

# OFFICE OF THE INFORMATION COMMISSIONER (QLD)

**Decision No. 97001**  
**Application S 6/93**

**Participants:**

"NHL"  
**Applicant**

THE UNIVERSITY OF QUEENSLAND  
**Respondent**

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - matter in issue relates to complaints of sexual harassment made by the applicant and others against an employee of the respondent - whether disclosure to the applicant of the matter in issue which (a) concerns the personal affairs of persons other than the applicant, or (b) concerns the shared personal affairs of the applicant and the subject of her complaint of sexual harassment, would, on balance, be in the public interest - application of s.44(1) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - whether the matter in issue is deliberative process matter falling within the terms of s.41(1)(a) of the *Freedom of Information Act 1992* Qld - whether segments of the matter in issue merely consist of factual matter which is not eligible for exemption under s.41(1) because of the operation of s.41(2)(b) of the *Freedom of Information Act 1992* Qld - whether disclosure of matter would, on balance, be contrary to the public interest - application of s.41 of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - whether respondent entitled to refuse access to segments of the matter in issue found not to be exempt under s.44(1) or s.41(1), on the basis that those segments would not be meaningful after deletion from the documents in issue of exempt matter - application of s.32(b) and s.32(c) of the *Freedom of Information Act 1992* Qld - words and phrases: "practicable".

FREEDOM OF INFORMATION - applicant challenging sufficiency of search by respondent for documents falling within the terms of the FOI access application - whether reasonable grounds exist for believing that the respondent has possession or control of other documents not dealt with in its response to the applicant's FOI access application - whether search efforts by the respondent have been reasonable in all the circumstances of the case.

*Freedom of Information Act 1992* Qld s.32, s.32(b), s.32(c), s.41(1), s.41(1)(a), s.41(2),  
s.41(2)(b), s.44(1), s.44(2), s.52(6), s.89

*Anti-Discrimination Act 1991* Qld s.118, s.133

*Judicial Review Act 1991* Qld

*Sex Discrimination Act 1984* Cth s.28B, s.106

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

*Cannon and Australian Quality Egg Farms Limited, Re* (1994) 1 QAR 491

*Criminal Justice Commission and Director of Public Prosecutions, Re*

(Information Commissioner Qld, Decision No. 96012, 28 June 1996, unreported)

*Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re*

(1993) 1 QAR 60

*Fagan and Minister for Justice and Attorney-General and Minister for the Arts, Re*

(Information Commissioner Qld, Decision No. 95015, 26 May 1995, unreported)

*Hudson as agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade*

*Development, Re* (1993) 1 QAR 123

*Shepherd and Department of Housing, Local Government and Planning, Re*

(1994) 1 QAR 464

*Stewart and Department of Transport, Re* (1993) 1 QAR 227

**DECISION**

1. I decide to vary that part of the decision under review by which the applicant was refused access to pages 23-33 of document 3, by finding that—
  - (a) the matter in issue which is identified in the findings stated at the ends of paragraphs 32, 33 and 40 of my accompanying reasons for decision, is not exempt from disclosure to the applicant under the *Freedom of Information Act 1992 Qld*; and
  - (b) the balance of the matter contained in pages 23-28 and pages 30-33 of document 3, and the name which appears next to the word "SUBJECT" on page 29, are exempt from disclosure to the applicant under s.44(1) of the *Freedom of Information Act 1992 Qld*; and
  - (c) the University is not entitled to rely on s.32(b) of the *Freedom of Information Act 1992 Qld* as a basis for refusing the applicant access, under the *Freedom of Information Act 1992 Qld*, to the matter referred to in (a) above.
  
2. I also find that no further documents of the University's Sexual Harassment Committee, or its Chairperson, which relate to the affairs of the applicant, exist in the possession or control of the University or its officers.

Date of decision: 14 February 1997

.....  
F N ALBIETZ  
**INFORMATION COMMISSIONER**

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THE UNIVERSITY OF QUEENSLAND  
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## **REASONS FOR DECISION**

### **Background**

1. The applicant seeks review of the respondent's decision to refuse her access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to certain documents which relate to the handling by the respondent of complaints of sexual harassment made by the applicant and others against an employee of the respondent. The applicant also asserts that the respondent has not identified and dealt with all documents in its possession or control which fall within the terms of her FOI access application.
2. By letter dated 19 November 1992, the applicant applied for access under the FOI Act to "all documentation held by the University of Queensland regarding myself...". The applicant specified that she wanted access to all records relating to her, of "an academic, employment-related and personal nature". The applicant went on to list a number of persons/committees within the University whom she believed held records relating to her, as well as expanding on the specific types of "records" which she believed existed. By letter dated 7 December 1992, in response to a request by the University's FOI officer, the applicant provided clarification of her request for access to all records "of an academic nature" by confirming that she required access only to pertinent records held by a particular Department.
3. On 29 December 1992, the University's initial decision-maker, Mrs Lavery, communicated her decision to grant the applicant access to some documents, but to refuse access to others on the grounds that they comprised exempt matter under s.41(1), s.44(1), s.46(1)(a) and s.46(1)(b) of the FOI Act.
4. On 10 January 1993, the applicant applied to the University for internal review of Mrs Lavery's decision to refuse access to certain documents. The applicant also raised 'sufficiency of search' issues in connection with Mrs Lavery's advice that no further relevant documents were held by the Secretary and Registrar of the University, the University's Legal

Officer, the University's Sexual Harassment Committee, and the Head of one Department.

5. By a further letter dated 10 January 1993, the applicant lodged a separate 'sufficiency of search' internal review application whereby she requested that a further search of the records of one Department be carried out, particularly of the minutes of staff meetings between June 1990 and 19 November 1992. The applicant believed that records additional to those identified in Mrs Lavery's decision ought to exist.
6. In addition to applying for internal review of Mrs Lavery's decision under the provisions of the FOI Act, the applicant, on 10 January 1993, requested a statement of reasons under the *Judicial Review Act 1991* Qld in relation to a number of aspects of Mrs Lavery's decision. Mrs Lavery provided the applicant with that statement of reasons by letter dated 5 February 1993. In it, she addressed the 'sufficiency of search' concerns of the applicant and detailed the searches she had undertaken, as well as expanding on the reasons for her decision to exempt certain documents.
7. On 24 January 1993, the applicant lodged a further 'sufficiency of search' internal review application, whereby she questioned Mrs Lavery's advice in her decision letter that the Dean of the Faculty of Arts held only one page which fell within the terms of the applicant's FOI access application. The applicant requested a review of the Dean's records. This request was dealt with separately by the University and was dealt with by my office as a separate external review application with a separate file opened - no. S 49 of 1993. I have given a separate decision, by way of a letter to the participants, in respect of application for review no. S 49 of 1993.
8. On 20 January 1993, Mr Porter, the University's Secretary and Registrar, notified the applicant that he had conducted an internal review of Mrs Lavery's decision. In relation to the 'sufficiency of search' issue, Mr Porter advised that he had instigated further searches in response to the applicant's queries. A further draft letter had been located on the University Legal Officer's computer, and a number of diary entries had been located within the records of one Department. Mr Porter decided that the applicant could be given access to copies of those documents. However, a check of the Department's minutes of staff meetings had revealed no information falling within the terms of the applicant's FOI access application.
9. In relation to the remainder of Mrs Lavery's decision, Mr Porter decided to disclose to the applicant further documentation, which had previously been withheld on the basis that it related to the personal affairs of others, and was exempt under s.44(1) of the FOI Act. The persons to whom the documentation related had provided Mr Porter with written authority to permit release of the documentation to the applicant. Mr Porter also decided to release three folios in relation to which Mrs Lavery had claimed exemption under s.41(1) of the FOI Act. Mr Porter affirmed Mrs Lavery's decision to refuse access to the remainder of the matter in issue, on the basis that it was exempt matter under s.41(1) and s.44(1) of the FOI Act.
10. Specifically, the matter to which the applicant was refused access consists of the following:
  - pages 23-29 of document 3, held by Professor Brown, Deputy Vice-Chancellor of the University, and Chairperson of the University's Sexual Harassment Committee. These pages comprise alternative drafts of letters and comments thereon, prepared by the University's Legal Officer and Director of Personnel Services, for the purposes of determining an appropriate response to a complaint made to the University by a Member of the Legislative Assembly (MLA), on behalf of a constituent (a member of staff of the University), about the University's treatment of the constituent in respect of allegations of sexual harassment made against him. Mr Porter decided that these pages related to the personal affairs of a person other than the applicant, and therefore were exempt from

disclosure to the applicant under s.44(1) of the FOI Act. In addition, Mr Porter decided that the folios formed part of the deliberative processes of the University, and were exempt under s.41(1) of the Act.

- pages 30-33 of document 3, also held by Professor Brown, comprising final versions of letters to the MLA, and to the person against whom complaints of sexual harassment had been made. For the same reasons he gave in relation to pages 23-29, Mr Porter decided that these pages were exempt under s.44(1) of the FOI Act.

11. On 24 January 1993, the applicant wrote to me requesting that I conduct an external review, under Part 5 of the FOI Act, of the University's decision.

### **External review process**

12. On 2 February 1993, the Deputy Information Commissioner and the investigator assigned to the applicant's file, met with the applicant to discuss the purpose and focus of her application. At that meeting, the applicant provided additional material in support of her application.
13. It became clear during the course of the review, as a result of discussions with the applicant, that her motivation for seeking access to her University records was to review how the University had dealt with the sexual harassment complaints which the applicant had made.
14. Following the meeting with the applicant, I wrote to Mr Porter on 8 February 1993, requesting that he provide:
  - clear confirmation that further searches for documents responsive to the applicant's request had been conducted in the offices of the University Legal Officer, and Secretary and Registrar, and detailing the results of those searches;
  - a specific response to the applicant's assertion that documents of the Sexual Harassment Committee relating to her personal affairs were held in the custody of the Chairperson of the Committee, but had not been disclosed to the applicant;
  - clear confirmation that further searches were conducted in connection with the applicant's assertion that there would have been references to her in the minutes and agendas from staff and staff/student meetings of one Department for the years 1990, 1991 and 1992;
  - clarification of an apparent discrepancy between Mrs Lavery's decision and Mr Porter's review decision, whereby Mrs Lavery had decided that pages 23-33 of document 3 related to the applicant's personal affairs (but that disclosure would not be in the public interest) whereas Mr Porter had decided that the pages did not relate to the applicant's personal affairs.
15. On 17 February 1993, the applicant provided me with a series of statements containing her reasons for believing that the University held further records concerning her personal affairs, which had not yet been identified and dealt with by the University.
16. On 8 March 1993, Mr Porter responded in detail to my letter dated 8 February 1993 and I, in turn, by letter dated 8 April 1993, communicated the substance of Mr Porter's responses to the applicant. Mr Porter provided information on the searches he had carried out in an attempt to locate any further relevant documents and provided a statement as to the University's method of organising its central record-keeping, so as to explain to the applicant why (contrary to the applicant's assertions) individual officers of the University might not retain records in their offices. Further, Mr Porter attempted to explain the difference in approach between Mrs Lavery and himself, which had resulted in the apparent discrepancy involving the classification of pages 23-33 of document 3.

17. I requested the applicant's advice as to whether, in light of the further explanation and assurances provided by Mr Porter, she was now satisfied with the University's response to her FOI access application. The applicant raised further queries regarding pages 23-33 of document 3, as well as the sufficiency of searches carried out by the University in respect of files held by the Sexual Harassment Committee (and its chairperson, Professor Brown). In respect of the former, I obtained copies of the pages in question from the University in order to determine whether or not they comprised information concerning the applicant's affairs.
18. On 25 March 1994, I wrote to the applicant, summarising the issues arising from her application, and communicating to her my preliminary views in relation to those issues. I requested that the applicant advise me whether or not she accepted my preliminary views. I did not receive a response from the applicant in that regard, nor have I received any further submissions or information from her since sending her my letter dated 25 March 1994. Given the lack of response from the applicant, this case has been accorded a low priority amongst the burgeoning caseload of my office, but I now wish to finalise the case by publication of my reasons for decision, as required by s.89 of the FOI Act. I should note that I also conveyed my preliminary views on the issues for determination to the University, which has indicated its acceptance of them.

### **Issues for determination**

19. As a result of concessions made by the applicant and the University, the issues which remain for determination are -
- (a) the University's entitlement to refuse access to portions of Professor Brown's file (document 3, pages 23-33) on the basis that those pages comprise exempt matter under s.44(1) or s.41(1) of the FOI Act;
  - (b) the 'sufficiency of search' issue raised by the applicant in respect of documents held by the Sexual Harassment Committee and its Chairperson, Professor Brown.

### **Relevant provisions of the FOI Act**

20. The University bases its exemption claims on s.41 and s.44 of the FOI Act, which (so far as relevant for present purposes) provide:

**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.*

**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.*

### **Refusal of access to document 3, pages 23-33**

21. The following specific matters were raised by the applicant concerning the University's decision to refuse to grant her access to pages 23-33 of document 3:
- the apparent inconsistency between Mr Porter's internal review decision, and the initial decision of the University's FOI officer, Mrs Lavery, as to whether pages 23-33 contained information concerning the applicant's personal affairs;
  - the University's failure to identify the public interest considerations on which the decision to refuse the applicant access to those pages was based; and
  - Mr Porter's failure to address, in his internal review decision, the initial decision-maker's determination that granting the applicant access to portions of those pages which did contain information relating to her personal affairs would not be practicable (within the meaning of s.32 of the FOI Act).

### **Apparent inconsistency between initial decision and internal review decision**

22. The determination as to whether or not particular matter in a document comprises information concerning an individual's personal affairs is essentially a question of fact, to be determined according to the proper characterisation of the matter in issue. In this particular case, the apparent discrepancy between the approaches taken by Mrs Lavery and Mr Porter in their decisions, as to whether portions of pages 23-33 related to the applicant's personal affairs, arose because of their difference of opinion on this question of fact.
23. Some portions of the pages in question identify the applicant by name (as both Mr Porter and Mrs Lavery have acknowledged in their decisions), but Mrs Lavery also identified certain additional segments of matter (which do not identify the applicant by name) as being matter concerning the applicant's personal affairs, on the basis of evidence in other documents available to her, and her knowledge of relevant events acquired in the course of processing the applicant's FOI access application. Mr Porter, on the other hand, appears to have viewed the segments in question in isolation, and decided that because the segments do not identify the applicant, they do not comprise information concerning the applicant's personal affairs.
24. If matter in a document concerns the affairs of an individual, but does not identify the individual, that may be a basis for finding that the information is not exempt from disclosure to another person under s.44(1) of the FOI Act (see *Re Stewart and Department of Transport* (1993) 1 QAR 227 at p.258, paragraph 81). It does not, in my opinion, afford a basis for refusing to disclose the matter in question to the individual whose affairs it concerns. I accept that real practical

difficulties are posed for an FOI administrator in identifying matter which does not specifically mention an applicant for access, or is not obviously about that applicant's affairs, as being matter which falls within the terms of the applicant's FOI access application (as I noted in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at pp.498-499, paragraph 12). In this instance, however, I am satisfied that Mrs Lavery was correct in identifying matter, which does not specifically refer to the applicant, as being matter which concerns the applicant's personal affairs. I therefore disagree with the statement in Mr Porter's internal review decision dated 20 January 1993 that "*none of the material* [in pages 23-33] *relates to* [the applicant's] *personal affairs*".

### **Applicability of exemption provisions**

25. The fact that some segments of pages 23-33 concern the applicant's personal affairs does not automatically make those pages, or even the specific segments which concern her personal affairs, accessible as of right, under the FOI Act. Consideration must still be given to whether any of the exemption provisions in Part 3, Division 2 of the FOI Act are applicable.
26. The exemption provision mainly relied upon by the University was s.44(1), the terms of which are set out at paragraph 20 above. In my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, I identified the various provisions of the FOI Act which employ the term "personal affairs" and discussed in detail the meaning of the phrase "personal affairs of a person", and relevant variations thereof, in the FOI Act (see pp.256-267, paragraphs 79-114, of *Re Stewart*). In particular, I said that information concerns the "personal affairs of a person" if it relates to 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:
- affairs relating to family and marital relationships;
  - health or ill-health;
  - relationships with 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 essentially a question of fact, to be determined according to the proper characterisation of the information in question.

27. The subject matter of pages 23-33 of document 3 concerns complaints of sexual harassment made against an employee of the University (one of the complaints having been made by the applicant), and how the University should respond to a complaint made by the alleged sexual harasser, through his MLA, in respect of the University's treatment of him regarding the allegations of sexual harassment. In *Re Stewart* at p.262 (paragraph 94), I said:

*I also endorse the principle stated by Smith J (President) of the Victorian AAT in Re Perton and Attorney-General's Department (1992) 5 VAR 302 at p.319:*

In our view, material which discloses a complaint or allegations made to the Commissioner for Equal Opportunity pursuant to the *Racial Discrimination Act*, and the *Sex Discrimination Act*, as is the case here, will in many circumstances be regarded as 'personal affairs'. This is notwithstanding that the complaint and allegations concern incidents that arose in the work place in the context of a person's employment.

Whether or not such material relates to a person's personal affairs is

ultimately a question of fact depending on the documents in issue and the context in which they were created.

28. I am satisfied that the making (and following up) of her complaint of sexual harassment, and her involvement in the incidents which prompted her to make the complaint, are matters which are properly to be characterised as matters concerning the applicant's personal affairs. Similarly, like material concerning complaints of sexual harassment, made by persons other than the applicant, is information which concerns the personal affairs of the other complainants.
29. I also consider that the alleged sexual harasser's involvement in the incidents which produced the complaints referred to in pages 23-33 of document 3, falls into the area of matters concerning his personal affairs, notwithstanding that the incidents occurred in a workplace context. In *Re Stewart* (at p.261, paragraph 92), I said that there is a relevant distinction to be drawn in respect of matters that relate to an employee as an individual, rather than an employee as agent or representative of the employer, and that some matters in the former category may fall within the meaning of the phrase "personal affairs". Conduct amounting to sexual harassment would not be conduct that an employee is authorised to perform as agent or representative of his or her employer. On the other hand, the employer's duty to protect the safety and welfare of employees while they are at work, as well as the employer's interest in maintaining an harmonious and productive workplace, have been supplemented by additional legal obligations. Conduct amounting to sexual harassment is unlawful under s.118 of the *Anti-Discrimination Act 1991 Qld* and under s.28B of the *Sex Discrimination Act 1984 Cth*. Moreover, both statutes contain vicarious liability provisions (see s.133 of the Queensland Act and s.106 of the Commonwealth Act) whereby an employer is made civilly liable for the actions of an employee, where the employee engages in conduct which amounts to sexual harassment, as defined in the respective statutes. The employer has a defence if the employer can prove, on the balance of probabilities, that reasonable steps were taken to prevent the employee from contravening the relevant provisions of the statute. This will generally mean that employers develop rules and/or policies for preventing or dealing with sexual harassment in the workplace, and that employees are expected to observe the employer's rules and/or policies. Where misconduct in employment becomes an issue, that grey area between "personal affairs" and employment affairs (discussed in *Re Stewart* at pp.261-264) is encountered. However, I consider that an individual's sexual conduct, and relations with others, has such a strong element of the personal about it that the information in issue concerning those matters should properly be characterised as information concerning the personal affairs of the person against whom the complaints of sexual harassment (mentioned in pages 23-33 of document 3) were made. I also consider that the actions taken by that person, in response to the actions taken by the University in respect of the complaints of sexual harassment, are properly to be characterised in this instance as matters concerning that person's personal affairs.
30. Thus, pages 23-33 of document 3, with few exceptions (e.g., some matter on page 29 which merely concerns administrative processes of the University), comprise segments of matter which, on their proper characterisation, fall into one of the following categories:
- (a) information which solely concerns the personal affairs of the alleged sexual harasser;
  - (b) information which concerns the shared personal affairs of the alleged sexual harasser and persons other than the applicant;
  - (c) information which concerns the shared personal affairs of the alleged sexual harasser and the applicant; and
  - (d) information which solely concerns the personal affairs of the applicant.

31. In my decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, I discussed the difficulties of applying the FOI Act to matter which concerns the personal affairs of more than one person, and stated (at pp.343-344, paragraphs 172-176) that the following principles were applicable:

*172. I accept the correctness of the position stated by Deputy President Galvin of the Victorian AAT in a case involving an application for access to adoption records, Re Thomas and Royal Women's Hospital and Another (1988) 2 VAR 618, at 622:*

I cannot see any reason why a particular matter might not be a personal affair of more than one party. 'Personal' has not been said to connote exclusiveness.

*173. The application of the Queensland FOI Act to matter that concerns the personal affairs of more than one person becomes a trifle complex. The starting point is the general right of access conferred by s.21 of the FOI Act, by which any person has a legally enforceable right to be given access, under the Act, to documents of an agency or official documents of a Minister, subject only to such reservations and exceptions as are to be found in the scheme of the FOI Act itself.*

*174. When dealing with an FOI access application an agency or Minister has a discretion to refuse access to exempt matter. Applied literally, the opening words of s.44(1) would produce the result that information concerning the personal affairs of an applicant is prima facie exempt matter. Section 44(2) therefore provides for an exception to the operation of s.44(1), i.e. that matter is not exempt under s.44(1) merely because it relates to information concerning the personal affairs of the applicant. Section 44(2) cannot be construed as a provision which confers a personal right of access to information concerning an applicant's personal affairs. There is only one provision in the FOI Act which confers a right of access, and that is s.21; moreover, the scheme of the Act makes it clear that information relating solely to an applicant's personal affairs may be exempt under any applicable exemption provision in Part 3, Division 2. Section 44(2) is, according to its plain terms, no more than an exception to an exemption provision.*

*175. The presence of the word "merely" in s.44(2) places a significant qualification on the scope of the exception, and one which is directly relevant to the circumstances under consideration. In paragraph 49 of my decision in Re Hudson as agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade Development [(1993) 1 QAR 123, at p.144], I expressed the view that the word "merely" in the phrase "merely factual matter" in the former s.36(2) of the FOI Act (since amended by the Freedom of Information Amendment Act 1993 Qld) meant purely factual matter, or solely or no more than factual matter. The English word "mere" comes from the Latin merus, meaning "pure, unmixed". Thus the Collins English Dictionary (Australian edition) gives the meaning of the word "mere" as "being nothing more than something specified". The correct sense of s.44(2) would be conveyed by paraphrasing it as - matter is not exempt under subsection (1) purely by reason that it relates to information concerning the personal affairs of the applicant for access.*

*176. Thus, if matter relates to information concerning the personal affairs of another person as well as the personal affairs of the applicant for access, then the*

*s.44(2) exception to the s.44(1) exemption does not apply. The problem here*

*arises where the information concerning the personal affairs of the applicant is inextricably interwoven with information concerning the personal affairs of another person. The problem does not arise where some document contains discrete segments of matter concerning the personal affairs of the applicant, and discrete segments of matter concerning the personal affairs of another person, for in those circumstances:*

- (a) the former will fall within the s.44(2) exception;*
- (b) the latter will be exempt under s.44(1) (unless the countervailing public interest test applies to negate the prima facie ground of exemption); and*
- (c) s.32 of the FOI Act can be applied to allow the applicant to have access to the information concerning the applicant's personal affairs, by the provision of a copy of the document from which the exempt matter has been deleted.*

*Where, however, the segment of matter in issue is comprised of information concerning the personal affairs of the applicant which is inextricably interwoven with information concerning the personal affairs of another person, then:*

- (a) severance in accordance with s.32 is not practicable;*
- (b) the s.44(2) exception does not apply; and*
- (c) the matter in issue is prima facie exempt from disclosure to the applicant according to the terms of s.44(1), subject to the application of the countervailing public interest test contained within s.44(1).*

32. Applying these principles, the information which solely concerns the personal affairs of the applicant is not exempt from disclosure to the applicant under s.44(1) of the FOI Act, by virtue of s.44(2). The information in this category comprises -

- (i) the first eight words of the second sentence in the third paragraph on page 23;
- (ii) the last six words of the first sentence in the third last paragraph on page 24;
- (iii) the second paragraph on page 29.

Furthermore, I can see no basis on which the above information could qualify for exemption under the other exemption provision relied upon by the University - s.41(1) of the FOI Act. The statements in (i) and (ii) above are purely factual statements (in respect of facts known to the applicant) which are not eligible for exemption under s.41(1) of the FOI Act, by virtue of s.41(2)(b). I find that the matter identified in (i) and (ii) above is not exempt from disclosure to the applicant under the FOI Act.

33. I have identified, in subparagraph 32 (iii) above, some matter contained in page 29. There is no other matter in page 29, apart from one name (see below), which concerns the personal affairs of any other person, within the terms of s.44(1). Moreover, I consider that page 29, as a whole, contains no matter which can be properly characterised as information falling within the terms of s.41(1)(a) of the FOI Act. Page 29 deals with purely procedural or administrative processes of the University: see *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.70-71, paragraphs 28-29. While there is some matter on page 29 which expresses, in the briefest of terms, a view about the appropriateness of the draft letters which are pages 23-28 (and which do comprise predominantly deliberative process matter within the terms of s.41(1)(a) of the FOI Act), no details of the substance of the draft letters are given on page 29. I find that there is no matter in page 29 which qualifies for exemption under s.41(1) of the FOI Act. I therefore find that page 29 is not exempt from disclosure to the applicant under the FOI Act, except for the name of the alleged sexual harasser where it appears at the top of page 29.

34. If page 29 is viewed in isolation, there is nothing in it to indicate the significance of, or give any context to, the appearance of that name (next to the printed word "SUBJECT"). However, if page 29 is disclosed together with the other matter in pages 23-33 which I have found is not exempt, the context in which the name is mentioned will be apparent, and disclosure of the name would therefore disclose information concerning the personal affairs of the person named. Deletion of a name, or other identifying information, is an expedient (permitted by s.32 of the FOI Act) which can have the effect of rendering disclosure of a more substantial segment of matter no longer invasive of personal privacy, and hence of removing a basis for its exemption under s.44(1) of the FOI Act: see *Re Stewart* at p.258, paragraph 81. For the reasons given at paragraphs 37-38 below, I consider that disclosure of the name of the person against whom complaints of sexual harassment have been made would not, on balance, be in the public interest, and hence I find that name, where it appears on page 29, to be exempt matter under s.44(1) of the FOI Act.

35. All of the matter in issue which falls within categories (a), (b) and (c) described in paragraph 30 above is *prima facie* exempt from disclosure to the applicant under s.44(1), subject to the application of the public interest balancing test incorporated in s.44(1). In respect of the category (c) matter (but not the category (a) or category (b) matter), 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.*

36. The University's position, as set out in Mr Porter's internal review decision of 20 January 1993, was that it would not be in the public interest to disclose pages 23-33 to the applicant:

*Some of the material relates to action taken by the University in response to your complaint. I have decided to refuse you access to this material. There is a strong public interest in protecting [the alleged sexual harasser's] privacy. There may also be a public interest in giving complainants notice of the outcome of their complaint. However, you have already been given details of the outcome of your complaint. I can see no public interest factor which would override [the alleged sexual harasser's] expectation of privacy in the case of these materials.*

*The rest of the material deals with matters of private concern to [the alleged sexual harasser] which do not relate to your complaint. In my view it is even clearer in this position that there is no public interest factor which would require the University to disclose personal affairs information about a staff member to a student.*

37. In the applicant's application for external review, she argued that disclosure of the matter in issue would be in the public interest, as it would enhance understanding of the manner in which the University's sexual harassment complaints process works. The applicant argued that there was a strong public interest in releasing those documents, in that the public had a right to know that all complaints are dealt with in an appropriate manner which protects the rights of both complainants and those complained against.

38. I disagree with the applicant in this regard. I consider that the manner in which an agency deals with allegations of sexual harassment against a member of its staff constitutes one aspect of the administration of government in which the public interest in fostering accountability through disclosure of information must be tempered by practical considerations. I consider that the task for an agency in constructively responding to incidents of alleged sexual harassment will ordinarily have greater prospects of success if the process remains confidential to the parties involved. The possibility of disclosure under the FOI Act to a wider audience may even deter some persons from making legitimate complaints. However, since the applicant was a party to the process of dealing with her own complaint of sexual harassment, the accountability issues which she has raised should be accorded appropriate weight in assessing the public interest in the disclosure to her of the matter in issue which specifically refers to the applicant's own complaint of sexual harassment.
39. With respect to the matter in issue which falls within categories (a) and (b) described in paragraph 30 above, I am not satisfied of the existence of any public interest considerations favouring disclosure which are sufficiently strong to outweigh the privacy interests of the individual against whom complaints of sexual harassment have been made, and of the persons (other than the applicant) who made complaints.
40. With respect to the matter in issue which falls within category (c) described in paragraph 30 above, the fact that the information concerns the applicant's personal affairs weighs in favour of its disclosure to the applicant, as does the public interest in a person who has made a complaint of sexual harassment being given access to information which will enable an understanding of how the agency dealt with the complaint, the outcome of the complaint, and the reasons for that outcome. (I note that the public interest would similarly tend to favour disclosure of information, of the kind just described, to the subject of the complaint - though this is not an issue which arises in the present case.) Moreover, I note that some segments of the matter in issue merely recount the substance of the applicant's complaint of sexual harassment. Since this is clearly information already known to the applicant, the weight of any privacy interest telling against disclosure of this information to the applicant is minimal. Taking these factors into account, I find that the following segments of the matter in issue are not exempt from disclosure to the applicant under s.44(1) of the FOI Act, because their disclosure to the applicant would, on balance, be in the public interest:
- (a) the first sentence of the last paragraph on page 23;
  - (b) the first fourteen words of the last sentence of the second last paragraph on page 24;
  - (c) the last full paragraph on page 25, except for the name at the end of that paragraph (the name being exempt matter under s.44(1) of the FOI Act for the reasons referred to in paragraphs 29 and 34 above);
  - (d) the second, third and fourth sentences in the last paragraph on page 30, subject to the deletion of the name of the person against whom complaints of sexual harassment were made (the name being exempt matter under s.44(1) of the FOI Act for the reasons referred to in paragraphs 29 and 34 above);
  - (e) the first paragraph, and the last two paragraphs, on page 32;
  - (f) the last fourteen words in the first sentence, and the whole of the second sentence, of the last paragraph on page 33.
41. I note that the University made a general claim that all of the matter in issue in pages 23-29 was exempt matter under s.41(1) of the FOI Act. I consider that those pages do, for the most part, comprise matter which is properly to be characterised as matter falling within the terms of s.41(1)(a) of the FOI Act. There are some segments which, applying the principles stated in *Re Hudson as agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123 at pp.144-148 (paragraphs 48-55 and 61), are properly to be characterised as merely factual matter, which is therefore excluded from exemption under s.41(1), by virtue of s.41(2)(b) of the FOI Act. I consider that the matter identified in points (a), (b) and (c)



of paragraph 40 above is not exempt matter under s.41(1) of the FOI Act, either because it merely consists of factual matter within the terms of s.41(2)(b), or because its disclosure to the applicant would not, on balance, be contrary to the public interest, having regard to the public interest considerations favouring disclosure to the applicant which are referred to in paragraphs 38 and 40 above.

42. With respect to pages 23-29, Mr Porter stated in his 20 January 1993 internal review decision:

*Pages 23-29 of Document 3 contain advices and opinions on how the University should respond to a complaint made by [an alleged sexual harasser] to a Member of the Legislative Assembly. ... In addition to the personal affairs ground, the materials form part of the deliberative processes of the University.*

*I consider that it is in the public interest for officers of the University to be able to place draft responses before senior officers including a wide range of options for action, so that the senior officer can make a decision based on those options. Disclosure of incomplete or provisional responses could create an improper impression of the University's concluded position. This outweighs any public interest you may have in discovering draft documents concerning another person's private affairs.*

43. I would not accede to any general proposition that disclosure of draft responses, simply because they are provisional and may not reflect an agency's considered final position on a matter, is necessarily contrary to the public interest in the effective working of government agencies. My views in this regard are stated in *Re Criminal Justice Commission and Director of Public Prosecutions* (Information Commission Qld, Decision No. 96012, 28 June 1996, unreported) at paragraphs 33-38.
44. Disclosure of most of the deliberative process material contained in pages 23-28 would, on balance, be contrary to the public interest because disclosure would offend the privacy interests of persons other than the applicant. It is for that reason that I have already found it to be exempt matter under s.44(1) of the FOI Act. I do not, therefore, need to consider whether there is also substance in the University's contention that -
- (i) disclosure of some matter in the incomplete or provisional draft responses comprised in pages 23-28 would give an incorrect and misleading indication of the position ultimately adopted by the University; and
  - (ii) disclosure would therefore be contrary to the public interest.
45. Even assuming that the contention has substance, I do not consider that it would outweigh the other public interest considerations favouring disclosure to the applicant of the matter identified at the end of paragraph 40 above, which I am satisfied is not exempt matter under s.44(1) or s.41(1) of the FOI Act. I note, however, that I do consider that proposition (i) above has substance, particularly in respect of some matter in pages 25-28 (the paragraph which spans pages 25-26, the last full paragraph on page 27, the last paragraph on page 28) which on its face is matter concerning the shared personal affairs of the applicant and the subject of her complaint, with much of it phrased as an account of factual matters. On closer investigation, however, this material turns out not to be factual. It was drafted on the basis that the proposed course of action reflected in it would be adopted by the University, put into action, and then reported upon in the final letter prepared from the draft letter in issue. However, the proposed course of action was not adopted by the University. The disclosure of this matter would clearly give a misleading and inaccurate indication of the manner in which the University handled the applicant's complaint of sexual harassment, the outcome of the complaint, and the reasons for that outcome. For this reason, the public interest considerations favouring its disclosure to the applicant (of the kind referred to in

paragraphs 38 and 40 above) are, in my opinion, significantly discounted in weight, and are not sufficiently strong to overcome the weight of the privacy interest telling in favour of non-disclosure of this matter.

46. In summary, then, I find that the matter in issue, which is identified in my findings stated at the ends of paragraphs 32, 33 and 40 above, is not exempt from disclosure to the applicant under s.44(1) or s.41(1) of the FOI Act, but that the balance of the matter in issue in pages 23-33 is exempt from disclosure to the applicant under s.44(1) of the FOI Act.

### **Practicability of providing copies from which exempt matter has been deleted**

47. Section 32 of the FOI Act provides:

**32.** *Subject to section 35, if—*

- (a) an application is made for access to a document containing exempt matter (including a document that is the subject of a certificate under section 36, 37 or 42); and*
- (b) it is practicable to give access to a copy of the document from which the exempt matter has been deleted; and*
- (c) it appears to the agency or Minister concerned (whether from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to such a copy;*

*the agency or Minister is to give access accordingly.*

48. In her decision dated 29 December 1992, Mrs Lavery determined that pages 23-28 were exempt from disclosure in their entirety, but she made the following statement concerning the possibility of providing partial access to pages 30-33:

*I have decided to refuse you access to these pages in which there are references to matters that can be identified as relating indirectly to your personal affairs. I have considered whether it is possible, in accordance with section 32 of the Act, to give access to copies of the pages from which the exempt matter has been deleted, but have determined that, given the context in which the matter relating to your personal affairs appears, it would not be practicable to do so.*

49. In response to the applicant's request for a statement of reasons under the *Judicial Review Act*, Mrs Lavery said, in respect of pages 30-33 "*... it was my view that it was not practicable to give access to two documents with all but five and six lines respectively, deleted.*"
50. Mr Porter conceded that he inadvertently omitted to deal with this aspect of Mrs Lavery's decision in his internal review decision. However, in the course of my preliminary investigation, Mr Porter correctly pointed out that his omission had the effect, in accordance with s.52(6) of the FOI Act, of producing a 'deemed decision' affirming the original decision. In any event, Mr Porter advised that he concurred with Mrs Lavery's decision on this point, saying:

*In my view these pages relate primarily to the personal affairs of another person. Releasing these documents to [the applicant] with all but five or six lines deleted would not have been practicable because the context would have been lost and the extracts meaningless on their own.*



51. It is evident, on the basis of the statements of both Mrs Lavery and Mr Porter, as quoted above, that the University took the view that an agency's determination of practicability in the context of s.32(b) of the FOI Act is to be made on the basis of whether the document from which exempt matter has been deleted would be meaningful. However, the word "practicable" means: "*that can be done, feasible*" (Australian Concise Oxford Dictionary); "*capable of being done; feasible*" (Collins English Dictionary, Third Australian Edition). I consider that the word "practicable" in s.32(b) of the FOI Act refers to the feasibility of producing a severed version of a document from which exempt matter has been deleted, i.e., whether it is physically or mechanically possible, and whether the agency concerned has the available resources to do so. The question of whether the resulting document will be meaningful is, in my view, addressed in s.32(c) of the FOI Act, in requiring that the agency determine (by reference to the terms of the relevant FOI access application, or through consultation with the applicant) whether the applicant would wish to be given access to a copy of a document from which all exempt matter has been deleted. The question of whether the severed matter is intelligible at all must, I think, be taken into account, and common sense judgements made: see my remarks in *Re Fagan and Minister for Justice and Attorney-General and Minister for the Arts* (Information Commissioner Qld, Decision No. 95015, 26 May 1995, unreported) at paragraphs 42-45. I note, however, that it is arguable that the intention of s.32(c) of the FOI Act is that this question should ultimately be committed to the subjective judgment of the applicant for access.
52. In any event, I am satisfied that it is practicable, in the sense described above, to give the applicant access to the matter which I have decided is not exempt from disclosure to the applicant, by deleting from copies of the documents in issue the matter which I have found to be exempt under s.44(1) of the FOI Act. I also consider that the segments of matter which I have found are not exempt from disclosure to the applicant, would be intelligible to the applicant. Whether the applicant would wish to be given access to them is an issue which the University can take up directly with the applicant, but I find that the University is not entitled to rely on s.32(b) of the FOI Act as a ground for refusing to give the applicant access to the matter which I have decided is not exempt from disclosure to the applicant.

**Sufficiency of search in respect of files held by the University's Sexual Harassment Committee and its Chairperson**

53. In her application for external review dated 24 January 1993, the applicant raised the following particular matters with respect to Mr Porter's internal review decision concerning files held by the University's Sexual Harassment Committee (the Committee), and its Chairperson, Professor Brown:

*I request that you review the decision not to provide the Sexual Harassment Committee documents relating to my affairs (namely complaints I made). These documents, it can be proved, are held in the custody of the Chairperson of the Sexual Harassment Committee and as such are relevant to my FOI request.*

*Furthermore I ask that you seek an explanation from Mr Porter concerning his failure to address or at the very least make his internal review decision in this instance.*

54. Mr Porter conceded that while an additional search for documents responsive to this particular aspect of the applicant's access application had been conducted in response to her application for internal review, this particular matter was overlooked in his internal review decision of 20 January 1993. However, Mr Porter pointed out that he did address this issue in his subsequent letter to the applicant dated 5 February 1993 (given in response to her further application for internal review) where he stated:

*... the handwritten notes on which the Deputy Vice-Chancellor bases his reports to the Sexual Harassment Committee contain no references to your name or any information by which you could be directly or indirectly identified.*

55. In response to my specific enquiries concerning this issue, Mr Porter stated that in the course of determining the applicant's application for internal review, the University's FOI Officer, Mrs Lavery, conducted further searches of Professor Brown's folders containing Committee Agendas and Minutes. Mr Porter provided the following information concerning the outcome of the further searches:

*... In accordance with the University's sexual harassment grievance procedures none of these Agendas or supporting papers include any reference to the persons either making or the subject of complaints. Some of the Chairperson's Agenda papers include handwritten, marginal notations; there are also some handwritten notes that form the basis of the Reports he has made to meetings. At Committee meetings, the Chairperson reports briefly on complaints that have been brought to his attention, and the steps he has taken to resolve them. No names or identifying details are mentioned. The Minutes record only that the Chairperson reported on a number of cases and on action he had taken.*

*During the period June 1991 and November 1992, which is the relevant period in [the applicant's] case, the Sexual Harassment Committee met on four occasions. The FOI Officer has informed me that she had checked the Chairperson's Agenda papers for those meetings; and had found two sets of handwritten notes which the Chairperson had obviously used as the basis of his Reports to the meetings in question. ... I can confirm that the Reports were written in anonymous terms. The handwritten notes relate to the personal affairs of the persons complained against. There are no references in those notes to matter that could identify a complainant.*

*Accordingly, I confirm that I cannot locate any further documents relating to [the applicant's] affairs in the Deputy Vice-Chancellor's Office.*

56. In response to a request from this office, the University provided copies of the Agenda papers, Minutes and handwritten notes referred to above, which were inspected for the purpose of verifying Mr Porter's statements concerning them. On the basis of that inspection, I was able to advise the applicant in my letter to her dated 25 March 1994, as follows:

- The four Committee meetings, which Mr Porter advised had taken place during the 'relevant period', were held on 22 August 1991, 10 March 1992, 5 November 1992 and 10 December 1992.
- The two sets of handwritten notes to which Mr Porter referred were prepared in relation to the meetings held on 22 August 1991 and 10 March 1992.
- Mr Porter was mistaken in identifying the meeting held on 22 August 1991 as having taken place during the 'relevant period', as the relevant time period appeared to run from September 1991 (the time of the lodging of the applicant's complaint of sexual harassment). In my view, this meant that the Minutes of the 22 August 1991 Committee meeting, and the handwritten notes prepared by the Chairperson for that meeting, fell outside the scope of the applicant's FOI access application.

- The Minutes of the three remaining meetings (i.e., those held in March, November and December 1992) recorded that Professor Brown had made reports to the Committee concerning complaints of sexual harassment, and action taken in respect thereof, at the meetings held in March and November 1992. Insofar as was relevant, the Minutes of those two meetings contained the following statements:

10 March 1992 *The Chairperson reported briefly on a number of incidents which had been brought to his attention and on action he had taken.*

5 November 1992 *The Chairperson explained to new members the process of reporting to the Committee on complaints. He advised that no names were mentioned, and that his report was intended to inform the Committee of the types of cases encountered. This also provided the opportunity to consider general principles arising from the cases.*

*The Chairperson reported briefly on a number of incidents which had been brought to his attention, and on action he had taken.*

- The handwritten marginal notations which appeared on the Chairperson's copies of the Agenda papers for the three Committee meetings held in 1992 were all general in nature, and related to matters which were in no way relevant to the agenda items concerning the Chairperson's reports of recent cases to the Committee. I determined that they were therefore non-responsive to the terms of the applicant's FOI access application.
  - As stated above, Mr Porter's position was that the handwritten notes prepared by the Chairperson for the 10 March 1992 Committee meeting were written in anonymous terms, and contained no references to matters which could identify a complainant. Mr Porter's conclusion was that the notes related to the personal affairs of the persons complained against. Of the 10 items dealt with in the handwritten notes in question, only one dealt with the relevant Department, and did so in anonymous terms. I was satisfied that to the extent that anyone could possibly be identified from the information contained in the notes concerning that item, it could only be the person complained about. I therefore concurred with Mr Porter's conclusion that the Chairperson's handwritten notes contained no information from which a complainant could be identified, either directly or indirectly.
57. I am satisfied from my inspection of the relevant documents that they contain nothing that, even when combined with a knowledge of the history of the applicant's complaint, could properly be regarded as information concerning the applicant. On that basis, I consider that the notes were non-responsive to the terms of the applicant's FOI access application.
58. In *Re Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464 at pp.469-470 (paragraphs 18-19), I said:

*18. It is my view that in an external review application involving 'sufficiency of search' issues, the basic issue for determination is whether the respondent agency has discharged the obligation, which is implicit in the FOI Act, to locate and deal with (in accordance with Part 3, Division 1 of the FOI Act) all documents of the agency (as that term is defined in s.7 of the FOI Act) to which access has been requested. It is provided in s.7 of the FOI Act that:*

**'document of an agency' or 'document of the agency'** means a document in the possession or under the control of an agency, or the

agency concerned, whether created or received in the agency, and includes -

- (a) a document to which the agency is entitled to access; and
- (b) a document in the possession or under the control of an officer of the agency in the officer's official capacity;

19. *In dealing with the basic issue referred to in paragraph 18, there are two questions which I must answer:*

- (a) *whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency (as that term is defined in s.7 of the FOI Act);*

*and if so,*

- (b) *whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.*

59. In the present case, I understand that the applicant's belief that the Committee (and in particular, its Chairperson) held further documents responsive to her access application was based, at least in part, on statements which were made to her confirming that her case was the subject of discussion at one or more meetings of the Committee. In this regard, I note that the FOI Act provides a right of access only to information which exists in documentary form, and that the fact that a matter may have been discussed by the Committee does not necessarily establish that a documentary record exists of such discussion. On the material before me, I am satisfied that the absence of any record of the Committee's discussion of the applicant's complaint is consistent with the Committee's usual practice, and its stated policy of preserving anonymity in connection with such matters. I consider that there are no reasonable grounds for believing that any records of discussion by the Committee of the applicant's complaint of sexual harassment exist in the possession or control of the University.
60. I am also satisfied that the University has made reasonable and well-directed search efforts to locate all documents held by the Committee, and its Chairperson, which were responsive to the terms of the applicant's FOI access application, and that there are no further searches or inquiries that the University could reasonably be required to undertake in that regard. Further, I am satisfied that Mr Porter was correct in his conclusion that the Agendas, Minutes, and other supporting papers (including the handwritten notes prepared by the Chairperson for those meetings) which had been located in the course of the University's processing of the applicant's FOI access application, were not responsive to the terms of that FOI access application.

### **Conclusion**

61. For the foregoing reasons, I decide to vary that part of the decision under review by which the applicant was refused access to pages 23-33 of document 3, by finding that—
- (a) the matter in issue which is identified in the findings stated at the ends of paragraphs 32, 33 and 40 above, is not exempt from disclosure to the applicant under the FOI Act; and
  - (b) the balance of the matter contained in pages 23-28 and pages 30-33 of document 3, and the name which appears next to the word "SUBJECT" on page 29 of document 3, are exempt from disclosure to the applicant under s.44(1) of the FOI Act; and

(c) the University is not entitled to rely on s.32(b) of the FOI Act as a basis for refusing the applicant access, under the FOI Act, to the matter referred to in (a) above.

62. I also find that no further documents of the University's Sexual Harassment Committee, or its Chairperson, which relate to the affairs of the applicant, exist in the possession or control of the University or its officers.

.....  
F N ALBIETZ  
**INFORMATION COMMISSIONER**