McMahon and Department of State Development

(S 18/01, 27 June 2002, Deputy Information Commissioner)

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

1.-2. These paragraphs deleted.

REASONS FOR DECISION

Background

3. The applicant was an employee of the Queensland public service until April 1999, when he was retrenched following a series of unsuccessful attempts at deployment. As part of the deployment process, he made applications to numerous agencies, including the Department, for appointment to advertised vacancies. He has since applied to the relevant agencies, under the FOI Act, for access to their documentation of the respective selection processes, in order to ascertain whether there was improper conduct in any of those selection processes in the treatment of his job applications. The applicant is concerned that there may have been collective improper conduct, which he has described as "mobbing".

4. With respect to the Department involved in this application for review, the applicant applied by letter dated 22 March 2000 for access, under the FOI Act, to:

> *…documents pertaining to the selection and appointment of officers to the positions*
> *SD3/99*
> *SD4/99*
> *including the decision not to deploy me at level to the AO8 level position Manager Research and Evaluation.*

5. The applicant received an initial decision dated 28 August 2000, by which he was granted access to 877 pages (either in full or in part) out of 1,130 pages identified as responsive to the terms of his FOI access application. The documents, and parts of documents, to which access was refused were found to be exempt under s.44(1) of the FOI Act. By letter dated 23 November 2000, the applicant sought an internal review of that decision. The internal review decision was made on behalf of the Department by Mr Frank Walduck who, by letter dated 7 December 2000, affirmed the Department's initial decision. By letter dated 17 January 2001, the applicant applied for review by the Information Commissioner, under Part 5 of the FOI Act, of Mr Walduck's decision.

External review process

6. In his application for external review, the applicant raised a number of issues regarding exemptions claimed by the Department, and also raised 'sufficiency of search' issues. Extensive inquiries have been undertaken by FOI officers within the Department, and by my staff, in an effort to locate any additional responsive documents, including inquiries of members of the relevant selection panel.

7. Negotiations were conducted with the applicant in an effort to provide him with as much information as possible from the job applications of unsuccessful applicants for the relevant advertised vacancies, apart from information which could enable identification of those unsuccessful job applicants. At one point, the applicant indicated that he would be satisfied if he could have access to more information from the responses to selection criteria 5 and 6 (on which the selection panel gave the applicant a low ranking), as contained in the statements addressing selection criteria which were lodged by a selected range of unsuccessful candidates. Extensive re-editing of those documents was done in accordance with the applicant's request, but he has subsequently again insisted that he is entitled to obtain access in full to all of the documents in issue.

8. In making my decision, I have taken into account the following material:

    1. the contents of the documents in issue;
    2. the Department's initial decision dated 28 August 2000;
    3. the application for internal review dated 23 November 2000;
    4. the internal review decision dated 7 December 2000;
    5. the application for external review dated 17 January 2001;
    6. copies of various e-mails and file notes relating to searches conducted by the Department to locate all responsive documents;
    7. the applicant's submissions dated 23 December 2000 (relating to application for review no. S 169/00), 13 and 17 June 2001, and 31 July 2001; and
    8. to the extent of its relevance in the present case, material held in respect of the applicant's other applications for review lodged with the Office of the Information Commissioner.

'Sufficiency of search' issues

9. As explained in *Re Smith and Administrative Services Department* (1993) 1 QAR 22 (pp.27-42, paragraphs 12-61) and in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 (pp.499-500, paragraphs 14-15), the Information Commissioner has jurisdiction to conduct an external review where an applicant who applies to an agency for access to documents complains that the searches and inquiries undertaken by the agency to locate requested documents have been inadequate.

10. The Information Commissioner explained the principles applicable to 'sufficiency of search' cases in *Re Shepherd and Department of Housing, Local Government & Planning* (1994) 1 QAR 464 (pp. 469-470, paragraphs 18 and 19) as follows:

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

> "'**document of an agency**' or '**document of the agency**' means a document in the possession or under the control of an agency, or the agency concerned, whether created or received in the agency, and includes -
>
> (a) a document to which the agency is entitled to access; and
>
> (b) a document in the possession or under the control of an officer of the agency in the officer's official capacity;"

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

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

and if so

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

11. The applicant asserts that additional responsive documents of the following kinds should exist in the possession or control of the Department:

1. notes on the evaluation of his application as a deployee;
2. scores recorded by individual panel members after scoring written applications against the selection criteria, for shortlisting purposes;
3. model answers to interview questions;
4. informal referee reports, e.g., by way of notes of telephone conversations;
5. originals of 'joint' shortlisting scoresheets (photocopies of which, *viz*, documents 492-496 in file SD 4/99 and documents 597-601 in file SD 3/99, have been disclosed to the applicant).

12. The procedures adopted, and the documents generated, by selection panels in the Queensland public sector are not uniform (nor are they required to be, since 9 May 1997 when Directive 5/97 issued by the Public Service Commissioner superseded the more

prescriptive Public Sector Management Standard for Recruitment and Selection). In my experience, it is a common practice for members of selection panels to create their own scoring sheets when evaluating written job applications for shortlisting purposes. It is less common for model answers to be prepared in respect of set interview questions. Some selection panels undertake informal referee checks of preferred candidates, while other panels only resort to informal referee checks in an effort to decide between candidates who are difficult to separate on the basis of written applications and/or interview performance. While there was no reason to assume that documents of the first four kinds noted above must exist in the possession or control of the Department, such documents are generated commonly enough in merit selection processes to have afforded a reasonable basis for requesting the Department to make further searches and inquiries in an effort to locate any responsive documents of those kinds.

13. With respect to category (e) above, there were reasonable grounds for believing that the original 'joint' shortlisting scoresheets might still exist in the possession of the Department. From his examination of the copies to which he has been given access, the applicant believes that examination of the original scoresheets would disclose that some scores have been 'whited out'. Even assuming that that did occur, it would not necessarily indicate anything untoward. Initial assessments are liable to be re-evaluated when more detailed comparisons are made between candidates, and as a result of discussion between panel members undertaking a joint evaluation process. In any event, the Department was willing to disclose the original scoresheets if it could locate them. The initial searches conducted by the Department for documents responsive to the applicant's FOI access application located photocopies of the 'joint' shortlisting scoresheets in the Human Resources (HR) section. However, subsequent searches of the HR section have failed to locate the originals. Inquiries have been made by the Department's FOI officers, and by a member of my staff, of the Chairman of the selection panel, and another panel member. Neither of them holds the originals, and neither was able to assist with any further information or possible leads as to their present whereabouts. In a letter dated 5 April 2001, the applicant was provided with copies of all correspondence and file notes relevant to these searches.

14. The same outcome followed from searches and inquiries (including inquiries of the Chairman, and another member, of the selection panel) with respect to the first four categories of documents identified in paragraph 11 above. The selection panel members do not recollect the creation of any documents corresponding to categories (a), (b), (c) and (d), and do not have any such documents in their possession.

15. While I stated above that it was a common practice for members of selection panels to create their own scoring sheets when evaluating job applications for shortlisting purposes, it also frequently occurs that selection panels meet and agree on a joint approach to the scoring of each written application for shortlisting purposes. The HR manager of the Department has stated that this was an accepted practice in the Department, and the Chairman of the relevant selection panel has informed my office that it was the approach adopted by the selection panel in the selection process for the relevant positions. Another member of the selection panel was contacted to verify the

Chairman's recollection. That member had no recollection of preparing individual shortlisting scores, but did recollect a lengthy panel meeting to finalise shortlisting prior to the interviews, and supports the Chairman's account. The preponderance of evidence is that no 'individual' shortlisting scoresheets were created, and I am not satisfied that there are reasonable grounds for believing that documents of the kind referred to in category (b) above exist in the possession or control of the Department.

16. I am satisfied that there are no further searches and inquiries that the Department could reasonably be required to undertake in an effort to locate any additional documents answering the descriptions in categories (a) – (e) from paragraph 11 above.

17. However, because documents matching those descriptions have not been located on the Department's files or in the possession of the panel members, the applicant has contended that searches should be made for files relating to him held under codenames, on which these documents may exist.

18. For a number of years the applicant worked for the former Department of Natural Resources (the DNR). During that time he lodged a number of grievances against officers of the DNR. He had also appealed against appointments within the Department and commenced court proceedings with respect to other matters. Ultimately, after a departmental restructuring at the DNR and a period as a surplus officer seeking deployment (during which the applications the subject of this external review were made), the applicant was retrenched from the Queensland public service in April 1999.

19. During the course of an FOI access application to the DNR, the applicant became aware of the existence of documents relating to him held by the DNR under the codename "---". The documents, and the basis for establishment of the codename, are discussed at pages 9-12 of a letter to the applicant dated 31 May 2000 from Mr F W Fanning (Director, Executive and Legal Services, DNR). Mr Fanning stated that this was done in order to allow officers responsible for dealing with the applicant's actions against the DNR to deal with them without revealing the applicant's identity beyond those for whom such knowledge was essential.

20. The applicant has submitted that the very existence of such documents in the DNR supports his contention of an overall pattern of mishandling his applications and related documents across a number of departments. He asserts that if such documents are held by one department, it is not unreasonable to assume that other departments would use similar processes. He also submitted:

> *… I am not searching for records of dealing involving chief officers, not directly at least. I am proposing a storage place for documents on dealings by lower level officers, but a storage place that only chief officers could approve (if such storage places are or can be legal).*
>
> *The critical role of the chief officers is not with the documents, but with approval of the storage place in which documents may lie. My argument is*

that these storage places for documents would not exist without the knowledge and approval of chief officers, however those storage places might be used. …[17 June 2001]

21. The Department has supplied me with the following internal e-mails and file notes created during the search for coded documents:

    9. e-mail correspondence between Bree Linklater and Kerry Rule, Human Resources Officer, dated 22 December 2000;
    10. internal review-file note
    11. e-mail from Graham Walker, Principal Employee Relations Adviser, to Michelle Duckworth (FOI officer) dated 5 March 2001:
    12. e-mail from Russell Wood, (at the time, Manager, Management Information Unit), to Michelle Duckworth, dated 5 March 2001;
    13. e-mail from Chrystal James, Management Information Unit, to Michelle Duckworth, dated 5 March 2001.

22. In his internal review decision, Mr Frank Walduck informed the applicant:

    Discussions also took place with senior officers of the Human Resources Division regarding the use of codenames rather than surnames for the filing of confidential documentation. I was informed that this was not a practice utilised by this Department and that any relevant documents would have been included on the selection and appointment files identified in the initial search.

23. The applicant has insisted that declarations be obtained in this review (and other external reviews) from the relevant chief executive officer(s). He said:

    Your first condition, then, requires me to take the word of the HRM officer that no codeworded files exist, where as, in the DNR case, the HRM was himself holding "---" documents and withholding them from DNR's FOI unit who knew the documents were being withheld. I only discovered the deceit because of a slip-up with one document.[17 June 2001]

24. There is no material before me which suggests that the relationship of the applicant with other DNR staff over many years, which gave rise to the creation of coded documents, is common to, and liable to result in the use of similar practices by, other departments. The fact that such an extraordinary procedure was used in the DNR, which had longstanding dealings with the applicant, is not sufficient to establish that similar procedures were, or might have been, adopted by other departments or agencies.

25. I am not satisfied that there is a proper or logical basis for refusing to accept the responses of Messrs Wood and Walker to questions specifically asked of the respondent Department in this case, concerning the existence of coded documents. I find that there is no reasonable basis for believing that coded documents concerning the applicant exist in the possession or control of the Department, unknown to senior officers in the Human

Resources and Information Management Units. I am also satisfied that the Department has conducted all reasonable searches and inquiries in an effort to locate any such documents, and indeed in an effort to locate all documents which the applicant believes should exist in response to his FOI access application.

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

26. The Department has claimed that the matter remaining in issue, which comprises identifying information contained in the job applications of unsuccessful candidates for the relevant positions in the Department, is exempt matter under s.44(1) of the FOI Act, in accordance with the principles explained by the Information Commissioner in *Re Baldwin and Department of Education* (1996) 3 QAR 251. The applicant has obtained access to those parts of the job applications the disclosure of which would not, in the opinion of the Departmental decision-makers, enable identification of the respective unsuccessful job applicants.

27. Section 44(1) of the FOI Act provides:

> ***44.(1)*** *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

28. The applicant has not disputed the correctness of the Department's characterisation of the matter in issue as matter the disclosure of which would disclose information concerning the "personal affairs" of the respective unsuccessful job applicants. It will be sufficient if I record my finding that, based on my examination of the matter remaining in issue, I am satisfied that, with some minor exceptions, the matter remaining in issue is properly to be characterised as matter the disclosure of which would disclose information concerning the personal affairs of the respective unsuccessful job applicants, in accordance with the reasons for decision given by the Information Commissioner in *Re Baldwin* at paragraphs 21-23. It is matter which, if disclosed, would disclose the fact that identifiable individuals had made unsuccessful applications for positions SD 3/99 and/or SD 4/99. That is information which concerns the personal affairs of the unsuccessful applicants. Hence the matter in issue is *prima facie* exempt from disclosure under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.44(1).

29. The minor exceptions to which I referred above consist of several segments of information in respect of which I consider that the Department has been overly cautious in making deletions. The prospect that disclosure of those passages could enable identification of the relevant job applicant is, in my opinion, negligible, and I am not satisfied that they qualify for exemption under s.44(1) of the FOI Act. (I will forward to the Department with these reasons for decision copies of the documents in issue on which I have marked those segments of information which qualify for exemption under s.44(1), in accordance with the principles stated in *Re Baldwin*, and my decision at paragraph 53 below. The applicant should be given access to the documents in issue

subject to the deletion of only the marked segments of information referred to in the preceding sentence.)

30. Because of the way that s.44(1) of the FOI Act is worded and structured, the mere finding that information concerns the personal affairs of a person other than the applicant for access must always tip the scales against disclosure of that information (to an extent that will vary from case to case according to the relative weight of the privacy interests attaching to the particular information in issue in the particular circumstances of any given case), and must decisively tip the scales if there are no public interest considerations which tell in favour of disclosure of the information in issue. It therefore becomes necessary to examine whether there are public interest considerations favouring disclosure, and if so, whether they outweigh all public interest considerations favouring non-disclosure.

Summary of applicant's submissions on the public interest balancing test

31. In submissions dated 23 December 2000 (in external review S 169/00), 13 and 17 June 2001, and 31 July 2001, the applicant has addressed arguments on the public interest considerations to be taken into account, and the relative weight that he contends should be accorded them, of which the following passages are representative:

> *14. the accountability outcome, as a positive for disclosure, was tied to the open merit selection process only. This process has some inherent features, namely*
>
> *1. for any person with standing, accountability can be tested by a comparison of their application with that of the successful (best) applicant.* Re Baldwin *provides that application.*
> *2. for any person with standing in the process, the adverse consequence of a bad process is the loss of a promotion or a transfer*
>
> *3. the concern about accountability was a concern for scrutiny, assurance of a process for which no disclosures of wrongdoing in the process have been as yet made*
>
> *My case will be substantively different to the circumstances "balanced" in* Re Baldwin.
>
> *4. the process for which I will be advocating the public interest in accountability will be the deployment process*
>
> *5. Here the adverse consequence of bad process is retrenchment*
> *6. The deployee is successful if he/she meets the selection criteria.*
> *The best application is likely to provide measures of suitability for the position that are higher than "adequate", and is thus not very useful for accountability purposes*

Applicants who gained ratings of "adequate" against the selection criteria provide a better basis for scrutiny of the decision as to whether or not the deployee's application was also "adequate" or "not adequate"

7. Wrongdoing or prima facie evidence of wrongdoing has already been identified in the deployment process and/or any consequent open merit selection process, FOI process, tribunal hearing or such.

8. Information exists tending to show "mobbing" of me across the public service with respect to these processes. (applicant's submission of 23 December 2000)

32. I understand this submission to mean that the public interest in the applicant being able to scrutinise, and hold accountable, agency processes for dealing with his applications for deployment favour disclosure of a wider range of selection process documentation than in the ordinary case of an unsuccessful applicant in a merit selection process (because the applicant merely had to establish that he was suitable for appointment to the advertised vacancy, not that he was the most meritorious available candidate), and is higher than in the ordinary case because:

9. the consequence of the misapplication of the process in his case was retrenchment;
10. the applicant alleges "wrongdoing" in the selection process;
11. the applicant alleges that the events formed part of an orchestrated approach to exclude the applicant from successfully obtaining deployment.

33. I should note in this regard that the applicant was a candidate for deployment at AO8 level in respect of position no. SD 4/99, but his application for the higher SO1 position, SD 3/99, fell to be treated on a merit selection basis.

34. After viewing the edited job applications that have been disclosed to him, the applicant submitted:

… Proven maladministration and prima facie or suspected official misconduct (with respect to public records and the treatment of a public officer, both entailing positions of trust) open the door for me to now obtain the documents without any exempted materials. Where responses to SC5 and SC6 by other applicants refer to unspecified work history/work experience/or such, I claim the right of access to other parts of their applications that describe this experience. (applicant's submission of 13 June 2001)

35. In the same submission, the applicant went on to add:

The public interest in accountability, I hold, includes the interest that the documents go to a person who will drive the processes or be a driver for the

processes of accountability concerning the events that are the subject of the FOI application.

Application of the public interest balancing test

36. The public interest considerations favouring disclosure to the applicant of the matter in issue are:

    12. the general public interest in scrutiny and accountability of government;
    13. the accountability of the Department for the proper conduct of selection processes in accordance with merit and equity principles, but also, in this case (at least with respect to position SD 4/99), in accordance with established government rules and policies for the deployment of surplus public service officers;
    14. the public interest in the fair treatment of the applicant according to law (as to which, see *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at pp.368-379, in particular at pp.376-377, at paragraph 190).

37. The public interest considerations telling against disclosure of the matter in issue to the applicant are the protection of the privacy interests of the unsuccessful job applicants, and the consideration identified by the Information Commissioner in *Re Baldwin* (at paragraph 33) as:

    33. … the probability that some meritorious candidates for appointment, especially from outside the public sector or the particular government agency in which an advertised vacancy has occurred, may be inhibited from applying at all for appointment to a government office if they perceive that the fact of their making an application for appointment may be disclosed in circumstances other than their appointment to the office.

38. The applicant has sought to distinguish his case from *Re Baldwin* on the bases mentioned in paragraphs 31-32 above. Because he was a surplus officer seeking deployment, the applicant asserts that proper scrutiny of the selection process requires comparison of his application with those that were rated at a level that could be equated with *suitability* for appointment, having regard to the relevant OPS Directive 4/98 which provided that:

    Assessment [of a surplus officer seeking deployment or redeployment] *shall be in terms of suitability with regard to the selection criteria for the job, as opposed to relative merit.*…[5.10]

39. In a memorandum by the Chairman of the selection panel dated 8 February 1999 (documents 497-501), he stated:

    One redeployee (Mr G McMahon) (from another Department and registered with OPS) applied for this position.

This applicant was considered first and in accordance with the guidelines.

It was the opinion of the selection panel that, on the face of the application, the applicant would not have the minimum level of competencies to fulfil the requirements of the position but, to more fully assess the applicant, an interview should be held.

This was undertaken and the following quantified assessment made against the criteria.

…

Overall, therefore, the selection panel considered Mr McMahon to be unsuitable for the position.

40. I accept the validity of the applicant's proposition that the interests (with regard to scrutiny and accountability of agency selection processes) of a surplus public service officer who is seeking deployment are different from those of an unsuccessful applicant for appointment or promotion in an ordinary merit selection process. Indeed, the selection processes involved differ in significant respects. The approach referred to in the first two sentences quoted from the report of the selection panel in this case (see paragraph 39 above) is logically correct. The first decision should be as to the suitability (as against the selection criteria for the vacant position) of any candidate for deployment. Should the candidate for deployment be determined to be unsuitable, the selection panel should then proceed with a merit selection process. (Although, I accept that, in a case where a selection panel considers it necessary to interview a candidate for deployment in order to determine his/her suitability for the vacant position, it may well be a more convenient and expeditious use of its time and resources to carry out shortlisting and interviews prior to making either decision.)

41. An agency or a selection panel that does not recognise these distinct decision-making tasks might prejudice the interests of a candidate for deployment. However, I am far from satisfied that, even in such a case, comparisons with the job applications of other unsuccessful candidates, even those who were shortlisted, necessarily affords a valid basis for any meaningful assessment of whether a candidate for deployment ought to have been rated as suitable for appointment to the advertised vacancy.

42. The applicant's claimed basis for wanting to compare his relevant skills, experience *et cetera* with other unsuccessful candidates would only have validity in respect of other candidates who were specifically rated by the selection panel as suitable for appointment to the advertised vacancy (even though not rated as the most meritorious candidate).

43. While it is common for candidates to be assessed as unsuitable at the shortlisting stage on the basis of their written applications, it would be rare for any selection panel to assess candidates as suitable for appointment at the shortlisting stage, i.e., without the

benefit of an interview. It certainly could not be safely assumed that any candidates not shortlisted for interview were regarded by the selection panel as suitable for appointment, unless there were a specific written finding to that effect, and no such findings were recorded by the relevant panel in the present case.

44. Nor do I accept that selection of a candidate for shortlisting necessarily equates to a finding by the selection panel that that candidate was suitable for appointment. Shortlisting does not, in itself, connote that all or any of the candidates selected for interview will be found to be suitable for appointment. It may be that, following interview, no person is found to be suitable for appointment, and the position is re-advertised (as happens from time to time with more senior public sector positions). If a person is appointed to a vacant position, it can be taken that that person was considered suitable, but it does not necessarily follow that any of the other shortlisted candidates was considered suitable. Some selection panels, after interviewing shortlisted candidates, rate them as either suitable or unsuitable for appointment to the advertised vacancy, and rank the suitable candidates in a comparative order of merit. Other selection panels do not specifically address suitability, but merely assess relative merit. In the present case, the report of the selection panel recorded a comparative order of merit of the shortlisted candidates for position SD 4/99, but did not address, or record any findings, as to whether or not the unsuccessful shortlisted candidates were suitable for appointment.

45. In the absence of any such findings by the selection panel, I have difficulty in attributing any substantial weight to the asserted public interest in the applicant being permitted to compare his relevant skills, experience *et cetera* with those of other unsuccessful candidates who were regarded by the selection panel as suitable for appointment to the advertised vacancies.

46. In any event, in the present case, I consider that the material already disclosed to the applicant under the FOI Act, plus the additional material to be disclosed in accordance with my finding at paragraph 29 above, is more than adequate to give a sufficient indication of the relevant skills, work experience *et cetera* of other unsuccessful candidates (including shortlisted candidates), so as to enable the applicant to make comparisons with his own relevant skills, work experience *et cetera*. While some of the withheld identifying information would give more detail as a basis for comparison, I do not consider that its disclosure could give the applicant any substantially greater assistance for his stated purposes, and certainly not to an extent that would justify overriding the privacy interests of the unsuccessful job applicants.

47. With respect to the applicant's asserted interest in accessing matter to enable him to make out a case of maladministration/misconduct, there is no material before me which affords any objective support for a suspicion that the conduct of the selection processes for positions SD 3/99 and SD 4/99 was affected by misconduct or wrongdoing. Therefore, I do not attribute any substantial weight in this case to the applicant's allegations that there was wrongdoing in the selection process, or that these selection

processes formed part of an orchestrated approach to exclude the applicant from successfully obtaining deployment.

48. I note that the applicant appears to believe that he already has sufficient material to enable him to make out a case of maladministration/misconduct. In a letter dated 13 June 2001, the applicant stated:

> *The material shown to me to date accepting some exemptions is sufficient to demonstrate wrongdoing and to raise suspicion of official misconduct.*

49. I do not know through what forum the applicant proposes to make out a case of maladministration/misconduct. However, the courts, and relevant statutory 'watchdog' agencies, would have coercive powers to call for and examine the unexpurgated copies of the documents in issue, if the applicant could persuade the relevant body that that was necessary in the interests of justice. More importantly, there would be legal restrictions on further use or disclosure of information obtained in that way (or, for instance, information obtained by the applicant through curial disclosure processes) that would safeguard the privacy interests of the unsuccessful job applicants so far as possible, in contrast to disclosure of information to the applicant under the FOI Act, which would leave the applicant free to use or further disseminate the information in any way that was not contrary to law.

Conclusion

50. Based on my examination of the matter remaining in issue, I am not satisfied that the public interest considerations claimed to favour its disclosure to the applicant outweigh the public interest considerations favouring non-disclosure (see paragraph 37 above). I find that the matter remaining in issue is exempt from disclosure under s.44(1) of the FOI Act.

Copyright

51. In his application for external review, the applicant queried the practice of the Department in allowing him to inspect certain documents without making full copies. Section 30(3)(c) of the FOI Act provides:

> ***30.(3)*** *If giving access in the form requested by the applicant*
>
> ...
>
> *(c) would involve an infringement of the copyright of a person other than the State;*
>
> *access in that form may be refused and given in another form.*

52. Questions relating to forms of access to non-exempt matter are not questions which the Information Commissioner has jurisdiction to determine (i.e., they do not fall within the categories of reviewable decisions specified in s.71 of the FOI Act). If an agency accepts that s.30(3)(c) is applicable in respect of particular documents, it is appropriate that access be given by way of inspection only.

DECISION

53. I decide to vary the decision under review (being the decision of Mr F Walduck on behalf of the Department dated 7 December 2000) by finding that:

    (a) the segments of matter in issue referred to in paragraph 29 above do not qualify for exemption from disclosure to the applicant under s.44(1) of the FOI Act; but

    (b) the balance of the matter remaining in issue is exempt matter under s.44(1) of the FOI Act.

54. I also decide that there are no reasonable grounds for believing that additional documents, responsive to the terms of the applicant's FOI access application dated 18 March 2000, exist in the possession or control of the Department, and that the searches and inquiries undertaken by the Department in an effort to locate any such documents have been reasonable in all the circumstances of this case.