'GDS' and Queensland University of Technology

(S 121/01, 7 June 2002, Deputy Information Commissioner Sorensen)

(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 is employed by the Queensland University of Technology (the University), and is a member of the academic staff one of its Schools. The Vice-Chancellor of the University received a written complaint from another staff member of the School, following an altercation between the staff member and the applicant on 25 August 2000. Upon receipt of that complaint, the Vice-Chancellor requested the University's Human Resources Department to obtain statements from other staff members. In a letter to the applicant dated 15 September 2000, the Vice-Chancellor gave notice of his decision to initiate a disciplinary investigation and listed seven allegations of possible serious misconduct on the part of the applicant. One of those allegations was based upon a written statement given by a third party, which statement comprises the matter remaining in issue in this review. In his letter to the applicant dated 15 September 2000, the Vice-Chancellor stated that further investigation of the seven allegations was required in accordance with the procedures set out in the University's Enterprise Bargaining Agreement (Academic Staff) 2000-2003 - Disciplinary Action for Misconduct and Serious Misconduct.

4. In accordance with the prescribed procedures under the Enterprise Bargaining Agreement (EBA), the applicant was requested to provide a written response to the allegations within 10 working days. The applicant then went on sick leave and Ms Cathy Grant, an industrial officer with the National Tertiary Education Union, represented him in his dealings with the University. Ms Grant contended that the applicant was unable to respond to the Vice-Chancellor's letter until he was provided with sufficient particulars of the allegations to enable him to respond. The University refused to provide the statements obtained from staff members to support the allegations, asserting that the applicant had already been provided with sufficient particulars of the allegations to enable him to respond. The applicant then applied to the University, by letter dated 22 December 2000, for access, under the FOI Act, to the following documents:

> *1. any complaints made about my conduct or behaviour by any other staff member or former staff member of the University,*
> *2. any communications between staff members or former staff members of the University, including the Vice-Chancellor, regarding the making of complaints against me,*

3. *any communications between staff members or former staff members of the University, including the Vice-Chancellor, regarding the decision to make allegations of possible serious misconduct against me.*

5. By letters dated 12 February 2001, the University's FOI Coordinator, Ms Tania Meggitt, consulted (in accordance with s.51 of the FOI Act) with relevant staff members of the University about the disclosure of their statements concerning the applicant, which had been given to the University's Human Resources (HR) department. Three of the staff members objected to the disclosure of the statements they had provided. The applicant was informed, by letter dated 2 March 2001, of Ms Meggitt's decision to grant him access to 41 folios, subject to the deletion of a small amount of material which Ms Meggitt decided was exempt matter under s.44(1) of the FOI Act. The applicant was also informed that, pursuant to s.51 of the FOI Act, access was deferred in respect of three documents, until the review entitlements of the relevant third parties had been exhausted. (No internal review of Ms Meggitt's decision was sought by the applicant, and the matter found by Ms Meggitt to be exempt under s.44(1) of the FOI Act is not in issue in this review.)

6. By letter dated 2 March 2001, Ms Meggitt informed the third parties of her decision to disclose their statements to the applicant under the FOI Act. Two of the third parties sought internal review of that decision. The internal review was conducted by Mr Ken Baumber, the University's Registrar, who informed the applicant, by letter dated 12 April 2001, that he had decided to vary the initial decision by finding that the statements given by those two third parties were exempt from disclosure under s.40(c) of the FOI Act.

7. By letter dated 31 May 2001, the applicant's representative, Ms Grant, applied to the Information Commissioner for review, under Part 5 of the Act, of Mr Baumber's decision.

External review process

8. The matter in issue (which at the commencement of this review comprised the statements given to the University's HR department by the two third parties) was obtained and examined. At a meeting between members of my staff, the third parties, and officers of the University, the third parties claimed to have been unaware that parts of their statements had been used by the Vice-Chancellor as evidentiary support for certain allegations contained in the Vice-Chancellor's formal letter to the applicant dated 15 September 2000, initiating possible disciplinary action against the applicant, in accordance with the EBA. The third parties were disturbed by this.

9. Each of the third parties applied for, and was granted, status as a participant in this external review, in accordance with s.78 of the FOI Act. The third parties were asked to consider whether they would consent to the disclosure of any part(s) of their statements, and each one agreed to the release of some matter, which, accordingly, is no longer in issue in this review.

10. By letter dated 6 February 2002, I informed the University, and the third parties, of my preliminary view that the matter remaining in issue (with the exception of a small amount of information concerning the personal affairs of individuals other than the applicant) did not qualify for exemption from disclosure to the applicant under s.40(c) or s.46(1) of the FOI Act.

11. By letter dated 19 February 2002, the Registrar of the University informed me that the University accepted my preliminary view and did not wish to contest the matter further.

12. By letters also dated 19 February 2002, each of the third parties informed me that they did wish to contest my preliminary view, and provided submissions in support of their objections to the disclosure of the matter remaining in issue. However, after further discussions and correspondence, one of the third parties withdrew her objection to the disclosure of the balance of her statement, and, accordingly, that matter is no longer in issue.

13. By letter dated 16 April 2002, the University was requested to supply statutory declarations about the circumstances surrounding the taking of the statement from the remaining third party, which statement contains the only matter now remaining in issue in this review. Statutory declarations dated 10 May 2002 were supplied by two officers of the University's HR department, who had requested the third parties to provide statements about the applicant. Both officers had previously supplied a statement about their involvement in the investigation of complaints against the applicant.

14. In making my decision in this matter, I have taken into account:

    1. the contents of the statements of both third parties;

    2. the applicant's FOI access application dated 22 December 2000;

    1. the third party's application for internal review and submissions dated 22 February 2001, 24 August 2001 and 19 February 2002;

    1. the University's initial decision dated 2 March 2001 and internal review decision dated 12 April 2001;

    1. the joint statements by two officers of the University's HR department dated 7 January 2001, and their individual statutory declarations dated 10 May 2002;

    2. the text of the Vice-Chancellor's letter to the applicant dated 15 September 2000; and

    3. the relevant provisions of the EBA.

15. It will be useful to set out the relevant provisions from the EBA, which governed the University's handling of the investigation into complaints about the applicant. Clause 49.4.2 of the EBA provides:

49.4.2 Any allegation of Misconduct or Serious Misconduct will be considered by the Vice-Chancellor. If he/she believes such allegation(s) warrant further investigation, the Vice-Chancellor will:

(i) notify the staff member in writing and in sufficient detail to enable the staff member to understand the precise nature of the allegation(s) and to properly consider and respond to them; and

(ii) require the staff member to submit a written response to the allegation(s) within ten (10) working days of the date of receipt of the written allegation(s). A staff member will be permitted reasonable time during work time to prepare such a response.

16. Clauses 49.4.5 - 49.4.8(iii) of the EBA relevantly provide:

49.4.5 If each of the allegation(s) made against the staff member is denied by the staff member, and the Vice-Chancellor is of the view that there has been no Misconduct or Serious Misconduct, he/she will immediately advise the staff member in writing and may, at the request of the staff member, publish the advice in an appropriate manner.

49.4.6 If one or more of the allegation(s) are admitted by the staff member and the Vice-Chancellor is of the view that the conduct constitutes Misconduct or Serious Misconduct, the Vice-Chancellor will advise the staff member in writing of the decision and the operative date and details of the Disciplinary Action to be taken.

49.4.7 If each of the allegation(s) is wholly or partly denied, or if the staff member has not responded to the allegation(s), the Vice-Chancellor may:

(i) decide to take no further action; or

(ii) in the case of partial denial or non-response, counsel or censure the staff member in relation to the conduct in question and take no further action; or

(iii) refer the matter to the Misconduct Investigation Committee.

49.4.8 Where a matter is referred to the Misconduct Investigation Committee for investigation:

(i) the Misconduct Investigation Committee shall be provided with:

(a) a copy of the written allegation(s) of Misconduct or Serious Misconduct, as the case may be; and

(b) a copy of any written reply to the allegation(s) by the staff member;

(ii) the Misconduct Investigation Committee shall:

(a) have the right to interview persons and receive written statements from persons regarding the allegation(s);

(b) abide by procedural fairness.

(iii) the person who is the subject of the allegation(s) of Misconduct or Serious Misconduct shall:

(a) have the right to be present (with or without a Representative) during all interviews conducted by the Misconduct Investigation Committee;

(b) have the right (personally, or through a Representative) to cross examine persons being interviewed by the Misconduct Investigation Committee during the interview process and in accordance with procedural requirements established by the Misconduct Investigation Committee;

(c) have the right (personally or through a Representative) to cross examine persons who provided written statements to the Misconduct Investigation Committee in accordance with procedural requirements established by the Misconduct Investigation Committee;

(d) have the right (personally, or through a Representative) to call witnesses for interview by the Committee, give evidence, make submissions and present additional documentation which is relevant to the investigation of allegations of Misconduct or Serious Misconduct;

(e) be provided with a copy of all written statements received by the Misconduct Investigation Committee and with a reasonable opportunity to provide a verbal or written response to matters raised in those written statements;

17. I will now turn to a consideration of the exemption provisions that have been invoked in the course of this review.

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

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18. While the University did not seek to rely on s.46 of the FOI Act in its internal review decision, the third party has raised its application.

19. Section 46(1) and s.46(2) of the FOI Act provide:

> ***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.*
>
> ***46.(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.*

20. Section 46(2) excludes parts of the third party's statement from eligibility for exemption under s.46(1), because they consist of matter of a kind mentioned in s.41(1)(a) of the FOI Act (principally, opinion recorded for the purposes of the University's deliberative processes, i.e., deciding what action to take in respect of the original complaint against the applicant), which was obtained from the third party in her capacity as an officer of the University. (See *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at p.292, paragraphs 35-36, and *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.70-71, paragraphs 27-32.) However, the balance of the statement, which consists of factual matter rather than matter of a kind mentioned in s.41(1)(a), is not excluded from eligibility for exemption under s.46(1). (In light of the finding I will express below, it is unnecessary for me to specifically identify the segments of matter which are excluded from eligibility for exemption under s.46(1), by the operation of s.46(2) of the FOI Act.)

Section 46(1)(a)

21. The Information Commissioner discussed the requirements to establish exemption under s.46(1)(a) in *Re "B"*. The test for exemption is to be evaluated by reference to a

hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind the respondent agency not to disclose the information in issue. I am satisfied that there is an identifiable plaintiff (the third party) who would have standing to enforce an obligation of confidence claimed to bind the University not to disclose those parts of her statement which remain in issue.

22. At paragraph 43 of *Re "B"*, the Information Commissioner said that an action for breach of confidence may be based on a contractual or an equitable obligation. There is nothing before me to suggest that the third party might be entitled to rely upon a contractual obligation of confidence in respect of her statement. In relation to equitable obligations of confidence, the Information Commissioner explained in *Re "B"* that there are five cumulative requirements for protection in equity of allegedly confidential information:

1. 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);

2. 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);

3. 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);

4. 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

5. 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).

Requirement (a)

23. I am satisfied that the information contained in the statement which is claimed to be the subject of an obligation of confidence, can be specifically identified.

Requirement (b)

24. It is clear that portions of the statement have already been disclosed to the applicant. Some were disclosed by the Vice-Chancellor in his letter to the applicant dated 15

September 2000 (apparently without the knowledge of the third party); other portions have been disclosed during the course of this review with the consent of the third party.

25. With respect to the undisclosed segments of information contained in the statement, it would appear that they are not known to the applicant. I am satisfied that they have a sufficient degree of secrecy/inaccessibility to satisfy requirement (b) above.

26. The third party has contended that her statement was provided at the request of the University, not as a complaint by the third party against the applicant, but simply in order to assist the University to "contextualise" the formal complaint which had been made against the applicant by another officer, and to assist the University in making a decision about the applicant's alleged improper behaviour. The third party has asserted that the statement was provided reluctantly, and on the understanding that the statement would be kept confidential from the applicant. However, as noted above, and contrary to the third party's alleged understanding, the Vice-Chancellor's letter to the applicant dated 15 September 2000 contained a summary of at least some of the contents of the statement, and identified the third party as the source of that information.

27. The information contained in the statement which has been disclosed to the applicant, through the Vice-Chancellor's letter dated 15 September 2000, can no longer be considered confidential information *vis-à-vis* the applicant. In certain circumstances, however, that might not necessarily disqualify that information from protection in equity. Assuming that circumstances were such that the grant of an equitable remedy would not be futile, a defendant would not ordinarily be permitted to avoid an equitable obligation where the only asserted ground for avoidance arose by virtue of the defendant's own conduct in breach of the equitable obligation. The crucial factor is whether or not the disclosure by the University to the applicant, through the Vice-Chancellor's letter, in itself constituted a breach of an equitable obligation of confidence owed to the third party. If it did, equity might not permit that breach to be compounded by a further disclosure of the information in the form of a copy of the statement: *cf. G v Day* [1982] 1 NSWLR 25, where the Supreme Court of New South Wales was prepared to restrain the publication of confidential information (the identity of an informant in a sensitive police investigation) notwithstanding a prior unauthorised publication of that information (by way of a brief mention in a television news report).

28. On the other hand, if, having regard to all the relevant circumstances, the disclosure by the University of some of the information contained in the statement was not an unconscionable use of information claimed to have been communicated in confidence, then the fact that the information had previously been communicated to the applicant (in circumstances involving no breach of an equitable obligation of confidence) would mean that no protection was available in equity from disclosure to the applicant of the same information in the form of a copy of the statement. For practical purposes then, the application of requirement (c) for exemption under s.46(1)(a), can be treated as determinative, in the circumstances of this case, of whether or not both the undisclosed, and the previously disclosed, information from the statement qualifies for exemption under s.46(1)(a).

Requirement (c)

29. A supplier of confidential information cannot unilaterally and conclusively impose an obligation of confidence: see *Re "B"* at pp.311-316, paragraphs 79-84, and pp.318-319, paragraphs 90-91. The touchstone in assessing whether requirement (c) to found an action in equity for breach of confidence has been satisfied, lies in determining what conscionable conduct requires of an agency in its treatment of information claimed to have been communicated in confidence. That is to be determined by an evaluation of all the relevant circumstances attending the communication of that information to the agency. The relevant circumstances will include (but are not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and circumstances relating to its communication of the kind 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: see *Re "B"* at pp.314-316, paragraph 82.

30. In her submission dated 24 August 2001, the third party acknowledged that no express request for confidentiality was made, but contended that an implied understanding of confidence existed between her and the University. In her submission dated 19 February 2002, the third party stated that:

> *On submission of my 'contextualising' statement, the University Human Resources informed me that the statement was to be held in confidence unless I decided at some point to waive that in confidence restriction.*

31. In his statutory declaration dated 10 May 2002, Mr Stephens (one of the two HR officers referred to in paragraph 13 above) stated that:

> *Prior to the statement from* [the third party] *being supplied I recall having telephone discussions and meetings with* [the third party] *whereby I informed* [the third party] *that her statement would be regarded as a confidential document, however, her statement could be used in evidence if the matter eventually was referred to a Misconduct Investigation Committee under the procedures prescribed under the Queensland University of Technology Enterprise Bargaining Agreement (Academic Staff) 2000-2003. I further advised* [the third party] *that in these matters the person who was the subject of the allegations had a right of reply which would be formally put to* [the applicant] *in a letter from the Vice Chancellor…*

32. The material before me indicates that there was probably some discussion between the University's HR officers and the third party concerning confidential treatment of the third party's statement, but that any statements made by the University's HR officers about confidential treatment were conditional. The HR officers knew, and third party ought reasonably to have understood, that the very purpose for which a statement was sought from the third party, i.e., to assist the investigation of possible disciplinary action against the

applicant, would involve procedures that could require disclosure to the applicant of material adverse to his interests.

33. The third party was aware that she was providing information which was adverse to the interests of a person about whom a formal complaint had been made by another staff member. While the third party has contended that she was not herself intending to make a complaint against the applicant, but was simply providing "contextualising" information in support of the other staff member's complaint, I note that none of the information contained in her statement relates to the incident about which the other staff member complained. Rather, her statement contains details of other instances of the applicant's alleged improper behaviour towards staff members.

34. It seems clear that the University considered that the third party's statement contained fresh allegations of serious misconduct against the applicant which required investigation. In accordance with clause 49.4.2 of the EBA, the Vice-Chancellor notified the applicant of the allegations which had been made against him, and requested a response from the applicant. In his statutory declaration dated 10 May 2002, Mr MacAulay of the HR department stated that he and Mr Stephens explained the investigation process to the third party and the other statement-givers:

> *On 15 September 2000 Mr Chris Stephens and I met with the female staff concerned.. as well as their Head of School and Dean of Faculty. At this meeting we advised that* [the applicant] *had been given a letter from the Vice-Chancellor setting out a number of allegations of possible serious misconduct. We advised the group that* [the applicant] *had ten working days to respond to the allegations. We also advised the group that once the Vice-Chancellor received the response he could decide as per the misconduct provisions to take no action, take disciplinary action or refer the matter to a Misconduct Committee for investigation. As I recall, we advised the group, as is our normal practice, that if the matter was referred to a Misconduct Committee,* [the applicant] *would be provided with all relevant documentation including their Statements and they may be required to appear before the Committee for questioning by* [the applicant] *or his representative regarding their Statements. While the female staff at the meeting expressed concerns for their security, which management undertook to address, they seemed to understand the process and possible steps that lay ahead.*

35. There may have been a misunderstanding between the University and the third party regarding the purpose for which her statement was given and the uses to which the University intended to put it. As I have already noted, it is clear that the University regarded the incidents dealt with in the third party's statement as separate incidents of misconduct on the part of the applicant, which warranted (or bolstered the case for) initiating disciplinary action against the applicant. Once the University had decided to initiate disciplinary action in respect of those incidents (as well as others), the University quite properly considered that details of the allegations made by the third party (and other staff) were required to be disclosed to the applicant under clause 49.4.2 of the EBA, in

order to accord him procedural fairness. The third party, however, contends that she expected that her statement would be kept confidential from the applicant because she was not intending to make a complaint against him. The third party was upset that, without her consent, the Vice-Chancellor included parts of her statement in his letter to the applicant.

36. From the information before me, I am satisfied that the University gave some explanation to the third party of the nature of the disciplinary investigation process, and what use could possibly be made of her statement. The contents of the statement itself (notably the fact that the introductory paragraph endeavours to specify that the author does not regard herself as a complainant, and in particular the contents of the last paragraph) indicate to my mind that the third party was conscious of the nature of what she was doing, and the possible consequences. It appears to me that, in the final paragraph of her statement, the third party acknowledged the possibility that the information she provided might be disclosed to the applicant. It is clear that she wanted some action to be taken against the applicant in respect of his inappropriate behaviour towards others. It is difficult to reconcile the third party's apparent desire for action to be taken against the applicant, with her stated expectation that the information she provided would be kept confidential from him. I do not consider that it was reasonable for the third party to expect that she could ventilate her specific concerns about the applicant's behaviour, in the context of a potential misconduct investigation, on the basis that the information she supplied would be kept secret from the applicant.

37. It is understandable (given the alleged behavioural propensities of the applicant) that the third party was reluctant to be (and is now offended at having been) cast into the role of an additional complainant. On the other hand, as an employee of the University, the third party owed duties of good faith and fidelity to her employer, which encompassed a positive obligation to disclose to her employer any information, acquired in her capacity as an employee, which the employer might reasonably require for the better management of its operations: see *Re Shaw and The University of Queensland* (1995) 3 QAR 107 at paragraphs 55-56. In my view, the third party had a duty to co-operate with the University's efforts to take appropriate steps to deal with alleged misconduct on the part of the applicant, and to supply any information which the University reasonably required in that regard. Moreover, she ought to have been aware of the provisions of the EBA and the possible course the investigation could take, i.e., the matter being referred to a Misconduct Investigation Committee with the applicant then being entitled to obtain copies of relevant evidentiary statements in accordance with clause 49.4.8(iii)(e) of the EBA.

38. However, regardless of what the third party and other statement-givers were or were not told about the investigation process and the uses to which their statements could be put, and whether or not the third party's statement should properly have been regarded as a complaint against the applicant, or as simply providing information in support of another's complaint, the relevant question is still whether, in all the circumstances, it would be unconscionable conduct on the part of the University to disclose the statement of the third party, without her consent, to the applicant. The following statement in *Re "B"* (at p.319, paragraph 93) is relevant:

Thus, when a confider purports to impart confidential information to a government agency, account must be taken of the uses to which the government agency must reasonably be expected to put that information, in order to discharge its functions. Information conveyed to a regulatory authority for instance may require an investigation to be commenced in which particulars of the confidential information must be put to relevant witnesses, and in which the confidential information may ultimately have to be exposed in a public report or perhaps in court proceedings.

39. The relevant circumstances in this case were that an investigation was being undertaken of potentially serious allegations of misconduct against a work colleague, with whom the supplier of information (the third party) was required to continue to interact on a regular basis. The information provided was sensitive and adverse to the applicant's interests, with potential for recriminations and resentments if it were disclosed to the applicant. While these circumstances tend to tell in favour of confidential treatment, the very purposes for which the relevant information was obtained indicate that any understanding or obligation of confidence must necessarily have been subject to implicit exceptions or conditions, comparable to those explained by the Information Commissioner in *Re McCann and Queensland Police* (1997) 4 QAR 30 at pp.53-54, paragraph 58:

I consider that there are three main kinds of limited disclosure which, in the ordinary case, ought reasonably to be in the contemplation of parties to the communication of information for the purposes of an investigation relating to law enforcement. Unless excluded, or modified in their application, by express agreement or an implicit understanding based on circumstances similar to those referred to in the preceding paragraph, I consider that the following should ordinarily be regarded as implicitly authorised exceptions to any express or implicit mutual understanding that the identity of a source of information, and/or the information provided by the source, are to be treated in confidence so far as practicable (consistent with their use for the purpose for which the information was provided) -

(a) where selective disclosure is considered necessary for the more effective conduct of relevant investigations …;

(b) where the investigation results in the laying of charges, which are defended, and, in accordance with applicable rules of law or practice … the prosecutor must disclose to the person charged the evidence relied upon to support the charges; and

(c) where selective disclosure is considered necessary -

(i) for keeping a complainant … informed of the progress of the investigation; and

(ii) where the investigation results in no formal action being taken, for giving an account of the investigation, and the reasons for its outcome, to a complainant … .

40. The language of exception (b) above contemplated a criminal investigation. The comparable exception in a disciplinary/grievance investigation would be where disclosure is necessary to accord procedural fairness to a person whose rights or interests would be adversely affected by the findings/outcome of the investigation, including a person who is subsequently charged with a breach of discipline. As the Information Commissioner explained in *Re Chambers and Department of Families, Youth and Community Care; Gribaudo (Third Party)* (1999) 5 QAR 16 at p.23, paragraph 17:

> *In my view, it is not ordinarily a wise practice for an investigator to give witnesses a blanket promise of confidentiality, since the common law requirements of procedural fairness may dictate that the crucial evidence (and, apart from exceptional circumstances, the identity of its provider(s)) on which a finding adverse to a party to the grievance may turn, be disclosed to that party in order to afford that party an effective opportunity to respond. I do not see how it could ordinarily be practicable to promise confidential treatment for relevant information supplied by the parties to a grievance procedure (i.e., the complainant(s) and the subject(s) of complaint) who should ordinarily expect their respective accounts of relevant events to be disclosed to the opposite party (and perhaps also to relevant third party witnesses) for response. Sometimes investigators may be tempted to promise confidentiality to secure the co-operation of third party witnesses, in the hope of obtaining an independent, unbiased account of relevant events. Even then, however, procedural fairness may require disclosure in the circumstances adverted to in the opening sentence of this paragraph.*

41. Even assuming that the statement of the third party was communicated to the University in circumstances which imposed an equitable obligation of confidence, any such obligation would have necessarily been subject to implicit conditions/exceptions permitting disclosure of information in circumstances where either procedural fairness, or contractual obligations to a staff member under the EBA, required disclosure. That is because conscionable conduct on the part of the University would require compliance with both statute law and common law (including the common law requirements of procedural fairness, and contractual obligations to University staff under the EBA).

42. The crucial question to my mind is whether or not, at the stage reached in the disciplinary process initiated against the applicant, procedural fairness requires disclosure to the applicant of the statement of the third party, or whether the particulars of alleged misconduct given to the applicant are sufficient to comply with the requirements of procedural fairness at this stage of the disciplinary process, such that a conditional obligation of confidence could continue to apply to the statement for the time being. (I note that it seems clear enough that the statement would have to be disclosed to the applicant, in accordance with cl. 49.4.8(iii)(e) of the EBA, if

the particulars of alleged misconduct based on the third party's statement are referred to a Misconduct Investigation Committee.)

43. In *Kioa v West* (1985) 60 ALJR 113 at p.127, Mason J of the High Court of Australia said:

> *The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.*

44. Mason J had earlier explained (at p.126) that his reference to rights or interests "must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests". His Honour continued (at p.127):

> *… the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, that is, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual, and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations …*

45. What constitutes the observance of fair procedures will vary according to the exigencies of particular cases, but ordinarily the duty to act fairly requires that a person be given an effective opportunity to know the substance of the case against the person, including in particular the critical issues or factors on which the case is likely to turn (*cf. Kioa* per Mason J at pp.128-129) so that the person is given an effective opportunity to deal with the case against him or her.

46. It appears from the disciplinary procedures set out in the EBA that serious consequences could flow for the applicant (including, potentially, termination of employment) depending on the Vice Chancellor's judgment in respect of any allegations of misconduct to which the applicant admits (see cl. 49.4.6). I consider that it was unfair to the applicant to require him to communicate a response to each of the particulars of alleged misconduct (in terms of admissions, or denials in whole or in part) without access to the evidence on which the particulars were based. I consider that procedural fairness requires disclosure to the applicant of the statement in issue to enable him to understand the precise nature of the allegations against him and to properly consider and respond to them (*cf.* cl. 49.4.2(i) of the EBA).

47. It follows that disclosure of the statement to the applicant would not constitute unconscionable conduct on the part of the University. Given the nature of the information provided by the third party, the context in which it was provided, the University's own investigation procedures and the requirement to accord the applicant procedural fairness, I am satisfied that equity would not impose an obligation of confidence restraining the University from disclosing to the applicant the adverse information contained in the statement of the third party.

48. I therefore find that requirement (c) to found an action in equity for breach of confidence is not satisfied with respect to the statement of the third party, and that the matter remaining in issue does not qualify for exemption under s.46(1)(a) of the FOI Act. (It is not necessary for me to go on to consider the application to the statement of requirements (d) and (e) for exemption under s.46(1)(a) of the FOI Act.)

Section 46(1)(b)

49. Matter will be exempt under s.46(1)(b) of the FOI Act if:

1. it consists of information of a confidential nature;
2. it was communicated in confidence;
3. its disclosure could reasonably be expected to prejudice the future supply of such information; and
4. the weight of the public interest considerations favouring non-disclosure equals or outweighs that of the public interest considerations favouring disclosure.

(See *Re "B"* at pp.339-341, paragraphs 154-160.)

50. The first of these requirements is, for practical purposes, identical to requirement (b) to found an action in equity for breach of confidence, and my comments in that regard above are equally applicable to the application of s.46(1)(b).

Communicated in confidence

51. Requirement (b) above is similar in nature to requirement (c) to found an action in equity for breach of confidence. The following is a summary of relevant principles with respect to requirement (b) for exemption under s.46(1)(b), taken from the Information Commissioner's decisions in *Re "B"* at pp.338-339 (paragraphs 149-153) and *Re McCann* at paragraphs 21-24, 33-34 and 57-58:

1. The phrase "communicated in confidence" is used in the context of s.46(1)(b) to convey a requirement for a mutual understanding between the supplier and the recipient of the relevant information that the relevant information is to be treated in confidence.

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

3. If there is no evidence of an express consensus, the relevant circumstances attending the communication of the information in issue must be examined to ascertain whether they evidence a need, desire or requirement on the part of the supplier of the information for confidential treatment which, in all the relevant circumstances, the supplier could reasonably expect of the recipient, and which was understood and

accepted by the recipient, thereby giving rise to an implicit mutual understanding that confidentiality would be observed.

4. If there was an express or implicit mutual understanding that information would be treated in confidence, it may also be necessary to construe the true scope of the confidential treatment required in the circumstances, e.g., whether it was or must have been the intention of the parties that the recipient should be at liberty to disclose the information to a limited class of persons, or to disclose it in particular circumstances; see, for example, the usual implicit exceptions to an understanding that confidential treatment would be accorded to information conveyed for the purposes of a law enforcement investigation, that are identified in *Re McCann* at paragraph 58.

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

52. For the reasons explained above at paragraphs 39-41, I am satisfied that any implicit mutual understanding that the statement of the third party would be treated in confidence was necessarily subject to an implicit exception, permitting disclosure to the applicant if procedural fairness required it. I am satisfied that the disciplinary investigation initiated against the applicant had reached the stage where procedural fairness required disclosure to the applicant of the third party's statement. Accordingly, the statement does not qualify for exemption from disclosure to the applicant under s.46(1)(b).

Prejudice to the future supply of information

53. Although it is not strictly necessary for me to do so, given the findings I have made in the preceding paragraph, I should also note that I do not consider that disclosure of the matter in issue could reasonably be expected to prejudice the future supply of like information by a significant number of sources in relation to the investigation by the University of staff complaints.

54. It is clear that there was a level of apprehension about providing the University with information adverse to the applicant. However, there was also obviously a considerable amount of concern about the applicant's behaviour, and a clear desire for action to be taken to remedy that behaviour. If any action were to be taken against the applicant, I consider that staff must or ought to have appreciated that information they provided might have to be disclosed to the applicant. The option open to staff was to provide information on which the University could act, or to say nothing and have the situation persist (as indeed the third party contemplated in the final paragraph of her statement). I am not satisfied that disclosure of the information in issue could reasonably be expected to prejudice the future supply of like information from staff in a similar situation.

55. For the reasons explained above, I find that the matter remaining in issue in the third party's statement does not qualify for exemption from disclosure to the applicant under s.46(1)(b) of the FOI Act.

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

56. In its internal review decision, the University decided that the third party's statement qualified for exemption under s.40(c) of the FOI Act. Although the third party has not expressly relied upon s.40(c), she has not expressly abandoned reliance on it (in contrast to the University, which has done so). I will therefore briefly address the application of s.40(c) of the FOI Act, which 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.*

57. The Information Commissioner explained and illustrated the correct approach to the interpretation and 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* (1995) 2 QAR 744, *Re Shaw*, and *Re McCann*. In applying s.40(c) of the FOI Act, it is necessary to determine:

1. whether any adverse effects on the management or assessment by the University of its personnel could reasonably be expected to follow from disclosure of the matter in issue; and

2. if so, whether the adverse effects, either individually or in aggregate, constitute a substantial adverse effect on the management or assessment by the University of its personnel. The adjective "substantial" in the phrase "substantial adverse effect" means grave, weighty, significant or serious (see *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663, at pp.724-725, paragraphs 148-150).

If the above requirements are satisfied, I must then consider whether the disclosure of the matter in issue would nevertheless, on balance, be in the public interest.

58. In *Re "B"* at pp.339-341 (paragraphs 154-160), the Information Commissioner 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 particular, the Information Commissioner 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 Concise Dictionary, 3rd Rev. ed 1988); "Regard as ... likely to happen; ... Believe that it will prove to be the case that…" (The New Shorter Oxford English Dictionary, 1993).

59. I accept that the investigation by an agency of complaints or allegations of misconduct about officers of that agency is an aspect of the management or assessment by that agency of its personnel.

Substantial adverse effect

60. In his internal review decision dated 12 April 2001, Mr Baumber of the University identified the following adverse effects which he considered could reasonably be expected to follow from disclosure of the matter in issue:

1. [a] *refusal by many staff members to provide statements in the future. This will mean that the best people to assist the University in the course of its investigations will not always provide statements, substantially reducing the University's ability to effectively investigate allegations of disciplinary breaches by staff members;*

2. [a] *reduction in the frankness and candour of statements which are provided. This will mean that the University will have less accurate information on which to assess allegations of disciplinary breaches, seriously prejudicing the University's ability to properly conduct disciplinary proceedings*; [and]

3. [an] *increase in the reliance on oral statements and comments. This will mean that the University will have less reliable and even inaccurate information before them on which to consider allegations of disciplinary breaches.*

61. I have stated above (at paragraphs 53-54) my finding that disclosure of the information in issue could not reasonably be expected to inhibit concerned or aggrieved staff from supplying like information in the future, or from cooperating with similar investigations. Given the University's obligation to follow the procedures laid down in the EBA in conducting its investigation into the applicant's behaviour, I do not see any reasonable basis for expecting that disclosure of the matter in issue could result in a loss of faith by staff in the University. While there may be potential for disharmony in the workplace if and when the applicant returns to work, given what the applicant already knows about the information provided by the third party and other staff members, I do not consider that

disclosure of the matter remaining in issue could significantly increase the potential for disharmony.

62. The University having abandoned its claim for exemption, there is no evidence before me that affords a reasonable basis for expecting that disclosure of the statement in issue will result in the University receiving less frank and reliable information in the future. However, I observe that, if the University requests staff members to provide information in the course of an investigation, the interests of the University in the effective management of its personnel, and the interests of all concerned with the investigation, will be best served if that information is provided in a form that will withstand scrutiny (including by the person the subject of the investigation, who, if the University proposes to take action, will ordinarily be entitled to know the substance of the information provided), i.e., if it is framed in careful and temperate language, and supported by particulars. 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 information of that nature to the subject of an investigation could reasonably be expected to have an adverse effect on the management or assessment by the University of its personnel.

63. Finally, I note that it is a fact of life that both the common law, and the EBA, mandate that procedural fairness be accorded to a member of University staff against whom disciplinary action is initiated. That is the legal context in which the University must manage its personnel. I have difficulty in accepting that disclosure of information to accord procedural fairness to a subject of disciplinary action could have a substantial adverse effect on the management by an agency of its personnel. Just as criminals will go unpunished in the courts if crucial witnesses are not prepared to testify to prove the elements of a contested criminal charge, so disciplinary action cannot be taken against errant staff members if crucial witnesses are not prepared to see the process through. There will be situations where conditional undertakings of confidentiality may enable disciplinary processes to work satisfactorily, but generally speaking I find it too difficult to reconcile the adverse effects claimed by Mr Baumber with the legal realities. It may be true that staff are sometimes reluctant to get involved in the confrontational aspects of disciplinary action taken against a fellow staff member, but only in exceptional circumstances could a disciplinary process be based on evidence kept confidential from the subject of that disciplinary action.

64. For these reasons, I am not satisfied that disclosure of the information in issue at this time could reasonably be expected to have a substantial adverse effect on the management or assessment by the University of its personnel.

Public interest balancing test

65. In his decision, Mr Baumber contended that disclosure of information of the type which is in issue here would cause resentment amongst the affected staff, which would result in a lack of cooperation between staff and potential disruption to the University's teaching, administrative and research activities. Mr Baumber argued that the public interest in the

effective functioning of the University outweighed the public interest in disclosure of the information in issue to the applicant.

66. In *Re Pemberton*, the Information Commissioner analysed a number of authorities which established that there can be circumstances in which there is a public interest in a particular applicant having access to particular documents, which might be sufficient to warrant disclosure to that particular applicant, even though no wider public interest considerations favour disclosure to the world at large. The Information Commissioner applied those principles in *Re Shaw*, stating at paragraph 35:

> *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.*

67. In the present case, the information in issue comprises a number of allegations made against the applicant. The applicant has argued that he has not been provided with sufficient detail regarding those allegations, and the context in which they were provided, to enable him to respond. He is concerned that there may be material, which has not been disclosed to him, which may adversely affect his chances of defending himself against the allegations.

68. I consider that the applicant's involvement in, and concern with, the information contained in the statements is such as to give rise to a public interest in him having access to what has been recorded about him, so that he has an adequate opportunity to properly consider and respond to the allegations against him. There is a strong public interest in the fair treatment of an individual, against whom allegations damaging to reputation and career prospects have been made: see *Re Pemberton* at pp.376-377, paragraph 190. As I noted at paragraph 46 above, if a finding of serious misconduct were to be made against the applicant based upon the information contained in the statements, there is the potential for his employment to be terminated without further notice. I consider that the disciplinary action initiated against the applicant had reached the stage where procedural fairness required disclosure to him of the third party's statement, and I consider that disclosure of that statement to the applicant would, on balance, be in the public interest.

69. For the reasons stated, I find that the matter remaining in issue does not qualify for exemption from disclosure to the applicant under s.40(c) of the FOI Act.

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

70. 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.*

71. In applying s.44(1) of the FOI Act, the first question to ask is whether disclosure of the matter in issue would disclose information concerning the personal affairs of a person other than the applicant for access. If that is the case a public interest consideration favouring non-disclosure is established, and the matter in issue will be exempt, unless there are public interest considerations favouring disclosure which outweigh all public interest considerations favouring non-disclosure.

72. In *Re Stewart and Department of Transport* (1993) 1 QAR 227, the Information Commissioner discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations) as it appears in the FOI Act (see pp.256-257, paragraphs 79-114, of *Re Stewart*). In particular, the Information Commissioner said that information concerns the "personal affairs of a person" if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:

1. family and marital relationships;
2. health or ill health;
3. relationships and emotional ties with other people; and
4. domestic responsibilities or financial obligations.

Whether or not matter contained in a document comprises information concerning an individual's personal affairs is a question of fact, to be determined according to the proper characterisation of the information in question.

73. The matter remaining in issue in this review comprises 3 full paragraphs, and several sentences in two other paragraphs in the third party's statement. It includes the third party's private address, and references to the emotional reactions of two persons to particular situations. I am satisfied that that information falls within the well accepted core meaning of "personal affairs" (discussed above).

74. 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.

75. The applicant's stated purpose in his initial application for access to documents from the University was to obtain copies of complaints against him by officers of the University - as

opposed to summaries or paraphrasing of those complaints – to enable him to properly respond to them. Having regard to the content, and the very limited amount, of information which I have found to be information concerning the personal affairs of persons other than the applicant, I can identify no public interest which would be served by the disclosure of that information to the applicant. It would not add anything to his understanding of the University's decision to investigate his conduct, or to his understanding of the substance of complaints made by the third party.

76. I find that those segments of matter which solely concern the personal affairs of the third party and of another individual comprise exempt matter under s.44(1) of the FOI Act.

DECISION

77. For the foregoing reasons, I set aside the decision under review (being the decision made on behalf of the University by Mr Baumber on 12 April 2001). In substitution for it, I find that:

(a) the matter referred to in paragraph 76 above is exempt matter under s.44(1) of the FOI Act; and

(b) the balance of the matter remaining in issue is not exempt from disclosure to the applicant under the FOI Act.