing in this report, or in any of the statements, on which to base a finding that the statements by staff members of the College were provided to the QPS pursuant to an express assurance or understanding that they would be treated in confidence as against the applicant. Nor am I satisfied, on the material before me, that the circumstances support an implicit understanding that the statements would be treated in confidence as against the applicant. The statements were a formal response (in many cases from the subjects of the relevant allegations) to written allegations by the applicant/complainant. The College and the persons providing the statements must, or ought reasonably, to have anticipated that information from the statements would have to be disclosed to the applicant, who was alleging that he was the victim of serious crimes.

24. I consider that any understanding of confidentiality that attended the communication of the statements must necessarily have been conditional. In *Re McCann*, at pp.53-54, paragraph 58, the Information Commissioner said:

> *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 to law 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 (I note that this could include selective disclosure to the public at large, as sometimes occurs when a public appeal is made for citizens who might have information, relevant to a particular police investigation, to bring it to the attention of the police);*

(b) where the investigation results in the laying of charges, which are defended, and, in accordance with applicable rules of law or practice (see, for example, guidelines issued by the Director of Public Prosecutions, under s.11 of the Director of Public Prosecutions Act 1984 *Qld, as to disclosure to an accused person of evidence to be called in the prosecution case: Guidelines 2.1, 2.3, 7.4 and 7.7 published at pages 83, 86, 108 and 111, respectively, of the 1995/96 Annual Report of the Director of Public Prosecutions Qld), 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, especially a victim of crime, 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, especially a victim of crime.

25. *Re Godwin and Queensland Police Service* (1997) 4 QAR 70 provides an example of the type of information that might be given to a complainant when a decision is made by the QPS to take no action. At paragraphs 53 of *Re Godwin*, the Information Commissioner said:

53. In the present case, for example, it may not have been necessary to provide the applicant with a copy of the third party's statement, but I consider that, in accordance with the third implicit exception referred to in the passage quoted from Re McCann *at paragraph 51 above, it would have been proper for the QPS to -*

1. inform the applicant that the third party had been interviewed;
2. convey the substance of the evidence obtained from the third party (and from Mr J, whose statement is no longer in issue) which negatived the applicant's allegation that Mr A had criminally assaulted the applicant (and which is contained in the sixth-last, fifth-last, fourth-last and last paragraphs of the third party's statement); and
3. explain that, in the context of a late-night altercation in a bar, where all involved admitted to having been drinking for many hours, and the other relevant witnesses described the occurrence of the applicant's injury in a way that afforded no grounds for laying charges of criminal assault against Mr A, there was no sufficient basis to warrant the police taking further action.

26. The information in issue either directly addresses the allegations made by the applicant, or provides background aimed at persuading the QPS that the version of events alleged by the applicant is not accurate. The extent of disclosure that should appropriately be made by

the QPS to a complainant who claims to be a victim of crime, may vary according to the exigencies of particular cases. However, in this case the matter in issue appears to me to be so directly relevant and responsive to the applicant/complainant's allegations that no mutual understanding of confidentiality could be maintained, as against the applicant, with respect to any part of the matter in issue.

27. I therefore find that this second requirement for exemption under s.46(1)(b) is not satisfied with respect to the matter remaining in issue, and hence that matter cannot qualify for exemption from disclosure to the applicant under s.46(1)(b) of the FOI Act.

Prejudice to future supply of information

28. In their submission dated 6 March 2002, the solicitors for the College stated:

> *If it becomes known to the general public that voluntary and confidential statements made by them to assist police investigations can later be released by your office, particularly to solicitors representing a complainant, this will obviously result in significant difficulties for police in the obtaining of voluntary and confidential statements from members of the public.*

29. The third requirement for exemption under s.46(1)(b) largely turns on the test imported by the phrase "*could reasonably be expected to*", which requires a reasonably based expectation, i.e., an expectation for which real and substantial grounds exist, that disclosure of the particular matter in issue could have the specified prejudicial consequences. A mere possibility, speculation or conjecture is not enough. In this context "*expect*" means to regard as likely to happen. (See *Re "B"* at pp.339-341, paragraphs 154-160, and the Federal Court decisions referred to there.)

30. At paragraph 161 of *Re "B"*, the Information Commissioner said:

> *161. Where persons are under an obligation to continue to supply such confidential information (e.g. for government employees, as an incident of their employment; or where there is a statutory power to compel the disclosure of the information) or persons must disclose information if they wish to obtain some benefit from the government (or they would otherwise be disadvantaged by withholding information) then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information. In my opinion, the test is not to be applied by reference to whether the particular confider whose confidential information is being considered for disclosure, could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of the sources available, or likely to be available, to an agency* [my underlining].

31. In this instance, the College and staff were the subjects of allegations made to the QPS and the QCC by the applicant and his mother. After seeking legal advice, the College and staff

provided the QPS with the information in issue. In my view, it is reasonable to expect that staff of an educational institution, subject to investigation by the QPS of allegations of a comparable nature to those in the present case, would be willing to co-operate with the investigation, and provide relevant information and explanations, in order to take the opportunity to exculpate themselves. Failure to co-operate with a QPS investigation would, in my view, be likely to entail far more onerous consequences, in terms of QPS pursuit of the investigation, and with the non-cooperation itself being potentially open to disclosure and adverse comment. I consider that the response by parties in that position in the future will be determined by what they perceive to be the best means of protecting their interests and/or being seen to behave responsibly, both from the point of view of the QPS investigators and of public perception, rather than (at least in the ordinary case) concern about potential disclosure to a complainant of direct responses to the complainant's allegations of wrongdoing.

32. I am not satisfied that disclosure of the matter remaining in issue could reasonably be expected to prejudice the future supply of like information to the QPS. This is a further ground for finding that the matter remaining in issue does not qualify for exemption from disclosure to the applicant under s.46(1)(b) of the FOI Act.

Public interest balancing test

33. Given my findings on the second and third requirements for exemption under s.46(1)(b), it is not strictly necessary to address the application of the public interest balancing test in s.46(1)(b). However, I note that, while the applicant has already had access to material contained in the QPS reports and correspondence, I am not satisfied, in the circumstances of this case, that those documents provide him with adequate information about the responses provided by the College and the individuals concerned. For the reasons discussed at paragraphs 46-55 below, I consider that disclosure to the applicant of the matter remaining in issue would, on balance, be in the public interest.

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

34. 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.*
>
> ***(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 containing the matter is being made.*

35. 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. 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.

Personal affairs matter

36. For the reasons explained in *Re Stewart and Department of Transport* (1993) 1 QAR 227 at pp.237-239 (paragraphs 20-27), and in the Federal Court judgments there cited, I am satisfied that -

    (a) the phrase "personal affairs of a person" (and its relevant variations in the FOI Act) does not include the business or professional affairs of a person; and

    (b) the word "person" appearing in conjunction with the phrase "personal affairs" refers only to natural persons, not to corporations, and that corporations are not capable of having personal affairs for the purposes of the FOI Act.

37. Section 44(1) of the FOI Act only applies to information about real people, not companies, clubs or other organisations. Thus, references to the name or location of the College and houses do not qualify for exemption from disclosure to the applicant under s.44(1) of the FOI Act. In addition, significant parts of the matter in issue solely concern the personal affairs of the applicant. That matter cannot qualify for exemption under s.44(1), by virtue of s.44(2).

38. In *Re Pope and Queensland Health* (1994) 1 QAR 616, after reviewing relevant authorities, the Information Commissioner found (see p.660, paragraph 116) that information which merely concerns the performance by government employees of their employment duties (and which does not stray into the realm of personal affairs in the manner contemplated in *Department of Social Security v Dyrenfurth* (1983) 86 ALR 533, and *Re Rees and Queensland Generation Corporation* (1996) 3 QAR 277 at paragraph 16) was not information concerning their 'personal affairs'. The general approach evidenced in that passage was endorsed by de Jersey J (as he then was) of the Supreme Court of Queensland in *State of Queensland v Albietz* [1996] 1 Qd R 215, at pp.221-222.

39. I consider that the same principle applies to persons who are not employed as public servants, i.e., information relating to their employment affairs, and their conduct in their capacity as employees, is not information concerning their personal affairs. I note that, in reviewing relevant authorities in *Re Pope*, the Information Commissioner had specifically endorsed the following observations, concerning s.33(1) (the personal affairs exemption) of the *Freedom of Information Act 1982* Vic, made by Eames J of the Supreme Court of Victoria in *University of Melbourne v Robinson* [1993] 2 VR 177 at p.187:

> *The reference to the* "personal affairs of any person" *suggests to me that a distinction has been drawn by the legislature between those aspects of an individual's life which might be said to be of a private character and those relating to or arising from any position, office or public activity with which the person occupies his or her time.* [my underlining].

40. The personal affairs exemption does not ordinarily extend to a person's name where it is used in the context of their employment. In *Re Griffith and Qld Police Service* (1997) 4 QAR 110, the Information Commissioner said:

> *53. Of course, the disciplinary process itself is an incident of the employment relationship, and an employee's involvement in the disciplinary process must, in my opinion, be properly characterised as an aspect of his or her employment affairs, rather than his or her personal affairs. However, there would remain an issue as to whether mention of the employee's name in connection with some alleged or possible (but still unproven) wrongdoing is properly to be characterised as information concerning the employee's personal affairs. In my opinion, it cannot ordinarily be characterised in that way where the impugned conduct occurred in the course of the performance by the employee of his or her duties of employment.*
>
> *54. Turning to the matter in issue in this external review, the CJC media release (see paragraph 22 above) indicates that the allegation investigated was that the third party had assaulted a youth. The incident took place at the offices of the Juvenile Aid Bureau at a time when the third party was on duty. All of the documents in issue were created as a part of the police disciplinary procedures to which the third party was subject as an incident of his employment as a QPS officer. In my view, the allegation of misconduct dealt with in this case is properly to be characterised as information concerning the employment affairs of the third party, rather than as information concerning his personal affairs.*

41. The matter in issue in this case contains numerous references to staff of the College in a context where they were clearly acting in their capacity as employees, and there is no suggestion that any wrongdoing on their part would extend beyond their employment affairs. I am satisfied that this matter does not comprise information concerning the personal affairs of the individual staff members, and that it therefore cannot qualify for exemption under s.44(1) of the FOI Act.

42. However, there is other matter which equally clearly refers to alleged conduct of such a personal nature that I am satisfied that it does concern the personal affairs of the staff involved. This includes allegations of sexual misconduct. The applicant has indicated that he does not seek access to identifying references regarding such matter, so the names of the persons involved are not in issue. However, the QPS has referred me to the Information Commissioner's decision in *Re Stewart*, where he said (at paragraph 81):

> *81. For information to be exempt under s.44(1) of the FOI Act, it must be information which identifies an individual or is such that it can readily be associated with a particular individual. Thus deletion of names and other identifying particulars or references can frequently render a document no longer invasive of personal privacy, and remove the basis for claiming exemption under s.44(1). This is an expedient (permitted by s.32 of the Queensland FOI Act) which has often been endorsed or applied in*

> *reported cases: see, for example,* Re Borthwick and Health Commission of Victoria *(1985) 1 VAR 25 where the applicant sought disclosure of the names and medical history (clearly "personal affairs" information) of intellectually handicapped children who had been the subject of a Health Commission inquiry. Rowlands J (President) held that the applicant's interest in the documents, and the privacy of the children, could both be accommodated by substituting letters of the alphabet for the children's names* [QPS underlining].

43. The QPS submitted:

> *The applicant will 'readily associate' the information comprised in folio 4, paragraph (5) with* [the staff named] *notwithstanding the deletion of their names.*

44. I accept that there are a number of passages in the matter in issue where mere deletion of the name of the person concerned will not mean that the matter discussed cannot be characterised as information concerning the personal affairs of the individuals. Clearly the applicant and his mother will, in many instances, be able to identify the individuals: but only because they made the allegations discussed, rather than because they deduced it from the material in these passages. As the QPS rightly points out, the question in relation to such matter involves a balancing of competing public interest considerations. The Information Commissioner has, however, on a number of occasions found that the balance of the public interest lies in disclosing to a complainant the substance of matter in issue with the name of the subject of the allegations deleted, thereby allowing the complainant to gain an understanding of the investigation undertaken by the agency, while giving some measure of privacy protection to the subject of allegations. This issue is discussed further at paragraphs 53-55 below.

45. More difficult issues arise in respect of allegations of assault which allegedly took place while a staff member was on duty (and information provided by staff in response to those allegations). These references may arguably stray beyond the mere employment affairs of those named, into the sphere of the personal affairs of the individuals: see the quote from *Re Griffith* at paragraph 40 above and *Re Ainsworth; Ainsworth Nominees Pty Ltd and Criminal Justice Commission; Others* (1999) 5 QAR 284, at paragraph 141. The QPS has submitted that this is an area requiring clarification. However, in this case, the applicant does not seek access to identifying references in respect of those named in such a context. Given that concession, and my finding below with regard to the public interest balancing test in respect of the matter in issue of this nature, I do not consider it necessary to make a finding on this issue in relation to that matter.

Public interest balancing test

46. Much of the matter in issue relates to the personal affairs of the applicant. He is therefore 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 note of caution made by the Information Commissioner in *Re "KBN" and Department of Families, Youth and Community Care* (1998) 4 QAR 422 at paragraph 58.)

47. Significant parts of the matter in issue also relate to the care and education of the applicant while he boarded at the College. I consider that there is a significant public interest in the applicant and his mother having access to information regarding those issues.

48. I have discussed above (see paragraphs 24-26) the significance of law enforcement agencies providing an adequate explanation to a complainant of how his or her complaint has been handled. At paragraph 52 of *Re Godwin*, the Information Commissioner said:

> *52. Whether or not the applicant is a victim of crime is a moot point. The applicant asserts that he is. Based on the statements obtained on investigation of the applicant's complaints, the QPS either does not accept that the applicant is a victim of crime, or at least does not consider that the available evidence supports the laying of charges against Mr A (the alleged perpetrator according to the applicant's complaint). Nevertheless, it is clear that the applicant was a complainant to the QPS, who had suffered injury in an altercation. Once the QPS had decided, after investigation, to take no formal action in respect of the applicant's complaint, I consider that the applicant was entitled to some form of explanation from the QPS, as a matter of sound administrative practice from a provider of publicly-funded services to the community, as to why it had been decided that no formal action would be taken. <u>The extent of the detail that could be offered by way of explanation in such circumstances would necessarily vary from case to case, depending on the need to respect any applicable obligations or understandings of confidence, or applicable privacy considerations</u>. Subject to any such constraints, I consider that there is a legitimate public interest in a complainant, especially a victim of crime, being given sufficient information to be satisfied that the QPS has conducted a thorough investigation (for instance, that the QPS has endeavoured to interview all relevant witnesses nominated by the complainant), and reached a fair and realistic decision about whether the available evidence was sufficient or insufficient to justify any formal action being taken in respect of the complaint.* [my underlining]

49. In their submissions, the College and the QPS advanced a number of considerations claimed to favour non-disclosure of the matter in issue:

4. the solicitors for the applicant were conducting a "fishing" exercise;
5. the only evidence in support of the allegations was the statements of the applicant;
6. the allegations of the applicant were vague and often not directed to any identifiable individual - it would be inappropriate to add credibility to the unsubstantiated allegations by disclosure of official documents which referred to them;
7. disclosure of matter relating to the unsubstantiated allegations would merely allow the applicant to construct further, more credible, allegations;
8. staff, who were merely trying to assist the applicant, had already been placed under stress by the making of the allegations - they should not be placed under further stress by disclosure of confidential information supplied by them.

50. In its submission dated 18 April 2002, the QPS submitted:

> *I acknowledge the force of the argument that, generally speaking, it is in the public interest, and involves limited invasion of third parties' privacy interests, to give access to information that an applicant has himself or herself communicated to an agency. On the other hand, so far as the ordinary reader in the world at large is concerned, the report comprising folios 004-006 is plainly an official report on Queensland Crime Commission letterhead, which may add some verisimilitude to its content. A document written out by the informant herself would not have that quality; it would be vague information or even rumour mongering merely set down in writing …* [exempt matter]
>
> *There is nothing in the sworn statements or in the investigators' report to provide any substance whatsoever to the damning allegation that* [exempt matter]. *Deletion of their names achieves nothing as* [the applicant's mother] *(who is expressly referred to as the caller in the documents) can identify whom she referred to in her telephone conversation with the QCC if she produces the document to others.*

51. The QPS comments were made specifically in relation to the QCC Information Report, although other matter contained in the QPS documents is similar in nature. I do not accept that the mere appearance, in a formal document of a law enforcement agency, of mere allegations of wrongdoing, would be interpreted by a significant number of members of the public as adding substance to the allegations. I consider that the great majority of people would appreciate that, when faced with allegations of such a serious nature, law enforcement bodies like the QPS and the QCC must carry out an investigation. In this case, the QPS sought a response from the College where the events were alleged to have taken place, and obtained some additional information from the QCC, before deciding that there was no substance in the allegations. I do not consider that a significant number of members of the public would believe that the mere appearance in official documents of a record of what was alleged by the applicant gives any credibility to the allegations.

52. I accept that a number of the allegations made by the applicant are vague, with no information having been supplied regarding the identity of the alleged offender. I also accept that all allegations have been determined by the QPS to be unsubstantiated.

However, the bulk of the allegations contained in the letter from the investigating officer to the Principal dated 23 August 1999 (to which the response of the College and staff was directed) are relatively specific allegations, albeit ones which have been found to be unsubstantiated from the point of view of the QPS. It may well be that one of the purposes for making the FOI application is to establish whether there is any basis for pursuing a remedy against either the College or individual staff. If that is the case, I do not consider that this would raise a public interest consideration favouring non-disclosure (*cf. Re Willsford and Brisbane City Council* (1996) 3 QAR 368). Nor does it appear to me that the applicant is likely to find anything of substantial assistance in the responses of the College and its staff, which clearly reject the claims of the applicant.

53. In *Re "HEN" and Queensland Police Service* (Information Commissioner Qld, S 9/00, 1 February 2001, unreported), a complainant, who had made a specific complaint against a named individual, sought information from the QPS about the handling of his complaint (in circumstances where the QPS had decided, after investigation, that no formal action should be taken). At paragraphs 26-29, the Information Commissioner said:

> *26. I consider that there is a public interest in accountability for the handling by the QPS of complaints of criminal conduct received from members of the public, and that it applies most strongly for the benefit of a citizen seeking information about the manner in which his/her complaint was investigated or handled. I consider that there is a strong public interest in the applicant having access to information that would disclose how his complaint was recorded and handled.*
>
> *27. On the other hand, the public interest in protecting an individual from disclosure of unproven allegations of wrongdoing is ordinarily a strong one. Of course, since the applicant's complaint made specific allegations against the third party, and the applicant knows that the third party is identified in the relevant documents, the third party's relevant privacy interests cannot practicably be protected as against the applicant.*
>
> *28. I have reached the conclusion that disclosure of folios 1-5 to the applicant would, on balance, be in the public interest, subject to the deletion from folios 1-5 of all identifying references to the third party, and to the address at which the alleged incident occurred. I have noted the third party's argument that this would still enable the applicant to publish the documents to the world at large, identifying the third party as the person referred to in the QPS records. I might be disinclined to make a decision that enabled that to occur in respect of QPS records that appeared to lend any credence (on the part of the QPS) to allegations made by the complainant. However, the context of folios 1-5 makes clear that they comprise a mere record of the allegations conveyed by the applicant.*
>
> *29. The extent of the disclosure I have foreshadowed would afford a substantial measure of protection to the privacy interests of the third party. Any wider*

dissemination of folios 1-5 (subject to the deletions I have indicated) could not infringe the privacy interests of the third party, without some supervening conduct on the part of the applicant (and other legal remedies might be available to the third party in respect of any such supervening conduct). On the other hand, disclosure of folios 1-5 would serve the public interest in accountability to a complainant in respect of how the QPS recorded and dealt with a complaint alleging criminal conduct.

54. I consider that there is a strong public interest in an applicant, who alleges that he is the subject of serious crimes, being given an adequate explanation of how his allegations were dealt with, particularly in a case where the QPS decides not to proceed with any charges. In this case, I am not satisfied that the matter disclosed to the applicant to date provides an adequate explanation of the responses by staff of the College. The only matter disclosed so far is that statements have been obtained. There has been no indication of from whom the statements were obtained, or of the substance of the statements.

55. To the extent that the matter in issue does comprise information concerning the personal affairs of persons other than the applicant, I find that disclosure of that matter to the applicant would, on balance, be in the public interest, and hence that it does not qualify for exemption from disclosure to the applicant under s.44(1) of the FOI Act. In the circumstances, the disclosure of that matter subject to the deletion of the names of the individuals against whom allegations of misconduct were made, gives some measure of privacy protection to those individuals, while allowing the applicant to obtain an understanding of the steps taken by the QPS, and the reasons why the QPS decided to take no further action in respect of the complaints.

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

56. Section 41(1) 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.*
>
> ***(2)*** *Matter is not exempt under subsection (1) if it merely consists of—*

(a) matter that appears in an agency's policy document; or

(b) factual or statistical matter; or

(c) expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.

57. The Information Commissioner discussed the requirements of s.41(1) of the FOI Act in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60: see pages 66-72 and particularly paragraphs 21-22: see also paragraph 34 of *Re Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206. The submission on behalf of the College referred to this provision, but did not address any particular submissions to it. Much of the matter in issue is merely factual, and therefore is excluded from eligibility for exemption under s.41(1) by virtue of s.41(2)(b) of the FOI Act. In respect of any matter in issue which does answer the description in s.41(1)(a) of the FOI Act, I have discussed above the submissions of the College and staff, and the public interest considerations favouring disclosure and non-disclosure. Consistently with the reasons given above, I find that disclosure to the applicant of the matter remaining in issue would not, on balance, be contrary to the public interest. I therefore find that none of the matter in issue qualifies for exemption under s.41(1) of the FOI Act.

Application of s.42(1) of the FOI Act

58. Section 42(1) of the FOI Act contains ten exemption provisions. The submission on behalf of the College did not specify which exemption provision(s) it relied upon. Section 42(1)(b) of the FOI Act relates to confidential sources of information: see *Re McEniery and Medical Board of Queensland* (1994) 1 QAR 349. In the circumstances of this case, I do not consider that any of the staff of the College who provided information could be regarded as confidential sources of information. They were the subjects of allegations made by the complainant, and it would be obvious to the complainant that information was likely to be sought from them. I do not consider that there is any reasonable basis on which they, and the QPS officer who sought information, could have had a mutual understanding that their identities would be kept confidential from the applicant.

59. The only provision of s.42(1) referred to in the QPS decisions was s.42(1)(e) of the FOI Act. The decision in that regard related only to the QCC report, and both the Crime and Misconduct Commission and the QPS have indicated that they no longer rely on s.42(1)(e). The Information Commissioner discussed the application of s.42(1)(e) in *Re "T" and Queensland Health* (1994) 1 QAR 386. None of the submissions made on behalf of the College address the application of s.42(1)(e). On the material before me, I am not satisfied that any of the matter in issue qualifies for exemption under s.42(1)(e), or any other paragraph of s.42(1) of the FOI Act.

DECISION

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60. I set aside the decision under review (being the decision of Assistant Commissioner McDonnell dated 13 February 2001), and in substitution for it, I decide that the matter remaining in issue (described in the attached schedule) does not qualify for exemption from disclosure to the applicant under the FOI Act.