'HIC' and Queensland Police Service

(S 34/96, 7 December 1998, Information Commissioner Albietz)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1.- 4. These paragraphs deleted.

REASONS FOR DECISION

Background

5. The applicant is a police Sergeant who seeks review of a decision by the Queensland Police Service (the QPS) to refuse him access, under the FOI Act, to records of an interview between a junior officer and the District Officer of the QPS, concerning the applicant's health and its effect on the applicant's work performance. At the time he made his FOI access application, the applicant was the officer in charge of a police station in a country town in Queensland. The junior officer was another officer at that station.

6. It appears that the applicant consulted a general practitioner about health concerns and was referred to a psychiatrist. The psychiatrist diagnosed the applicant as suffering from post-traumatic stress disorder and associated illnesses. The applicant was interviewed by the District Officer concerning his health, and the Assistant Commissioner for the region subsequently directed the District Officer to interview both the applicant and the junior officer concerning the applicant's state of health. The junior officer was interviewed. The applicant later learned of the interview and, by letter dated 31 October 1995, applied to the QPS under the FOI Act for access to the record of interview and other related documents.

7. By letter dated 8 January 1996, Acting Inspector Anderson of the QPS informed the applicant that 30 documents had been located which fell within the terms of the relevant FOI access application. Acting Inspector Anderson decided to grant access to 25 documents in full, but decided that part of folio 1 was exempt under s.46(1) of the FOI Act, and that the whole of folios 27-30 were exempt under s.44(1) and s.46(1) of the FOI Act.

8. By letter dated 9 February 1996, the applicant sought internal review of Acting Inspector Anderson's decision, which was affirmed by Chief Superintendent Freestone in his internal review decision dated 19 February 1996. By letter dated 22 February 1996, the applicant applied to me for review, under Part 5 of the FOI Act, of Chief Superintendent Freestone's decision.

External review process

9. The documents containing the matter in issue were obtained and examined. Folios 27-30 comprise the record of the interview between the junior officer and the District Officer. Folio 1 is a memorandum from the District Officer to the Assistant Commissioner for the region. The matter deleted from folio 1 summarises parts of the record of interview.

10. The junior officer was informed of my review, and he applied for, and was granted, status as a participant in accordance with s.78 of the FOI Act. The junior officer has provided a statutory declaration in support of the case made by the QPS that the matter in issue is exempt matter.

11. In making my decision, I have considered the contents of the documents in issue, the correspondence between the applicant and the QPS in the course of dealing with the FOI access application and internal review application, and the following submissions and evidence, which have been exchanged between the QPS and the applicant:

1. submissions by the QPS, dated 9 August and 21 October 1996
2. statutory declaration of the junior officer, dated 23 July 1996
3. statutory declaration of an Acting Inspector who replaced the District Officer while he was on sick leave, dated 23 July 1996
4. statutory declaration of the QPS State Rehabilitation Co-ordinator, dated 22 July 1996
5. submissions by Gilshenan & Luton, Lawyers, on behalf of the applicant, dated 3 October and 4 November 1996.

12. The submissions of the participants have addressed not only the exemption provisions initially relied on by the QPS, but also the possible application of s.40(c) of the FOI Act. Ultimately, I have found it unnecessary to deal with exemption provisions other than s.40(c) of the FOI Act.

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

13. Section 40(c) of the FOI Act provides:

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

14. I have considered the application of s.40(c) of the FOI Act in *Re Pemberton and The University of Queensland* (1994) 2 QAR 293, *Re Murphy and Queensland Treasury & Ors* (1995) 2 QAR 744, *Re Shaw and The University of Queensland* (1995) 3 QAR 107, and *Re McCann and Queensland Police Service* (Information Commissioner Qld, Decision No. 97010, 10 July 1997, unreported). 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 an agency of its personnel, unless disclosure of the matter in issue would, on balance, be in the public interest.

15. 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 *Freedom of Information Act 1982* Cth, in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.339-341, paragraphs 154-160. 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).

16. If I am satisfied that any adverse effects could reasonably be expected to follow from disclosure of the matter in issue, I must then determine whether those adverse effects, either individually or in aggregate, constitute a substantial adverse effect on the management or assessment by the QPS of its personnel. For reasons explained in *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 (at pp.724-725, paragraphs 148-150), I consider that, where the Queensland Parliament has employed the phrase "substantial adverse effect" in s.40(c) of the FOI Act, it must have intended the adjective "substantial" to be used in the sense of grave, weighty, significant or serious.

17. If I find that disclosure of the whole or any part of the matter in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by the QPS of its personnel, I must then consider whether disclosure of that matter would nevertheless, on balance, be in the public interest.

Substantial adverse effect

18. At the outset, I consider it appropriate to state that, on my reading of the record of interview comprising folios 27-30, the junior officer did everything in his power to emphasise the positive aspects of the applicant's work performance, while nevertheless truthfully and accurately responding to the questions to which he was directed to reply. It appears to me that the junior officer did his best to maintain loyalty to his colleague, while also recognising and complying with his duty to the QPS.

19. From my examination of the QPS submissions and the evidence, I consider that there are three apprehended adverse effects on the management or assessment by the QPS of its personnel, which call for detailed consideration. I will refer to them as claimed adverse effects (a), (b) and (c). They are:

(a) apprehension of management problems if other members of staff, or members of the public, were to obtain access to the matter in issue;

(b) management problems caused by a perceived breach of trust (in the QPS disclosing information understood to have been provided to senior management in confidence) and the potential for prejudice to the future supply of like information that is needed for the purposes of management and assessment processes; and

(c) the potential for disruption to working relationships within the QPS.

Management problems occasioned by wider dissemination of the matter in issue

20. As to claimed adverse effect (a), I indicated in *Re Pemberton* at pp.365-366, paragraphs 152-154, that s.40(c) 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 to persons other than just the particular applicant for access under the FOI Act.

21. The content of the matter in issue does not suggest that the applicant has engaged in any conduct upon which disciplinary action could be based. It appears clear that the relevant interview was conducted in order to assess whether the junior officer could shed any light on the effects or potential effects which the applicant's illness might have on the applicant's work performance at an isolated country station. (I should also say that I have no knowledge of whether or not the applicant continues to suffer from any form of illness. He may well have completely recovered.)

22. Nevertheless, I consider that a significant number of fellow officers or members of the public, on reading the matter in issue, could reasonably be expected to form some apprehension about whether the applicant continues to suffer from the illness, and about its potential effects on the applicant's work performance. If the information recorded in the matter in issue were to be disseminated in any community in which the applicant was working, or indeed within the QPS, I

consider it reasonable to expect that this could give rise to management difficulties with respect to the applicant, and his relationships with other QPS personnel and/or the public. In this sense, I consider that disclosure of the matter in issue could reasonably be expected to have an adverse effect on the management by the QPS of its personnel.

23. However, at pp.368-371, paragraphs 165-172, of *Re Pemberton*, I discussed possible qualifications to the ordinary approach described in paragraph 20 above. In addition, s.6 of the FOI Act 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 -*
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> *(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.*

24. In this case, the interview comprised in folios 27-30 was concerned with the applicant's work performance. In *Re Stewart and Department of Transport* (1993) 1 QAR 227, I indicated that, ordinarily, information which concerns an individual's work performance or other work-related matters does not concern that individual's personal affairs (see pp.261-264, paragraphs 91-102). In *Re Pope and Queensland Health* (1994) 1 QAR 616, after reviewing relevant authorities (at pp.658-660), I expressed the following conclusion at p.660 (paragraph 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.*

The general approach evidenced in this passage was endorsed by de Jersey J (as he then was) of the Supreme Court of Queensland in *State of Queensland v Albietz* [1996] 1 Qd R 215, at pp.221-222.

25. Nevertheless, in this case, the basis for concern about the applicant's work performance was ill-health, and I consider that both documents containing matter in issue must be properly characterised as documents that contain matter relating to the personal affairs of the applicant, so that s.6 of the FOI Act is relevant.

26. As a matter of statutory construction, I consider that the reference in s.6(b) of the FOI Act to "the matter" is confined to matter which relates to the personal affairs of the applicant, i.e., it does not extend to other matter which does not relate to the

personal affairs of the applicant, although contained in a document which contains some matter that does relate to the personal affairs of the applicant. But, having said that, the matter in issue in the present case which relates to the applicant's personal affairs is the very matter the disclosure of which would be most likely to cause claimed adverse effect (a).

27. The significance of s.6(b) of the FOI Act in this context is that it permits some adjustment or allowance to be made, in evaluating the effects of disclosure, for the fact that the matter in issue relates to the personal affairs of the particular applicant for access. Thus, while the potential for wider dissemination (which could reasonably be expected to cause claimed adverse effect (a)) cannot be entirely discounted, s.6(b) permits account to be taken of the likelihood of the applicant permitting wider dissemination of information obtained under the FOI Act relating to his personal affairs, in circumstances where wider dissemination is likely to be detrimental to his interests (including his privacy interests). I consider that the greatest damage that might be occasioned by any wider dissemination of the matter in issue (i.e., beyond the applicant) would most likely befall the applicant. Damage might also be occasioned to the interests of the junior officer, and wider dissemination could, in my view, reasonably be expected to have an adverse effect on the management by the QPS of its personnel, as explained above. However, the relative weight to be attributed to that adverse effect could appropriately be discounted to an extent that compensates for the considerations which could reasonably be expected to inhibit any wider dissemination by the applicant of the matter that relates to his personal affairs. No similar discounting in reliance on s.6(b) is available in respect of matter in issue which does not relate to the applicant's personal affairs.

Understanding of confidence

28. Turning to claimed adverse effect (b), the junior officer has given evidence that he was extremely reluctant to provide any information concerning the applicant's general health and wellbeing to the District Officer. The record of interview clearly shows that that was the case. The junior officer only answered questions when he was directed to do so by the District Officer. The junior officer also stated that he believed that the content of the record of interview was confidential, and that anything said by him was to remain confidential between him and the District Officer. No evidence was provided from the District Officer who, I understand, was absent on sick leave at the time evidence was gathered by the QPS. However, the Acting Inspector who took over from the District Officer did provide evidence which indicated his belief that, in an interview between a commissioned officer and a subordinate officer, an implied confidential relationship exists.

29. It is not difficult to understand why the junior officer did not wish to make any comments relating to the applicant, nor why, when forced to do so, he wished his comments to be kept confidential from the applicant. He was working in a country station, subject to the direct supervision of the applicant. He no doubt wished to

maintain both a good working relationship and a good personal relationship with the applicant. He was not a health professional, but was being asked to give his opinion on the effect of the applicant's illness on the applicant's work performance.

30. However, in many cases an investigating officer representing the QPS will not reasonably be able to give an unconditional undertaking as to confidentiality, or be party to an unconditional understanding of confidentiality. As I indicated in *Re McCann*, it may be necessary for the QPS, in the exercise of its functions and in order to comply with the legal requirements of procedural fairness, to disclose information gained during an interview. However, I also recognised in *Re McCann* (at paragraphs 47-51 and 57-58) that the circumstances of a particular case can give rise to a conditional understanding of confidentiality.

31. In this case, the junior officer should have been aware that, if it proved necessary to take formal action in relation to the applicant's illness, it may be necessary to disclose the information provided by the junior officer in order to give substance to the case of the QPS.
However, I consider that the circumstances of the case were such that there was an implicit understanding between the District Officer (on behalf of the QPS) and the junior officer, that, unless it proved prudent or necessary for the purposes of taking formal action to deal with the applicant's illness, the matter in issue would not be disclosed to the applicant.

32. The State Rehabilitation Co-ordinator of the QPS has given evidence that, not long after the interview took place, the applicant commenced a rehabilitation placement program, and voluntarily transferred to a police station in a larger centre to continue that program. There is nothing in the material before me to show that any formal action which might have required disclosure of the matter in issue to the applicant was ever undertaken by the QPS.

33. I do not suggest that it is a universal rule that any interview involving a direction to answer questions involves an implicit understanding of confidentiality. However, where the circumstances of a particular case justify such a finding, the subsequent disclosure of information (other than in accordance with implicitly understood exceptions permitting disclosure when necessary - see *Re McCann* at paragraphs 57-58) could reasonably be expected to raise concerns by junior staff about the reliability of protection available to them under an express or implicit understanding that information has been provided to management in confidence, and to prejudice the future supply of information in similar investigations.

34. The weight or seriousness of the apprehended adverse effect increases according to the sensitivity of the information liable to be disclosed. This case is one in which the information sought from the junior officer was of a particularly sensitive kind. It involved not merely a recounting of a factual situation, but a direction that the junior officer give his impression of the health of a colleague and its effect on the colleague's work performance. Such an assessment is necessarily a subjective one,

which any worker may well be loathe to have placed on record, not merely from concern that it may be disclosed to the colleague but also out of loyalty to the colleague.

35. Added to this is the special nature of police work. I do not accept, as the QPS contended, that the statutory requirement to answer questions adds significant weight to the case of the QPS. I have previously indicated that all employees owe a duty of good faith and fidelity to their employer, which would encompass a duty to report to the employer information, acquired in the capacity of employee, which the employer might reasonably require for the better management of its operations (see p.125, paragraphs 55-56, of *Re Shaw*, and paragraph 71 of *Re McCann*). However, the nature of police work adds significantly to the potential for recrimination and retribution if adverse comments are disclosed. QPS officers have considerable powers that are not shared by other members of the community. A QPS officer is clothed with the authority to take actions invasive of the rights or liberties of a member of the community (including other officers), which may ostensibly be undertaken for appropriate purposes, but in reality be designed to exact retribution. In addition, police officers do not enjoy a 9-to-5 job. Particularly in smaller centres, they may be on 24-hour call and be required to carry out numerous onerous, unpleasant or dangerous duties, where reliance on the support of fellow officers is essential. The scope for a senior officer who is a supervisor of a junior officer, or who is able to influence those who are supervisors of a junior officer, to assign the junior officer to more than his or her fair share of onerous, unpleasant or dangerous duties is far greater than that for a supervisor in most public sector agencies.

36. In the circumstances of this case, I am prepared to accept that any unwarranted breach of the understanding of confidence (in respect of information supplied by the junior officer in the record of interview - folios 27-30) could reasonably be expected to have a substantial adverse effect on the management or assessment by the QPS of its personnel, through the apparent breach of trust involved, and by making it more difficult to obtain full and frank co-operation in similar investigations in the future.

<u>Disruption to working relationships</u>

37. With regard to claimed adverse effect (c), I believe that the claim had considerable force while the applicant remained in charge of the station in the country town. The potential for recrimination/retribution of the kind indicated in paragraph 35 above, or at least a souring of relationships between the two officers, was at its height while the applicant and the junior officer staffed the station in the country town.

38. As the applicant has now transferred to another station, that potential has diminished, but I do not believe it can be completely discounted. The QPS has correctly pointed out that there is a potential for further transfers in the future

which may yet bring these two officers together again. Disclosure could reasonably be expected to cause management problems within the QPS if any ongoing dispute were to develop between the two officers, or between the junior officer and officers friendly to the applicant.

39. I am satisfied that disclosure of the matter in issue could reasonably be expected to have the three adverse effects discussed above. When aggregated, I find that those adverse effects could reasonably be expected to have a substantial adverse effect on the management or assessment by the QPS of its personnel.

Public interest balancing test

40. I accept that there is a public interest in enhancing the accountability of the QPS in respect of its handling of management issues concerning the ill-health of staff. I also recognise that there may be a public interest in a particular applicant having access to information which affects or concerns the applicant to such a degree as to give rise to a justifiable "need to know" which is more compelling than for other members of the public (see *Re Pemberton* at pp.368-377, paragraphs 164-193 - see also s.6 of the FOI Act).

41. The applicant contended that the "record of interview has a substantial effect on [his] career in the [QPS]". It is also clear that he considers that the interview has affected "promotional and disciplinary issues" facing him. However, the applicant has provided no evidence or submissions as to how the record of interview might have been, or might be, taken into account to his detriment. The evidence I have before me shows that the applicant commenced a rehabilitation placement program and transferred from the country station shortly thereafter (see statutory declaration of State Rehabilitation Co-ordinator). There is no evidence before me that any formal action detrimental to the applicant's career prospects in the QPS has been taken based on the matter in issue, or that any such action is proposed. Nor can I see any basis on which the record of interview could be taken into account in any disciplinary action against the applicant. However, I imagine that it is possible that the record of interview, along with other material relating to his service, might be taken into account in considering the applicant's prospects for promotion.

42. I do not consider that the interest of the applicant in having access to the matter in issue is of the same kind as that discussed in *Re Pemberton*. While the interview did concern the applicant's work performance, it was in the context of dealing with an illness that he was experiencing at a particular time. The key to resolving such work performance difficulties was in the establishment of an appropriate rehabilitation program, rather than in the applicant considering and addressing any innate concerns about his general work performance. In that sense, the public interest in disclosure to the applicant of the narrow, health-related concerns expressed during the interview is not of a similar kind, nor as strong as, the public interest in disclosure of reports by Heads of Department, assessing shortcomings/areas for improvement in the work performance of a senior

academic/research scientist, that were in issue in *Re Pemberton*.

43. The applicant has already been given a considerable amount of information from the file concerning the management by the QPS of the issues raised by his illness. The only matter to which he has been denied access is the record of interview with the junior officer, and a summary of the interview contained in a report by the District Officer. The satisfaction of the other elements of s.40(c) of the FOI Act gives rise to a *prima facie* public interest consideration favouring non-disclosure. In this case, I consider that the potential for prejudice to the management and assessment processes of the QPS is substantial. I am not satisfied that the public interest considerations which favour disclosure to the applicant are strong enough to support a finding that disclosure of the matter in issue would, on balance, be in the public interest. I therefore find that the matter in issue is exempt matter under s.40(c) of the FOI Act.

DECISION

44. I vary the decision under review (being the decision of Chief Superintendent P J Freestone on behalf of the respondent dated 19 February 1996) by finding that the matter in issue identified at paragraph 9 above is exempt matter under s.40(c) of the FOI Act.