OFFICE OF THE INFORMATION COMMISSIONER (QLD)	**)** **)**	S 134 of 1993; S 139 of 1993 (Decision No. 95032)

Participants:

S 134 of 1993

ROSLYN MARY SHAW
Applicant

- and -

THE UNIVERSITY OF QUEENSLAND
Respondent

- and -

PETER ROBERT L'ESTRANGE
Third Party

S 139 of 1993

PETER ROBERT L'ESTRANGE
Applicant

- and -

THE UNIVERSITY OF QUEENSLAND
Respondent

- and -

ROSLYN MARY SHAW
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - document in issue read out to the applicant at a mediation session held to address a staff dispute - whether disclosure of the document to the applicant would found an action for breach of confidence - application of s.46(1)(a) of the *Freedom of Information Act 1992* Qld - whether disclosure of the document could reasonably be expected to have a substantial adverse effect on the management or assessment by the University of its personnel - whether disclosure to the applicant would, on balance, be in the public interest - application of s.40(c) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - 'reverse FOI' application - documents in issue comprising a letter to the Head of the Department of Dentistry, a record of interview and a letter to the Vice-Chancellor, each concerning the applicant's views on work relationships involving the third party - whether any of the documents are exempt under s.46(1)(a) of the *Freedom of Information Act 1992* Qld on the basis that disclosure would found an action for breach of confidence - consideration of matter excluded from the application of s.46(1) by the terms of s.46(2) of the *Freedom of Information Act 1992* Qld - whether disclosure of any of the documents could reasonably be expected to have a substantial adverse effect on the management or assessment by the University of its personnel - whether disclosure to the third party would, on balance, be in the public interest - application of s.40(c) of the *Freedom of Information Act 1992* Qld - whether the documents contain "deliberative process" matter the disclosure of which would be contrary to the public interest - application of s.41 of the *Freedom of Information Act 1992* Qld - whether documents contain information concerning a person's personal affairs - application of s.44(1) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.28(1), s.40(c), s.41(1), s.41(1)(a), s.41(1)(b), s.41(2)(b), s.44(1), 46(1)(a), s.46(2), s.51, s.102(1), s.102(2)
Freedom of Information Act 1982 Cth s.45

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Bell v Lever Brothers Ltd [1932] AC 161
Cairns Port Authority and Department of Lands, Re (1994) 1 QAR 663
Commissioner of Police v the District Court of New South Wales and Perrin (1993) 31 NSWLR 606
Dyki and Federal Commissioner of Taxation, Re (1990) 22 ALD 124
Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (1993) 1 QAR 60
Hivac Ltd v Park Royal Scientific Instruments Ltd [1946] 1 Ch 169
James and Australian National University, Re (1984) 2 AAR 327
Joint Coal Board v Cameron (1989) 19 ALD 329
Murphy and Queensland Treasury & Ors, Re (Information Commissioner Qld, Decision No. 95023, 19 September 1995, unreported)
Pemberton and The University of Queensland, Re (Information Commissioner Qld, Decision No. 94032, 5 December 1994, unreported)
Pope and Queensland Health, Re (1994) 1 QAR 616
Saunders v Parry [1967] 1 WLR 753
Smith Kline and French Laboratories (Aust) Limited & Ors v Secretary, Department of Community Services and Health (1991) 28 FCR 291; 99 ALR 679
State of Queensland v F N Albietz, Information Commissioner Qld and Murphy (Supreme Court Qld, de Jersey J, 6 October 1995, unreported)
Swain v West (Butchers) Ltd [1936] 3 All ER 251
Waterford and Department of Treasury, Re (No. 2) (1984) 5 ALD 588
University of Melbourne v Robinson [1993] 2 VR 177

DECISION

1. In application for review no. S 134 of 1993, I set aside the decision under review (being the internal review decision made on behalf of the respondent by Mr D Porter on 7 July 1993, in respect of the document identified in his reasons for decision as document 1) and in substitution for it, I find that document 1 is not exempt from disclosure to the applicant under the *Freedom of Information Act 1992* Qld.

2. In application for review no. S 139 of 1993 -

   (a) I vary the first decision under review (being the internal review decision made on behalf of the respondent by Mr D Porter on 30 June 1993, in respect of the document identified in his reasons for decision as document 5) to the extent that I find that the segments of document 5 identified in paragraph 79 of my accompanying reasons for decision comprise exempt matter under s.41(1) of the *Freedom of Information Act 1992* Qld; and

   (b) I affirm the second decision under review (being the internal review decision made on behalf of the respondent by Mr D Porter on 7 July 1993, in respect of the documents identified in his reasons for decision as document 2 and document 4).

Date of Decision: 18 December 1995

.....

F N ALBIETZ
INFORMATION COMMISSIONER

TABLE OF CONTENTS

Page

OFFICE OF THE INFORMATION COMMISSIONER (QLD)	**)** **)**	S 134 of 1993; S 139 of 1993 (Decision No. 95032)

Participants:

S 134 of 1993

ROSLYN MARY SHAW
Applicant

- and -

THE UNIVERSITY OF QUEENSLAND
Respondent

- and -

PETER ROBERT L'ESTRANGE
Third Party

S 139 of 1993

PETER ROBERT L'ESTRANGE
Applicant

- and -

THE UNIVERSITY OF QUEENSLAND
Respondent

- and -

ROSLYN MARY SHAW
Third Party

REASONS FOR DECISION

Background

1. These cases involve a dispute over access to documents which, in broad terms, relate to a breakdown in effective working relationships between some members of staff in the Faculty of Dentistry at the University of Queensland. On 5 April 1993, Dr Shaw applied to the University of Queensland (the University) for access under the *Freedom of Information Act 1992* Qld (the FOI Act or the Queensland FOI Act) to a large number of documents, only four of which remain in issue at this stage. In application for review no. S 134 of 1993, Dr Shaw seeks review of the University's decision to refuse her access to a document prepared

by Associate Professor L'Estrange, and identified in the University's decision under review as document 1. Application for review no. S 139 of 1993 is a 'reverse FOI' application by Associate Professor L'Estrange, who challenges the University's decision to give Dr Shaw access under the FOI Act to documents identified in the University's decision under review as documents 2, 4 and 5.

2. The University's initial decision in response to Dr Shaw's FOI access application dated 5 April 1993 was made by Mrs Margaret Lavery. In the course of preparing the University's response, and in accordance with the obligations imposed by s.51 of the FOI Act, Mrs Lavery wrote to Associate Professor L'Estrange on 6 May 1993, asking for his views on the disclosure of documents described as documents 1, 2, 3A, 3B, 4 and 5. Associate Professor L'Estrange replied by letter dated 11 May 1993, enclosing a legal opinion which he had obtained from Gilshenan and Luton, Lawyers, and asserting that the relevant documents were exempt under the FOI Act.

3. By letters to Associate Professor L'Estrange (dated 3 June 1993) and to Dr Shaw (dated 4 June 1993) Mrs Lavery conveyed her decision that documents 1-4 inclusive were not exempt from disclosure to Dr Shaw, but that document 5 was exempt under s.44(1) of the FOI Act. On 18 June 1993, Dr Shaw applied for internal review of the decision to refuse her access to document 5, and on 21 June 1993, Associate Professor L'Estrange applied for internal review of the decision to give Dr Shaw access to documents 1, 2, 3A, and 4. The internal reviews were undertaken by the Registrar of the University, Mr D Porter, who decided on 30 June 1993 that, apart from a small number of passages which were exempt under s.44(1) of the FOI Act, document 5 should be released to Dr Shaw. Mr Porter also decided, on 7 July 1993, that document 1 was exempt from disclosure to Dr Shaw under s.46(1)(a) of the FOI Act, but confirmed Mrs Lavery's decision that documents 2-4 inclusive should be released to Dr Shaw.

4. By letter dated 19 July 1993, Dr Shaw applied to me for review, under Part 5 of the FOI Act, of Mr Porter's decision that document 1 is exempt under s.46(1)(a) of the FOI Act. By letter dated 28 July 1993, Associate Professor L'Estrange applied to me for review of -

   (a) Mr Porter's decision of 30 June 1993 to give Dr Shaw access to document 5, except for some segments which Mr Porter decided were exempt under s.44(1) of the FOI Act (I note that Dr Shaw has not sought review of that aspect of Mr Porter's decision); and

   (b) Mr Porter's decision of 7 July 1993 to give Dr Shaw access to document 2 and document 4.

   Dr Shaw and Associate Professor L'Estrange were each granted status as participants in the reviews commenced by the other (see s.78 of the FOI Act).

The external review process

5. Copies of the documents in issue were obtained and examined. On the basis of my initial assessment of the documents, I wrote on 12 August 1994 to Associate Professor L'Estrange, and to the University, conveying my preliminary views on documents 1, 2 and 4, and inviting responses. The University replied on 22 August 1994, advising that it did not wish to comment upon nor contest my preliminary views. Associate Professor L'Estrange responded with evidence/submissions (given in the form of a statutory declaration by himself dated 14 September 1994) in support of his contentions that documents 1, 2, 4 and 5 are exempt from disclosure under the FOI Act. He also lodged supporting evidence, relevant to his case in respect of document 4, in the form of a statutory declaration by Mr William John Weir dated

20 October 1994.

6. The material lodged on behalf of Associate Professor L'Estrange was provided to the University and to Dr Shaw. The University considered that the evidence lodged by Associate Professor L'Estrange in relation to document 4 called for a response on its part. It subsequently forwarded statutory declarations by Mr Porter and by the University's Legal Officer, Mr Roger Byrom, both dated 22 November 1994. Those statutory declarations were provided to Associate Professor L'Estrange and to Dr Shaw. Dr Shaw provided evidence/ submissions in the form of a statutory declaration dated 9 December 1994, copies of which were provided to the other participants. On 18 January 1995, Gilshenan and Luton, on behalf of Associate Professor L'Estrange, lodged a short reply to that material.

7. Associate Professor L'Estrange's case for exemption of document 5 was based on s.46(1)(a), s.40(c) and s.44(1) of the FOI Act. In the course of preparing my reasons for decision, I noted that Associate Professor L'Estrange had not addressed the application of s.46(2) and s.41(1) of the FOI Act to document 5. Although I did not think that natural justice strictly required it, I decided it was appropriate that these issues should be drawn to the attention of Associate Professor L'Estrange, and that he be given the opportunity to address them in a supplementary submission if he wished. A letter dated 22 August 1995 was forwarded to Gilshenan and Luton, who acted on behalf of Associate Professor L'Estrange in this review, explaining the issues and inviting a supplementary submission by 8 September 1995. Gilshenan and Luton informed my office that Associate Professor L'Estrange now resides in England, and sought an extension of time for responding. When contacted by telephone on 7 December 1995, Mr Weir of Gilshenan and Luton confirmed that the letter of 22 August 1995 had been forwarded to his client's last-known address, but that no response had been received. Mr Weir was informed that it was not considered appropriate to delay the case any further, pending a response from Associate Professor L'Estrange.

8. I will deal with the documents in issue according to the numerical order ascribed to them in the decisions under review, although that will involve my dealing with them in roughly reverse-chronological order. All of the documents relate to aspects of a long-running dispute. Document 4 was created on 18 July 1990, document 5 on 30 August 1990, document 2 in October 1991 and document 1 in December 1991.

Relevant provisions of the FOI Act

9. The exemption provisions considered by the University, or claimed by Associate Professor L'Estrange, to apply to the documents in issue are s.40(c), s.41(1), s.44(1) and s.46(1) of the FOI Act.

10. Section 40(c) provides:

> ***40.*** *Matter is exempt matter if its disclosure could reasonably be expected to -*
>
> ...
>
> *(c) have a substantial adverse effect on the management or assessment by an agency of the agency's personnel;*
>
> ...
>
> *unless its disclosure would, on balance, be in the public interest.*

11. Section 41 provides (so far as relevant):

> ***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.*
>
> ...

12. Section 44(1) 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.*

13. Section 46 provides:

> ***46.(1)*** *Matter is exempt if -*
>
> *(a) its disclosure would found an action for breach of confidence; or*
>
> *(b) it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*
>
> ***(2)*** *Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless its disclosure would found an action for breach of confidence owed to a person or body other than -*
>
> *(a) a person in the capacity of -*
>
> *(i) a Minister; or*
>
> *(ii) a member of the staff of, or a consultant to, a Minister; or*

(iii) an officer of an agency; or

(b) the State or an agency.

Consideration of document 1

14. Document 1 is a memorandum prepared to record the collective opinion of Associate Professor L'Estrange, Dr M G Roper and Dr M H Spratley (all members of staff of the University's Faculty of Dentistry, in particular the Division of Prosthetic Dentistry) as to why it was not possible to re-establish harmonious and co-operative working relationships with Dr Shaw. The document was prepared in contemplation of a meeting that was held on 12 December 1991, between Ms H Langford (an independent mediator), Mr P Watson (the University's Director of Personnel Services), Messrs Roper, Spratley and L'Estrange, and Dr Shaw. The purpose of that meeting was to attempt to re-establish harmonious, co-operative working relationships amongst staff within the Division of Prosthetic Dentistry at the Dental School, and was apparently part of the process which the University had been requested to undertake by the Human Rights and Equal Opportunities Commission, following its consideration of a complaint by Dr Shaw. According to Associate Professor L'Estrange, document 1 was given to the University's Director of Personnel Services, Mr Peter Watson, at Mr Watson's request, in advance of the scheduled meeting, for the purpose of allowing the independent mediator, Ms Langford, to gain an insight into the views held by Messrs Roper, Spratley and L'Estrange, and the way in which they intended proceeding at the scheduled meeting.

15. On the material before me, there is no dispute that the text of document 1 was read out at the meeting of 12 December 1991, with Dr Shaw in attendance. Associate Professor L'Estrange contends that Dr Shaw (like all present at the meeting, including Mr Watson representing the University) agreed to accept preconditions binding those present to an obligation of confidence in respect of the information that was conveyed at the meeting. Dr Shaw disputes this.

Application of s.46 to document 1

16. In her initial decision on behalf of the University, Mrs Lavery said:

> *I have noted the contents of document 1, and the obligations that were placed on the meeting participants. Dr Shaw was, however, present at the meeting, and was party to the confidentiality agreement. I do not believe s.46(1)(a) can be applied to exempt document 1 from access to Dr Shaw: its purpose is to protect against release to parties outside the agreement where such release would found an action for breach of confidence. Thus it is my view that s.46(1)(a) does not apply.*

Mrs Lavery also found that s.46(1)(b) could not be applied to deny access to a person who was party to the confidential communication.

17. In his internal review decision, Mr Porter said:

> *There is no doubt that you* [i.e. Associate Professor L'Estrange] *expected the document to be kept confidential and there appears to be no dispute that all those attending the meeting were made aware of that position. I have considered whether Dr Shaw being present when the contents of the document were read out negated, in her case, that strong expression of confidentiality*

> *but have decided that it does not. I believe, therefore, that disclosure would found an action for breach of confidence and have decided that the document is exempt under s.46(1)(a) of the FOI Act.*

18. In his statutory declaration of 22 November 1994, Mr Porter sought to further explain his decision in this regard by stating that his understanding of disclosure under the FOI Act was that it is "disclosure to the world", but that if a limited disclosure to Dr Shaw is permitted (with protection of the University from an action for breach of confidence) then he accepts that his decision on internal review was incorrect.

19. In *Re Pemberton and The University of Queensland* (Information Commissioner Qld, Decision No. 94032, 5 December 1994, unreported) at paragraphs 168-171 and 178, I explained why, in applying exemption provisions under the FOI Act, adherence to the orthodox approach of assessing the effects of disclosure of information as though disclosure were to the world at large, is not always appropriate. The terms of a particular exemption, and the nature of its sphere of operation, may permit account to be taken of the position of the particular applicant for access. I singled out s.46(1)(a) and s.46(1)(b) as pre-eminent examples in this regard, citing my observations in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.322-323; paragraphs 103-104. A recipient of confidential information may be at liberty, consistently with the scope or extent of the obligation of confidence imposed, to divulge the information to a limited class of persons. Thus, it was held by a Full Court of the Federal Court of Australia in *Joint Coal Board v Cameron* (1989) 19 ALD 329 (per Beaumont and Pincus JJ at p.339) that disclosure of the information in issue to a particular applicant for access under the *Freedom of Information Act 1982* Cth (the Commonwealth FOI Act) would not breach the relevant obligation of confidence, nor destroy the confidential character of the information for other purposes and *vis-à-vis* other persons. Hence the information in issue was not exempt from disclosure, to the particular applicant for access, under s.45 of the Commonwealth FOI Act, as then in force.

20. It is also relevant in this regard to draw attention to s.102(2) of the Queensland FOI Act, which provides:

> ***(2)*** *The giving of access to a document (including an exempt document) because of an application must not be taken for the purposes of the law relating to defamation or breach of confidence to constitute an authorisation or approval of the publication of the document or its contents by the person to whom access is given.*

21. This provision contemplates that an applicant for access under the FOI Act may obtain access to information in circumstances where its further publication would constitute a breach of confidence. Apart from a genuine mistake (i.e. an agency or Minister giving access to information in the mistaken belief that it is not exempt under s.46(1)(a) of the FOI Act), such circumstances could only arise where -

    (a) an agency or Minister decides to exercise the discretion conferred by s.28(1) of the FOI Act to grant access to information that is exempt matter under s.46(1)(a), in that its disclosure, otherwise than under the FOI Act (with the protection afforded by s.102(1) of the FOI Act) would found an action for breach of confidence; or

    (b) confidential information is disclosed to a particular applicant for access under the FOI Act in circumstances where disclosure to that person does not involve a breach of the relevant obligation of confidence, but disclosure to other persons would found an action for breach of confidence.

22. In respect of (b) at least, s.102(2) of the FOI Act makes it clear that the giving of access to a document under the FOI Act does not derogate from any obligation owed by the successful applicant for access, under the general law relating to breach of confidence, whereby further publication of the document or its contents may be an actionable breach of confidence.

23. In my opinion, the initial decision made on behalf of the University by Mrs Lavery (see paragraph 16 above) was correct. The contents of document 1 were read out in Dr Shaw's presence at the meeting on 12 December 1991. The matter in issue is not confidential information *vis-à-vis* Dr Shaw. Disclosure of the information in document 1 to Dr Shaw would not, therefore, constitute an unconscionable use of the information on the part of the University (see the elements of an action in equity for breach of confidence, set out at paragraph 50 below).

24. The attempt by Associate Professor L'Estrange, at p.2 of his statutory declaration/submission dated 14 September 1994, to draw a distinction between the information in document 1 which was read out to Dr Shaw, and the same information embodied in document 1 (which document was handed to Mr Watson representing the University, and is said to be the subject of a confidence to which Dr Shaw was not a party, so that disclosure of the document itself to Dr Shaw would found an action for breach of confidence) is, in my opinion, untenable.

25. I am satisfied that document 1 is not exempt from disclosure to Dr Shaw under s.46(1)(a) of the FOI Act.

26. I note that in her statutory declaration/submission dated 12 December 1994, Dr Shaw contended that neither before the meeting of 12 December 1991, nor at any other time, did she expressly or implicitly agree to any precondition set by Associate Professor L'Estrange. Dr Shaw made other contentions which, if established, might lead to the conclusion that she is under no binding obligation of confidence in respect of the information conveyed to her from document 1. That is an issue which it is unnecessary for me to consider in view of my findings above, and it is preferable that I express no view on it since Associate Professor L'Estrange may wish to test the issue by court action if Dr Shaw further publishes, or proposes to further publish, the contents of document 1. It is sufficient that I note that both Associate Professor L'Estrange and the University believe that the contents of document 1 were disclosed to those present at the meeting of 12 December 1991 under conditions of confidence, and that the terms of s.102(2) make it clear that Dr Shaw's obtaining access to document 1 under the FOI Act is not to be taken, for the purposes of the law relating to breach of confidence, as constituting an authorisation or approval of any publication by Dr Shaw of document 1 or its contents.

Application of s.40(c) to document 1

27. The terms of s.40(c) are set out at paragraph 10 above. The focus of this exemption provision is on the management or assessment by an agency of the agency's personnel. The exemption will be made out if it is established that disclosure of the matter in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by the University of its personnel, unless disclosure of the matter in issue would, on balance, be in the public interest.

28. I analysed the meaning of the phrase "could reasonably be expected to", by reference to relevant Federal Court decisions interpreting the identical phrase as used in exemption provisions of the Commonwealth FOI Act, in my reasons for decision in *Re "B"* at pp.339-341; paragraphs 154-160. Those observations are also relevant here. In particular, I said in *Re "B"* (at pp.340-341; paragraph 160):

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

The ordinary meaning of the word "expect" which is appropriate to its context in the phrase "could reasonably be expected to" accords with these dictionary meanings: "to regard as probable or likely" (Collins English Dictionary, Third Aust. ed); "regard as likely to happen; anticipate the occurrence ... of" (Macquarie Dictionary, 2nd ed); "Regard as ... likely to happen; ... Believe that it will prove to be the case that ..." (The New Shorter Oxford English Dictionary, 1993).

29. Associate Professor L'Estrange has stated the expected adverse effects which he asserts will follow from the disclosure of document 1, and it is for me to determine whether those expectations are reasonably based. If I am satisfied that any of the claimed adverse effects could reasonably be expected to follow from disclosure of document 1, it is also for me to determine whether any of the claimed adverse effects, either individually or in aggregate, constitute a substantial adverse effect on the management or assessment by the University of the University's personnel. I have previously considered the meaning of the adjective "substantial" in the phrase "substantial adverse effect", where it appears in s.49 of the FOI Act. For the reasons given in *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 at pp.724-725 (paragraphs 147-150), I consider that where the Queensland Parliament has employed the phrase "substantial adverse effect" in s.40(c), s.40(d), s.47(1)(a) and s.49 of the FOI Act, it must have intended the adjective "substantial" to be used in the sense of grave, weighty, significant or serious. In *Re Dyki and Federal Commissioner of Taxation* (1990) 22 ALD 124, Deputy President Gerber of the Commonwealth AAT remarked (at p.129; paragraph 21) that: "*The onus of establishing a 'substantial adverse effect' is a heavy one ...*".

30. The expected adverse effects stated by Associate Professor L'Estrange in his submission regarding s.40(c) were -

    (a) it is reasonable to consider that Dr Shaw will use document 1 to cause further problems in the Department, "*in light of her history of making false and malicious allegations against staff members*".

    (b) "*Other staff members would surely be discouraged in expressing frank and honest opinions about other staff both in defence of any allegations made against them, or in duly complaining about staff shortcomings. The repercussions of management problems within the department are reasonably likely to spread throughout the entire university to the extent that the entire system of personnel management and assessment could reasonably be expected to be substantially adversely affected.*"

    (c) "*The whole system of so called confidential mediation for staff problems is likely to be compromised if the expectation of confidentiality is destroyed.*"

31. As to (a), I am unable to see how a document which essentially sets out the considered opinions of Messrs L'Estrange, Roper and Spratley on Dr Shaw's behaviour, could be used by Dr Shaw to cause further problems in the Department, or could, by its disclosure, cause or enable the making of false and malicious allegations against staff members (unless of course the allegations in document 1 itself are false and malicious).

32. As to (b), I do not think there is any reasonable basis for an expectation that staff members would be discouraged from expressing frank and honest opinions in defence of allegations made against them. Moreover, if a person takes it upon himself or herself to complain about shortcomings in other staff, the interests of the University in the effective management of its personnel will be best served if that complaint is made in a form that will withstand scrutiny (including by the person complained against, who, if the University proposes to take action on the complaint, will ordinarily be entitled to know the substance of the complaint), i.e. a complaint framed in careful and temperate language, and supported by particulars of the evidence which substantiates the basis for complaint. Frank and honest opinion can still be, and preferably should be, expressed in this way. I do not consider that the prospect of disclosure of a complaint to the subject of the complaint could reasonably be expected to have an adverse effect on the management or assessment by the University of its personnel, let alone a substantial adverse effect.

33. As to (c), I merely observe that confidential mediation of staff problems necessarily involves disclosure and discussion of the views and concerns of the parties involved in the staff problem (of whom, in this instance, Dr Shaw was one). Disclosure of document 1 to Dr Shaw cannot reasonably be expected to compromise a system for confidential mediation of staff problems.

34. I am not satisfied that disclosure of document 1 to Dr Shaw could reasonably be expected to have a substantial adverse effect on the management or assessment by the University of the University's personnel. I am prepared to accept, however, that the task of constructively addressing staff problems of the kind which arose between Dr Shaw and Messrs L'Estrange, Roper and Spratley has greater prospects of success through co-operative effort if the process remains confidential to the parties involved. It may well be the case that disclosure of a document like document 1 to an outside party could reasonably be expected to have the prejudicial consequences contemplated by s.40(c). In *Re Pemberton* at paragraph 154, I said:

> ... *Section 40* [of the FOI Act] *is an exemption provision of a kind where it is ordinarily proper, in assessing the relevant prejudicial effects of disclosure of the matter in issue to have regard to the effects of disclosure on persons other than just the particular applicant for access under the FOI Act. (I say "ordinarily", for the reasons explained at paragraphs 165-172 below).*

35. Rather than agitate issues as to whether this is an appropriate case for departure from the ordinary approach, or whether (applying the ordinary approach) a substantial adverse effect on the management or assessment by the University of the University's personnel could reasonably be expected, I prefer to state my finding that, applying the principles explained in *Re Pemberton* at paragraphs 164-193, I am satisfied that disclosure of document 1 to Dr Shaw would, on balance, be in the public interest. Dr Shaw's involvement in, and concern with, the information in document 1 gives rise to a public interest in her having access to what is recorded about her. This, allied with the public interest in the fair treatment of an individual against whom allegations damaging to professional reputation and career prospects have been made, is sufficient to justify a finding that disclosure of document 1 to Dr Shaw would, on balance, be in the public interest.

36. I am satisfied that document 1 is not exempt from disclosure to Dr Shaw under s.40(c) of the FOI Act.

Consideration of document 2

37. Document 2 comprises a letter dated 11 October 1991 to Professor K F Adkins, Head of the Department of Dentistry, from Messrs L'Estrange, Roper and Spratley, setting out their views on the expected adverse effects of Dr Shaw's impending return to work in the Faculty after

eight months study leave, and a letter dated 16 October 1991 from Professor Adkins to the Vice-Chancellor, forwarding the earlier letter and adding his own comments.

38. In her decision at first instance, Mrs Lavery decided that the two letters described as document 2 comprised matter of a kind mentioned in s.41(1)(a) of the FOI Act (since they were in the nature of opinion that had been prepared, and consultations that had taken place, for the purpose of the deliberative processes involved in the personnel management functions of the University), and hence, having been written by persons in their capacities as officers of the University, the application of s.46(1) of the FOI Act was precluded by the terms of s.46(2) (the effect of s.46(2) is explained at paragraphs 72-75 below). I consider that Mrs Lavery was clearly correct in this regard, and that aspect of her decision has not been contested by Associate Professor L'Estrange.

39. In his statutory declaration/submission dated 14 September 1994, Associate Professor L'Estrange agreed that document 2 comes under the ambit of s.41(1)(a), but argued that its disclosure to Dr Shaw would be contrary to the public interest, making it exempt under s.41(1) of the FOI Act (the terms of which are set out at paragraph 11 above). He asserted that the letter dated 11 October 1991 to Professor Adkins was written on a confidential basis and although it was reasonable to expect that the letter would be passed on to other senior University officials, he argued that it is clear that document 2 was to be kept confidential from Dr Shaw. He argued that, although it is reasonable to expect that Dr Shaw may be informed of the substance of the contents, this does not have the unavoidable consequence that Dr Shaw should be given the document itself. The public interest considerations against disclosure were said to be the need to maintain proper and effective management of personnel, and to avoid further serious staff problems by allowing disclosure of documents setting out opinions made privately to senior decision-makers. Associate Professor L'Estrange argued that preservation of confidentiality preserves the relationship of frankness between staff and management, and the stability of the working environment.

40. In my opinion, the authors of the letter dated 11 October 1991 to the Dean of the Faculty of Dentistry must have intended, hoped and expected that it would influence the University's deliberative processes with respect to its personnel management functions in placing Dr Shaw on her return from study leave. Moreover, the authors could not reasonably have expected that a decision adverse to Dr Shaw's interests could properly have been taken without informing her of the substance of the allegations made in that letter. In addition, most of the information contained in the letter is, in essence, the same as information contained in document 1 (which was read out to Dr Shaw at the meeting on 12 December 1991) and in document 3A (which was disclosed to Dr Shaw after Associate Professor L'Estrange did not include it among the documents in respect of which he applied for external review of Mr Porter's decision dated 7 July 1993).

41. I do not consider that there is justification, in all the relevant circumstances, for according any substantial weight to the public interest considerations, said to favour non-disclosure of document 2, which have been identified by Associate Professor L'Estrange. Moreover, the public interest considerations referred to in paragraph 35 above favour disclosure of document 2 to Dr Shaw. I am not satisfied that disclosure of document 2 to Dr Shaw would, on balance, be contrary to the public interest. I find that document 2 is not exempt from disclosure to Dr Shaw under s.41(1) of the FOI Act.

42. Associate Professor L'Estrange's submission in respect of document 2 said: "*I also repeat and rely on my submissions in relation to the applicability of s.40(c) in relation to document 1*". As to s.40(c), the third adverse effect identified in paragraph 30 above cannot apply to document 2. Moreover, my comments at paragraphs 31 and 32 above on the first and second

adverse effects identified in paragraph 30 above are equally applicable in respect of document 2. For the reasons given at paragraph 35 above, I find that document 2 is not exempt from disclosure to Dr Shaw under s.40(c) of the FOI Act.

Consideration of document 4

43. Document 4 comprises notes from a meeting held on 18 July 1990 between Associate Professor L'Estrange, who was accompanied by his solicitor Mr William Weir of Gilshenan and Luton, and the Registrar of the University, Mr Porter, who was assisted by Mr R Byrom, the University's Legal Officer. There is a conflict of evidence about the basis on which Associate Professor L'Estrange provided information to Mr Porter, on behalf of the University, at this meeting. I will refer to the evidence in some detail.

44. In his application for internal review, Associate Professor L'Estrange said:

> *The interview which document 4 purports to be a record of, was one which I was directed to have. It was part of the due process required of the Human Rights and Equal Opportunities Commission. I expressed concern at the meeting, concerning the confidentiality of the meeting. The reason why I did not want the report of the meeting to go to the Human Rights and Equal Opportunities Commission was because I did not want it to go to Dr Shaw. Although not recorded in the documents, I made that clear to Messrs Porter and Byrom at the meeting.*

45. Contrary to the assertion made in the second sentence of the passage quoted above, Mr Porter said, in his internal review decision, that document 4 arose from a personnel problem involving members of staff of the Division of Prosthetic Dentistry and its effect on the conduct of public clinics. It did not relate to negotiations with the Human Rights and Equal Opportunities Commission but was an attempt to solve an industrial problem which had arisen in relation to the conduct of public clinics. Mr Porter did not consider document 4 to be exempt under s.46(1) and stated that, although there were discussions about confidentiality, the only assurance which was given to Associate Professor L'Estrange at the time of the meeting was that information from the meeting would not be voluntarily provided to the Human Rights and Equal Opportunities Commission without first contacting Associate Professor L'Estrange.

46. In his statutory declaration/submission, Associate Professor L'Estrange said:

> *The reference to confidentiality only being with respect to information being passed to the Human Rights and Equal Opportunities Commission is simply false.*
>
> *The fact is that prior to discussions getting underway it was made clear to all parties present that everything said had to be confidential <u>from Ms Shaw</u>, although the University made some qualifications in respect of the Human Rights Commission, it was agreed that nothing of the conversation would be advised to Ms Shaw. My solicitor, Mr Weir, who was present at this meeting, has informed me that he is willing to swear as to this fact.*
>
> *I therefore regarded the meeting as a confidential mediation. Had I known it was anything else, and a so called "report" of the meeting could be handed to Ms Shaw, I would not have participated.*

The combined effect of the sensitive nature of the information and the circumstances in which it was communicated gave rise to an obligation of confidence.

The purpose of the meeting on 18 July 1990 was to confidentially make known my personal view of the problems involving Ms Shaw and it certainly was not a reasonable expectation at that point in time that Ms Shaw should be made aware of those details. The information was given to those present so that they were aware of the views of those concerned, and not for the purpose of relaying my personal views to Ms Shaw, which simply would have exacerbated the problem at hand.

This document is exempt under the provisions of Section 46(1)(a) of the Freedom of Information Act.

47. Mr William John Weir, Solicitor, in his statutory declaration stated:

1. *In respect of Document 4, I attended a meeting with Associate Professor L'Estrange, Dr Porter and Mr Byrom.*

2. *Before the meeting commenced I informed Dr Porter and Mr Byrom that my client would not be prepared to participate in any conference unless the complete details of that conference were kept confidential from Dr Shaw.*

3. *The conference was suspended at the request of Mr Byrom. He then advised that if certain documents were required by the Human Rights Commission the University, although it would not volunteer the documents, may be forced to give them up. Other than that requirement the documents as far as the University was concerned would be kept confidential from Dr Shaw.*

4. *Under those circumstances Associate Professor L'Estrange agreed to continue with the interview.*

5. *The notes of the interview as produced by the University were reasonably accurate and in accordance with my notes, but did not include the private discussion held prior to the general meeting at which the undertaking not to disclose other than for the possible production of documentation to the Human Rights Commission was given.*

48. In his statutory declaration, Mr Porter stated:

1. I have read the Statutory Declarations of Peter Robert L'Estrange and William John Weir. The meeting on 18 July 1990, referred to in those Statements was one of a series of meetings that I conducted to deal with an industrial problem which had arisen in one of the Dental School's public clinics. The incident was part of an on-going problem of deteriorating working and personal relationships between Associate Professor L'Estrange, Mr Roper, Mr Spratley and Dr Shaw, which had been the subject of a complaint by Dr Shaw to the Human

Rights Commission.

2. *I was accompanied at the meetings by Mr Roger Byrom, the University Legal Officer, who kept a note of the proceedings.*

3. *To the best of my recollection Mr Byrom's notes are an accurate record of the meeting with Associate Professor L'Estrange and Mr Weir.*

4. *After some introductory remarks which I had given at the start of all the interviews, there was a discussion on confidentiality and whether the proceedings would be made known to the Human Rights Commission. I confirmed that it was not the intention of the University to provide a record of the meeting to the Commission and that the University would not do so voluntarily.*

5. *Mr Weir, in his Statutory Declaration dated 20 October 1994 declares that the notes "did not include the private discussion held prior to the general meeting at which the undertaking not to disclose other than for the possible production of documentation to the Human Rights Commission was given". In my view the notes do record both that discussion and the undertaking.*

6. *I have no recollection of a discussion in respect of disclosing the proceedings to Dr Shaw.*

49. Mr Byrom, the University's Legal Officer, in his statutory declaration stated:

1. *I have read the Statutory Declaration of Douglas Porter dated 22 November 1994.*

2. *I agree with the account given by Douglas Porter in paragraphs 1 and 2 of the said Statutory Declaration.*

3. *I prepared the typewritten notes of the meeting that are identified as "document 4" in the letter of 22 September 1994 from the Information Commissioner to Association Professor L'Estrange.*

4. *The typewritten notes referred to in paragraph 3 were prepared from hand-written notes taken by me during the meeting and which have since been destroyed.*

5. *To the best of my recollection the typewritten notes accurately reflect my hand-written notes which, in turn, accurately recorded the meeting in question.*

6. *I have no recollection of the information recounted in paragraph 2 of the statutory declaration of William John Weir dated 20 October 1994.*

7. *In July 1990 it was well-publicised internal University policy that documents on its files would not be disclosed to staff-members on request.*

8. *Given that the meeting was one of a series of meetings conducted by*

> *Douglas Porter to deal with an industrial problem I verily believe that an undertaking to keep the complete details of the meeting confidential from Dr Shaw would have unreasonably curtailed the efficacy of the process and I say that no such undertaking was given.*

50. Associate Professor L'Estrange contends that document 4 is exempt under s.46(1)(a) of the FOI Act (the terms of which are set out at paragraph 13 above) in circumstances where the test for exemption under s.46(1)(a) must be evaluated in terms of the requirements for an action in equity for breach of confidence, there being five criteria which must be established:

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

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

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

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

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

51. The key criterion is (c) above, and I need not examine the others, because I am satisfied from my examination of document 4, in light of the evidence referred to above, that criterion (c) cannot be established in respect of document 4. In *Re "B"* at p.316 (paragraph 84), I stated that criterion (c) above requires an evaluation of the whole of the relevant circumstances including (but not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and the circumstances relating to its communication, such as those referred to by a Full Court of the Federal Court of Australia in *Smith Kline and French Laboratories (Aust) Limited & Ors v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at pp. 302-3 (the relevant passage is reproduced in *Re "B"* at pp.314-316; paragraph 82).

52. The contents of document 4 itself, in particular the issues canvassed with Associate Professor L'Estrange by Mr Porter, on behalf of the University, once the interview got under way, support Mr Porter's assertion that the purpose of the interview was to attempt to solve an industrial problem which had arisen in relation to the conduct of public clinics. The nature of the University's concern, and its purpose in holding the meeting, is reflected in the information supplied by Associate Professor L'Estrange which Mr Byrom saw fit to record. Document 4 records information concerning the apparently difficult relations between Dr Shaw and Associate Professor L'Estrange only insofar as it concerns issues relevant to the

running of the public clinics.

53. The University, having undertaken the task of providing services to the public through the conduct by the Dental School of public clinics, had a duty to investigate and resolve any staffing/industrial problems that might be affecting the efficient and effective conduct of public clinics, and the provision of satisfactory standards of service to the public. Associate Professor L'Estrange had a duty as employee to co-operate with his employer's requirements in that regard. An employer would ordinarily be entitled to require an employee to provide information on aspects of the employer's operations on the basis that the information was the employer's to deal with, for the purpose of the conduct of the employer's operations, as the employer saw fit (though it may be appropriate for the employer to give an undertaking to the employee that the information so provided would not be voluntarily disclosed to an outside organisation, as appears to have occurred in the present case).

54. In my opinion, it is clear that the interview on 18 July 1990 took place as an incident of the employer-employee relationship between the University and Associate Professor L'Estrange. This is consistent also with Associate Professor L'Estrange's statement that the interview was one that he was directed to have.

55. I find it difficult to reconcile, with what I understand to be the correct legal position, the suggestion in the evidence of Associate Professor L'Estrange and Mr Weir that the former might refuse to supply information requested by his employer. It is well established in law that an employee owes duties of good faith and fidelity to his employer (see, for example, *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] 1 Ch 169 at p.174, per Lord Greene MR). There is a positive duty to act in the employer's best interests and to protect the employer's interests, which extends to a positive obligation to disclose relevant information which an employee receives in his or her capacity as employee (see *Saunders v Parry* [1967] 1 WLR 753 at p.765, per Havers J). The cases in which these duties are recognised and enforced invariably involve breach by an employee of the duty to disclose information to an employer, coupled with an attempt to exploit the information to the advantage of the employee and to the detriment of the employer (these being the kinds of situations which provoke the expenditure of money, time and effort on litigation), but the principles are of general application. The duties apply with greater force to employees holding positions of special trust and responsibility (see, for example, *Swain v West (Butchers) Ltd* [1936] 3 All ER 251 at pp.264-265 per Greene LJ). In terms of management responsibility for the conduct of the Dental School's public clinics, Associate Professor L'Estrange was one of the senior staff. He was, or had recently been, acting as head of the Division of Prosthetic Dentistry.

56. I do not see how Associate Professor L'Estrange could have refused to comply with lawful requests by the University for disclosure of information about the University's operations, especially any in respect of which he had management responsibilities, without leaving himself open to charges of breach of duty. Ordinarily, an employee is under no obligation to disclose his own wrongdoings (see *Bell v Lever Brothers Ltd* [1932] AC 161 at p.231 per Lord Thankerton, p.288 per Lord Atkin), but Mr Porter was not attempting to establish any wrongdoing on the part of Associate Professor L'Estrange. He was attempting to gather information from relevant employees with a view to finding a means to remedy the breakdown in working relationships and/or ensure that it did not adversely affect the conduct of public clinics.

57. I find it difficult to accept that information of the kind recorded in document 4, which an employee has a duty to disclose to his employer on request, could be the subject of a legally enforceable duty of confidence owed by the employer to the employee. Moreover, having regard to the nature of the duties of disclosure owed by Associate Professor L'Estrange to the University, and the purpose for which the University required the information, I find it

improbable that Mr Porter would have given an undertaking of confidentiality to Associate Professor L'Estrange.

58. There are several anomalies in the evidence with regard to what, if any, undertakings were given to Associate Professor L'Estrange on behalf of the University. Mr Weir's evidence does not accord at all with the contemporaneous notes taken by Mr Byrom which indicate that Mr Weir initiated the discussion concerning confidentiality, and that his expressed concern, and the assurances he sought, were in respect of information being passed on to the Human Rights and Equal Opportunities Commission. Mr Weir's evidence is to the effect that Mr Byrom raised the issue of the information potentially being required by the Human Rights and Equal Opportunities Commission as an exception to an agreement reached to keep any information supplied at the meeting confidential from Dr Shaw. Yet Mr Weir also says that Mr Byrom's notes of the interview were reasonably accurate and in accordance with his own notes (which he has not put in evidence), except that they did not include an earlier discussion at which an undertaking was given not to disclose other than for the possible production of documentation to the Human Rights and Equal Opportunities Commission. In my opinion, the tenor and content of the first paragraph of Mr Byrom's notes is not at all consistent with such an undertaking having earlier been given.

59. Associate Professor L'Estrange also says that it was the University which wished to make some qualifications, in respect of the Human Rights commission, to an agreement that nothing would be disclosed to Dr Shaw. He also asserts that he regarded the meeting as a confidential mediation, in which he would not have participated had he known that anything could have been given to Dr Shaw. To my mind, however, it defies logic that a confidential mediation process to resolve the particular situation with which the University was concerned could have excluded Dr Shaw.

60. The evidence of Mr Porter and Mr Byrom is to the effect that Mr Byrom's notes accurately record the substance of the discussion on confidentiality, and the only undertaking that was given on behalf of the University consequent upon that discussion (as per paragraph 4 of Mr Porter's statutory declaration). Associate Professor L'Estrange's solicitors have provided me with copies of correspondence between their client and Mr Byrom in September 1990 (a matter of some 4-5 weeks after the meeting of 18 July 1990) and a letter from their client to the Vice-Chancellor dated 28 September 1990. The letter from Mr Byrom to Associate Professor L'Estrange dated 20 September 1990 makes it clear that the latter had challenged Mr Byrom's understanding of what Mr Porter had agreed at the 18 July meeting, but that Mr Byrom adhered to the account in his contemporaneous record of the meeting, at a time when the episode should still have been reasonably fresh in his mind. In my opinion, this indicates that the conflict in evidence is not the product of any failure of recollection attributable to the passage of time.

61. I consider that the material before me reflects a genuine disagreement or misunderstanding as to the position reached after the discussions on confidentiality at the meeting of 18 July1990. I consider that it is no coincidence that the position asserted by each side is that which serves the purpose it was attempting to further: Associate Professor L'Estrange wished to ensure that Dr Shaw would not obtain information that might be used against him, and the University wished to preserve its right to obtain information from an employee and use it as it saw fit in its attempts to resolve the staff dispute and ensure satisfactory standards of service to the public in the Dental School's public clinics. I find compelling Mr Byrom's evidence (in paragraph 8 of his statutory declaration) that an undertaking to keep the complete details of the meeting confidential from Dr Shaw would have unreasonably curtailed the efficacy of the process which the University was attempting to undertake. I find it improbable that such an undertaking would have been given on behalf of the University.

62. I am not satisfied that any consensus was reached, or express undertaking given, as to confidentiality of the information supplied by Associate Professor L'Estrange at the meeting of 18 July 1990, other than that which is clearly stated in Mr Byrom's contemporaneous note of the meeting, i.e. that Mr Porter agreed that he would not voluntarily pass information gained at the interview to the Human Rights and Equal Opportunities Commission without further contact with Associate Professor L'Estrange. (I note that Associate Professor L'Estrange's letter to Mr Byrom dated 19 September 1990 states that it was agreed that a copy of any future written communication from the University to the Human Rights and Equal Opportunities Commission would be made available to Associate Professor L'Estrange.)

63. Having regard to all the relevant circumstances, I am not satisfied that the University obtained the information in document 4 under an obligation of confidence. It should have been clear to Associate Professor L'Estrange that his employer was conducting one of a series of interviews aimed at resolving a staff dispute affecting the conduct of the Dental School's public clinics. If considered necessary for that purpose, the University may have wished to give each, or several, of the persons interviewed the opportunity to consider and answer the views put forward by others. In my opinion, there is no reason in law or in logic why the University should have been restrained from so doing. In this situation, the University had to cater to wider interests than merely the interests of Associate Professor L'Estrange: not least the interests of members of the public attending the Dental School's public clinics. I am unable to accept that the information contained in document 4 was supplied by Associate Professor L'Estrange to the University in circumstances which bound the University in conscience not to disclose the information to Dr Shaw.

64. I find that document 4 is not exempt from disclosure to Dr Shaw under s.46(1)(a) of the FOI Act.

65. Associate Professor L'Estrange also submitted that document 4 is exempt under s.40(c) of the FOI Act, and in this regard he repeated and relied on his submissions made in relation to document 1 (see paragraph 30 above). I do not think those claimed adverse effects have any reasonable basis when applied to document 4, which was created in circumstances where an employee was obliged to give a full and frank accounting to his employer in respect of the performance of an area of the employer's operations. In any event, for the reasons given at paragraph 35 above, I find that document 4 is not exempt from disclosure to Dr Shaw under s.40(c) of the FOI Act.

Consideration of document 5

66. Document 5 is a letter dated 30 August 1990 from Associate Professor L'Estrange to the Vice-Chancellor, containing Associate Professor L'Estrange's perceptions of Dr Shaw's complaints/allegations, his views on the University's handling of the complaints, and an outline of the consequent effects on him, both personally and professionally.

67. In her initial decision on behalf of the University, Mrs Lavery found that document 5 was not exempt under s.46(1) of the FOI Act, but was exempt under s.44(1) of the FOI Act on the basis that it concerned Associate Professor's L'Estrange's personal affairs, and that the public interest leaned towards non-disclosure. On application for internal review by Dr Shaw, however, Mr Porter decided that document 5 related largely to Associate Professor L'Estrange's employment affairs, and was not exempt under s.44(1) except for some small passages which did relate to Associate Professor L'Estrange's personal affairs. Dr Shaw has not challenged Mr Porter's decision to exempt some small segments of document 5 under s.44(1), and those segments are not in issue in this review. Associate Professor L'Estrange,

however, contends that document 5 is exempt in its entirety under s.44(1), s.46(1)(a) and s.40(c).

Application of s.44(1) to document 5

68. In *Re Pope and Queensland Health* (1994) 1 QAR 616 at p.660 (paragraph 116), I said:

> *116. Based on the authorities to which I have referred, I consider that it should now be accepted in Queensland that information which merely concerns the performance by a government employee of his or her employment duties (i.e. which does not stray into the realm of personal affairs in the manner contemplated in the* Dyrenfurth *case) is ordinarily incapable of being properly characterised as information concerning the employee's "personal affairs" for the purposes of the FOI Act.*

That view, which I restated in *Re Murphy and Queensland Treasury* (Information Commissioner Qld, Decision No. 95023, 19 September 1995, unreported) at paragraph 28, was impliedly endorsed by de Jersey J of the Supreme Court of Queensland in *State of Queensland v F N Albietz, Information Commissioner (Qld) and Murphy* (Supreme Court of Queensland, No. 696 of 1995, de Jersey J, 6 October 1995, unreported) at pp.9-11.

69. Among the authorities which I referred to as supporting the passage from *Re Pope* quoted above were the judgments of the New South Wales Court of Appeal in *Commissioner of Police v The District Court of New South Wales and Perrin* (1993) 31 NSWLR 606, and the judgment of Eames J of the Supreme Court of Victoria in *University of Melbourne v Robinson* [1993] 2 VR 177, from which the following passage (at p.187) applies squarely to those parts of document 5 which are in issue in this review:

> *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.*

70. Based on my examination of the information contained in document 5, I consider that, apart from the matter which Mr Porter decided was exempt under s.44(1), it must properly be characterised as information which concerns Associate Professor's L'Estrange in his employment as an officer of the University, and which also concerns the employment affairs of Dr Shaw and personnel management issues relevant to the management/administration of the University. The information in issue in document 5 cannot properly be characterised as information concerning the personal affairs of Associate Professor L'Estrange, and it does not qualify for exemption under s.44(1) of the FOI Act.

Application of s.46 to document 5

71. Associate Professor L'Estrange has argued that document 5 is exempt under s.46(1)(a) on the basis that it was prepared for the Vice-Chancellor's personal attention and is a personal and highly sensitive document, written out of grave concern at the effect of the whole affair on Associate Professor L'Estrange's personal and professional life and well-being, and containing his own views on the situation as a whole.

72. In *Re "B"* at p.292 (paragraph 35), I explained that s.46(2) is generally the logical starting

point for the application of s.46 of the FOI Act:

> *35. FOI administrators who approach the application of s.46 should direct their attention at the outset to s.46(2) which has the effect of excluding a substantial amount of information generated within government from the potential sphere of operation of the s.46(1)(a) and s.46(1)(b) exemptions. Subsection 46(2) provides in effect that the grounds of exemption in s.46(1)(a) and s.46(1)(b) are not available in respect of matter of a kind mentioned in s.41(1)(a) (which deals with matter relating to the deliberative processes of government) unless the disclosure of matter of a kind mentioned in s.41(1)(a) would found an action for breach of confidence owed to a person or body outside of the State of Queensland, an agency (as defined for the purposes of the FOI Act), or any official thereof, in his or her capacity as such an official. Section 46(2) refers not to matter of a kind that would be exempt under s.41(1), but to matter of a kind mentioned in s.41(1)(a). The material that could fall within the terms of s.41(1)(a) is quite extensive (see* Re Eccleston *at paragraphs 27-31) and can include for instance, material of a kind that is mentioned in s.41(2) (a provision which prescribes that certain kinds of matter likely to fall within s.41(1)(a) are not eligible for exemption under s.41(1) itself).*

73. In *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60, I undertook a detailed analysis of s.41 of the FOI Act, in which I stated (at pp.70-71; paragraphs 27-29) that the critical words in s.41(1)(a) are "deliberative processes involved in the functions of government". (The word "government" is given a non-exhaustive definition in s.7 of the FOI Act and includes an agency and a Minister.) The words in question extend to cover deliberation for the purposes of any decision-making function of an agency. They do not, however, cover the purely procedural or administrative functions of an agency. One passage in particular has come to be accepted as correctly explaining the meaning of the term "deliberative processes" involved in the functions of an agency. In *Re Waterford and Department of Treasury (No. 2)* (1984) 5 ALD 588 at 606; 1 AAR 1 at 19-20, the Commonwealth Administrative Appeals Tribunal (comprising Deputy President Hall, Mr I Prowse and Professor Colin Hughes) said:

> *The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.*

(See also *Re James and Australian National University* (1984) 2 AAR 327 at p.335; the relevant passage is reproduced in *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 at p.685; paragraph 44).

74. I consider that Associate Professor L'Estrange must have intended, hoped and expected that document 5 would influence the University's deliberative processes with respect to its personnel management functions in dealing with allegations made by Dr Shaw. Based on my examination of document 5, I consider that it was prepared in the course of, or for the purposes of, the deliberative processes involved in the personnel management functions of

the University, and comprises matter of a kind mentioned in s.41(1)(a) of the FOI Act.

75. By virtue of s.46(2), s.46(1) does not apply to matter of a kind mentioned in s.41(1)(a) unless its disclosure would found an action for breach of confidence owed to a person or body other than the persons or bodies mentioned in s.46(2)(a) and (b). Associate Professor L'Estrange has submitted that disclosure of document 5 would found an action for breach of confidence owed to him, but, in my opinion, document 5 was clearly written by Associate Professor L'Estrange in his capacity as an officer of the University (see s.46(2)(a)(iii) of the FOI Act), for the purpose of raising concerns which affected him in that capacity. The application of s.46(1) to document 5 is therefore excluded by the terms of s.46(2).

Application of s.41 and s.40(c) to document 5

76. As pointed out in the last two sentences of the passage from *Re "B"* quoted at paragraph 72 above, s.46(2) refers not to matter of a kind that would be exempt under s.41(1), but to matter of a kind mentioned in s.41(1)(a). Matter may answer the description of "matter of a kind mentioned in s.41(1)(a)", but still not be exempt under s.41(1), if its disclosure would not be contrary to the public interest, or if it is excluded from exemption under s.41(1) by virtue of s.41(2) or s.41(3).

77. Whether the matter in issue in document 5 is exempt under s.41(1) depends on whether its disclosure would, on balance, be contrary to the public interest, as contemplated by s.41(1)(b) of the FOI Act. The relevant public interest considerations are essentially the same as those considered in relation to document 2. Document 5 includes an eloquent complaint by Associate Professor L'Estrange as to the University's alleged failure to afford him natural justice in respect of allegations made against him by Dr Shaw - something which casts an ironic light on his attempts, through the pursuit of his 'reverse FOI' application, to deny Dr Shaw access to details of allegations made against her.

78. I am prepared to accept that there may be (always according to the circumstances of the particular case) a public interest (relating to the efficient and effective management of an agency) in an employee of an agency being able to raise with the chief executive of the agency issues of concern as to his or her treatment, without unnecessary further disclosure of the employee's concerns. However, if the employee expects action to be taken on the concerns expressed, then a degree of further disclosure will ordinarily be necessary. I cannot accept that Associate Professor L'Estrange expected the statements and views expressed in document 5 to remain a personal matter between himself and the Vice-Chancellor. He intended them to influence the manner of the University's actions in respect of the situation that had arisen between himself and Dr Shaw.

79. To the extent that document 5 consists of matter that relates solely to the effect on Associate Professor L'Estrange of the University's handling of the dispute, and its disclosure would not assist Dr Shaw's understanding of the University's handling of the dispute, or otherwise serve the public interest in accountability for the performance by the University of its functions, I am prepared to find that its disclosure would be contrary to the public interest. The passages which are eligible for exemption under s.41(1) in that regard are:

- the first sentence in the second paragraph on page 2; and
- the first full paragraph on page 4.

80. The disclosure to Dr Shaw of the balance of the matter in issue in document 5 would not be contrary to the public interest, for the same reasons as those given at paragraph 35 above.

81. Associate Professor L'Estrange also submitted that document 5 is exempt under s.40(c) of the FOI Act, and in this regard he again repeated and relied on his submissions made in relation to document 1 (see paragraph 30 above). It may well be the case that the segments of document 5 identified in paragraph 79 above are exempt under s.40(c) of the FOI Act, but having already found them exempt under s.41(1), I do not need to consider that issue. The balance of the matter in issue in document 5 is not exempt from disclosure to Dr Shaw under s.40(c) for the same reasons as those given at paragraph 35 above.

Conclusion

82. For the foregoing reasons -

(a) I vary the internal review decision of Mr Porter dated 30 June 1993 to the extent that I find that the segments of document 5 identified in paragraph 79 above are exempt matter under s.41(1) of the FOI Act;

(b) I set aside the internal review decision of Mr Porter dated 7 July 1993 in respect of document 1, and in substitution for it, I find that document 1 is not exempt from disclosure to Dr Shaw under the FOI Act; and

(c) I affirm Mr Porter's internal review decision dated 7 July 1993 in respect of documents 2 and 4.

.....
F N ALBIETZ
INFORMATION COMMISSIONER