



## Decision and Reasons for Decision

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**Application Number:** 210644 – Part B

**Applicant:** Dr M Haneef

**Respondent:** Department of Police

**Third Party:** Australian Federal Police

**Fourth Party:** Australian Crime Commission

**Decision Date:** 16 September 2010

**Catchwords:** ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – QUEENSLAND – REFUSAL OF ACCESS:

**EXEMPT INFORMATION – INFORMATION TO WHICH SECRECY PROVISION APPLIES** – whether police officer’s notes include information the disclosure of which is prohibited by a secrecy provision in schedule 1 of *Freedom of Information Act 1992 (Qld)* – whether notes relate to personal affairs of applicant only – whether section 109 of *Constitution (Cth)* prevents Information Commissioner from applying public interest test – whether information exempt under section 48 of *Freedom of Information Act 1992 (Qld)* (FOI Act)

**EXEMPT INFORMATION – INFORMATION AFFECTING PERSONAL AFFAIRS** – police officer’s notes include names of individuals – whether name of person discussed by Department of Immigration and Citizenship is personal affairs information – whether name of person under Department of Police surveillance is personal affairs information – whether name of person in the context of their employment is personal affairs information – whether exemption applies to information concerning the applicant – whether public interest factors favour disclosure of names – whether information exempt under section 44(1) of FOI Act

**SCOPE OF APPLICATION** – whether information in police officer’s notes falls within the scope of the application

**SECRECY PROVISION** – whether disclosure of information in police officer’s notes prohibited by any secrecy provisions

**EXEMPT INFORMATION – INFORMATION AFFECTING RELATIONS WITH OTHER GOVERNMENTS – whether disclosure of information in police officer’s notes could reasonably be expected to damage relations between State and another government – whether information exempt under section 38(a) of FOI Act**

**EXEMPT INFORMATION – INFORMATION AFFECTING RELATIONS WITH OTHER GOVERNMENTS – whether disclosure of information in police officer’s notes could reasonably be expected to ‘divulge information of a confidential nature communicated in confidence by or on behalf of another government’ – whether public interest factors favour disclosure of confidential information divulged by another government – whether information exempt under section 38(b) of FOI Act**

**EXEMPT INFORMATION – INFORMATION AFFECTING CONFIDENTIAL COMMUNICATIONS – whether disclosure of information in police officer’s notes would disclose information of a confidential nature communicated in confidence – whether disclosure of confidential information would prejudice the future supply of information of the same type – whether information exempt under section 46(1)(b) of FOI Act**

**EXEMPT INFORMATION – INFORMATION DISCLOSING DELIBERATIVE PROCESSES – whether disclosure of information in police officer’s notes would disclose consultation or deliberation relating to deliberative processes – does section 41(2) exception or section 41(3) exception apply – whether disclosure of information contrary to public interest – whether information exempt under section 41(1) of FOI Act**

**EXEMPT INFORMATION – INFORMATION RELATING TO LAW ENFORCEMENT – whether there is a lawful method or procedure – whether lawful method or procedure used regarding contravention or possible contravention of law – whether disclosure of information in police officer’s notes could reasonably be expected to prejudice lawful method or procedure – whether information exempt under section 42(1)(e) of FOI Act**

**EXEMPT INFORMATION – INFORMATION SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE – whether information of confidential nature and communicated in confidence – whether information communicated in the course of a lawyer-client relationship – whether information communicated for the dominant purpose of legal advice – whether information exempt under section 43(1) of FOI Act**

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## REASONS FOR DECISION

1. Part A of this decision dealing with all folios other than 147 and 148 was issued on 24 February 2010.
2. This Part B decision deals with the relevant information on folios 147 and 148 and finalises this external review.

### Summary

3. On the information available to me, I find that:
  - on folio 147, all text in lines three, four and seven to 16 (inclusive) is exempt from disclosure under section 48(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**)
  - on folio 148:
    - the third word in line 15 and the first three words in line 18 are exempt from disclosure under section 44(1) of the FOI Act
    - the remaining information—that is, the first two words in line three, the third and fourth words in line four and the first two words in line five—is not exempt from disclosure under the FOI Act and can be released.
4. The decision under review is varied insofar as it relates to folios 147 and 148.

### Background to this review

5. The background to this external review is set out in paragraphs 5-10 of the Part A decision.

### Decision under review

6. The decision under review is the decision issued by the Department of Police (referred to as the Queensland Police Service (**QPS**)) dated 25 September 2008 insofar as it relates to folios 147 and 148.

### Applicable legislation

7. The FOI Act was repealed by the *Right to Information Act 2009* (**RTI Act**)<sup>1</sup> which commenced on 1 July 2009.<sup>2</sup> I am required to consider the application of the FOI Act (and not the RTI Act) in this review as the applicant's application was made under the FOI Act and was not finalised by 1 July 2009.<sup>3</sup>

### Information in issue

8. The relevant information in this review comprises:
  - on folio 147 - all text in lines three, four and seven to 16 (inclusive)
  - on folio 148 - the first two words in line three, the third and fourth words in line four, the first two words in line five, the third word in line 15 and the first three words in line 18.

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<sup>1</sup> Section 194 of the RTI Act.

<sup>2</sup> With the exception of sections 118 and 122 of the RTI Act.

<sup>3</sup> Section 199 of the RTI Act.

## Information relevant to this decision

9. The applicant, QPS, the Australian Federal Police (**AFP**) and the Australian Crime Commission (**ACC**) made submissions in this review including those summarised below.
10. QPS submits that:
- on folio 147, all relevant information is exempt under sections 38(a), 38(b) and 46(1)(b) of the FOI Act
  - on folio 148—
    - the first two words in line three are exempt under sections 38(a), 38(b) and 46(1)(b) of the FOI Act
    - the third word in line 15 and the first three words in line 18 are exempt under sections 44(1) of the FOI Act
11. AFP submits that:
- on folio 147, all relevant information is exempt under section 46(1)(b) of the FOI Act
  - on folio 148, the first two words in line three are exempt under section 46(1)(b) of the FOI Act and
  - *‘there are secrecy provisions which may also prohibit the disclosure of the information in question’.*
12. ACC submits that all relevant information on folios 147 and 148 is:
- exempt under sections 38(a), 38(b), 41(1), 42(1)(e), 43(1) and 46(1)(b) of the FOI Act
  - outside the scope of the FOI application and
  - prohibited from disclosure under a secrecy provision.
13. The applicant submits:<sup>4</sup>
- regarding matter claimed to be exempt under section 38(a) and (b) of the FOI Act:

*Although the AFP led oral evidence at the [AAT] hearing to the effect that it had received permission from the UK authorities to make the disclosure, it maintained its claim for exemption over that same information under s 33(1)(b),<sup>5</sup> on the basis that nothing altered the historical fact that the information had been communicated in confidence.*

*Importantly, however, on the final day of hearing, senior counsel for the AFP orally conceded that the AFP could no longer contend, pursuant to s 33(1)(a)(iii),<sup>6</sup> that the Commonwealth’s international relations may be damaged if the information was disclosed.*

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<sup>4</sup> I note that the applicant has not made submissions regarding section 41(1) of the FOI Act. Given that I am satisfied that none of the relevant information is exempt from disclosure under this provision, procedural fairness does not require these submissions to be sought from the applicant.

<sup>5</sup> Of the *Freedom of Information Act 1982* (Cth) (**Commonwealth FOI Act**), which is similar to section 38(b) of the Queensland FOI Act.

<sup>6</sup> Of the Commonwealth FOI Act, which is similar to section 38(a) of the Queensland FOI Act.

- regarding matter claimed to be exempt under section 42(1)(e) and section 43(1) of the FOI Act—see paragraphs 52 and 73 respectively of the Part A Decision
- regarding matter claimed to be exempt under section 44(1) of the FOI Act—see paragraph 96 of the Part A Decision; also:

*In relation to claims for exemption over personal information of Dr Ali, the Information Commissioner should be cognisant of the observations made by Deputy President McPherson in Haneef and Australian Federal Police at [20]:*

... A similar mystery surrounds statements made by Dr Ali in the course of an interview with police in Queensland that was conducted on 3 July 2007. Details of these statements, or at least some of what he said, initially appear in folios 9 to 11 and some or all of them are repeated in folios 98 to 101 and 126 to 127. In each instance exemption is claimed by AFP pursuant to s 41 of the Act as constituting personal information that it would be unreasonable to disclose. Effect being given to the exemption in respect of some of what was said by Dr Ali to the police, one then subsequently encounters what is apparently the substance of the same information openly disclosed in para 30 on folios 257 to 260.

- regarding matter claimed to be exempt under section 46(1)(b) of the FOI Act:
  - Under section 46(1)(b) of the FOI Act, it is not sufficient for information to be communicated in confidence. The information itself must be confidential in nature. It is relevant, therefore, for the IC to consider whether information over which the exemption is claimed has, and/or continues to have, the requisite character of confidentiality. In that regard, the IC can consider the level of public disclosure of information which has already occurred, not only in the AFP's submissions to the Clarke Inquiry, but also in Mr Clarke's report itself...;*
  - The extent of the public disclosure which has already occurred is also relevant to the assessment of whether release of the documents under the FOI Act could reasonably be expected to prejudice the future supply of similar information from a substantial number of sources available, or likely to be available, to an agency. The concession of senior counsel for the AFP<sup>7</sup> is noteworthy in this regard;*
  - There are countervailing public interest considerations in favour of disclosure which were not able to be taken into account under the Commonwealth provision. These are discussed below.*  
[applicant's footnotes omitted]
- regarding public interest considerations—see paragraph 96 of the Part A Decision; also:

*The QPS submission that the public interest consideration in ensuring the accountability of a law enforcement agency "has been achieved through the release ... and by the examination [of material] by the Clarke Inquiry" is the very argument which has been rejected by the Administrative Appeals Tribunal in Re Downie and Department of Territories.*

14. I also note the applicant's statement that:

*[T]here is a suggestion that the information in question "may" be subject to secrecy provisions. However, the relevant secrecy provisions are not identified.*

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<sup>7</sup> That AFP could no longer contend that the Commonwealth's international relations may be damaged if the information was disclosed.

15. In making this decision, I have taken the following into account:

- the applications made by the applicant
- the original and internal review decisions
- written correspondence, evidence and submissions received from the applicant, QPS, AFP and ACC
- file notes of various conversations between staff members of this Office, QPS, AFP, ACC and the applicant's legal representative during the course of the review
- relevant provisions of the FOI Act as referred to in this decision
- legislation, case law and previous decisions of the Information Commissioner as referred to in this decision
- the content of the material claimed to be exempt
- publicly available information.

### **Findings – relevant information on folio 147**

#### **Section 48(1) of the FOI Act**

16. Section 48 of the FOI Act provides:

**48 Matter to which secrecy provisions of enactments apply**

- (1) *Matter is exempt matter if its disclosure is prohibited by an enactment mentioned in schedule 1 unless its disclosure is required by a compelling reason in the public interest.*
- (2) *Matter is not exempt under subsection (1) if it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to the document containing the matter is being made.*

17. Section 48 of the FOI Act requires consideration of three issues:<sup>8</sup>

- Is there a provision of an enactment mentioned in schedule 1 of the FOI Act that prohibits the disclosure of the information? If so, a public interest consideration favouring non-disclosure of the information is established.
- Does the information relate to the personal affairs of the applicant only? If so, the section 48(2) exception to the section 48(1) exemption applies, and the information can be released.
- Is there a compelling reason in the public interest to disclose the information? If so, the information can be released, despite the provision in schedule 1.

**Is there a provision of an enactment mentioned in schedule 1 to the FOI Act that prohibits the disclosure of the relevant information?**

18. The answer is 'yes' for the reasons set out below.

19. After examining the relevant information on folio 147, I required the ACC to produce further documents related to the information to allow me to take all relevant matters into consideration.

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<sup>8</sup> As noted in *KT and Brisbane North Regional Health Authority* (1998) 4 QAR 287 at paragraph 47.

20. After carefully considering all relevant material, I am satisfied that:

- the relevant information on folio 147 comprises information, the disclosure of which is prohibited by a provision of an enactment mentioned in schedule 1 to the FOI Act (that is, a ‘secrecy provision’)
- a public interest consideration favouring non-disclosure of this information arises and it is *prima facie* exempt under section 48(1) of the FOI Act.

21. Unfortunately, given the nature of the relevant information on folio 147, I am unable to set out more detailed findings, as to do so would:

- effectively reveal the information in issue on folio 147, in contravention of section 87(3) of the FOI Act<sup>9</sup> and
- disclose information, the disclosure of which is prohibited by the relevant secrecy provision, which would place this Office at risk of prosecution for contravention of the secrecy provision.<sup>10</sup>

**Does the relevant information relate to the personal affairs of the applicant only?**

22. The answer to this question is ‘no’.

23. I am satisfied that the relevant information on folio 147 relates to a person other than the applicant. Therefore, the exception to the section 48(1) exemption is not activated.

24. Again, due to section 87(3) of the FOI Act and the relevant secrecy provision, I am unable to set out more detailed findings in respect of this part of the decision.

**Is there a compelling reason in the public interest to disclose the relevant information?**

25. The answer to this question is that the *Constitution* (Cth) (**Constitution**) prevents me from applying the public interest test in section 48(1) of the FOI Act.

26. The relevant secrecy provision has a Commonwealth counterpart which prohibits disclosure in near identical terms.<sup>11</sup> Accordingly, the effect of section 109 of the Constitution is relevant:

**109 Inconsistency of laws**

*When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.*

27. Together, section 109 of the Constitution and the relevant secrecy provision operate to render section 48(1) of the FOI Act invalid to the extent that it is inconsistent with the Commonwealth provision.

28. Accordingly, this Office is not able to apply the public interest test to the relevant information on folio 147 and I have no alternative but to find that it is exempt from disclosure under section 48(1) of the FOI Act.

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<sup>9</sup> Section 87(3) of the FOI Act provides ‘[t]he commissioner must not, in a decision on a review or in reasons for a decision on review, include matter or information of a kind mentioned in subsection (1)’. Section 87(1) refers to ‘matter that is claimed to be exempt matter’.

<sup>10</sup> The offence of contravening the secrecy provision is also set out in the relevant enactment.

<sup>11</sup> The Queensland offence provision also has a Commonwealth counterpart enabling prosecution for the offence of contravening the Commonwealth secrecy provision.



## Findings – relevant information on folio 148

29. The remainder of this decision relates to whether the relevant information on folio 148 can be released.

### **Section 48(1) of the FOI Act**

30. After carefully examining all relevant material,<sup>12</sup> I am satisfied that::

- disclosure of the relevant information on folio 148 is not prohibited by the secrecy provision which applies to folio 147, nor by any other secrecy provision mentioned in schedule 1 of the FOI Act
- the relevant information on folio 148 is not exempt from disclosure under section 48(1) of the FOI Act.

### **Section 44(1) of the FOI Act**

31. Section 44 of the FOI Act provides:

#### **44 Matter affecting personal affairs**

- (1) *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would on balance, be in the public interest.*
- (2) *Matter is not exempt under subsection (1) merely because it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to a document containing the matter is being made.*

...

32. Section 44(1) of the FOI Act requires me to consider the following:

- Does the information concern the personal affairs of person (other than the applicant<sup>13</sup>). If so, a public interest consideration favouring non-disclosure is established.
- Would disclosure of the information be, on balance, in the public interest? If so, it can be released.

33. The Information Commissioner has stated that the 'personal affairs of a person' as it appears in the FOI Act<sup>14</sup> refers to information which:

- concerns the private aspects of a person's life and
- is information which identifies an individual or is such that it can readily be associated with a particular individual.

34. 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.

35. The relevant information on folio 148 comprises the names of people and other more general information. I must first ask whether it is relevant personal affairs information.

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<sup>12</sup> Including the further documents produced by ACC mentioned above regarding the relevant information on folio 147.

<sup>13</sup> Section 44(2) of the FOI Act.

<sup>14</sup> *Stewart and Department of Transport* (1993) 1 QAR 227 at pages 256-267, paragraphs 79-114.

## Names on folio 148

36. In determining whether a person's name constitutes their personal affairs, the Information Commissioner has stated that:<sup>15</sup>

*A person's name, in isolation, does not ordinarily constitute information concerning that person's personal affairs. In Commissioner of Police v the District Court of New South Wales and Perrin (1993) 31 NSWLR 606, Mahoney JA said (at p.638):*

A person's name would not, I think, ordinarily be, as such, part of his personal affairs. It is that by which, not merely privately but generally, he is known.

...

*However, a person's name almost invariably appears in a document in the context of surrounding information. It is the characterisation of a person's name, in the context of the information which surrounds it, which may give rise to difficulties. Thus, Lockhart J, ..., in Colakovski v Australian Telecommunications Corporation...said:*

There is a real question as to whether the name and telephone number can answer the description of 'information relating to the personal affairs' of that person under s.41(1).<sup>16</sup> Viewed as an abstract conception I would be inclined to the view that it could not, but such questions are not considered by Courts in the abstract.

*Thus, while disclosure of a person's name, in the abstract, would not ordinarily be a disclosure of information concerning that person's personal affairs, **disclosure of that name in the context in which it appears may disclose information concerning the person's personal affairs.***

[my emphasis]

37. After carefully examining the relevant information on folio 148, I am satisfied that the following words constitute names of individuals other than the applicant:

- the third and fourth words in line 4
- the third word in line 15 and
- the first three words in line 18.

38. I am satisfied that the two-word name in line 4 does not comprise personal affairs information as it is the name of a government employee<sup>17</sup> and is mentioned in the context of that person's work, rather than in any personal capacity. Accordingly, it is unnecessary for me to consider the public interest question regarding this information and I find that it is not exempt from disclosure under section 44(1) of the FOI Act.

39. However, in respect of the names comprised by the third word in line 15 and the first three words in line 18, I find that:

- the context of the first name indicates that that person was discussed in a document of the Department of Immigration and Citizenship
- the context of the second name indicates that that person had been the subject of QPS surveillance
- mention of the names in these contexts comprises personal affairs information.

## Other general information on folio 148

40. The remaining information on folio 148 comprises:

<sup>15</sup> *Pearce and Queensland Rural Adjustment Authority* (1999) 5 QAR 242 at paragraphs 21-23.

<sup>16</sup> This case refers to section 41(1) of the *Freedom of Information Act 1982* (Cth), which is a similar provision to section 44(1) of the FOI Act.

<sup>17</sup> Of QPS, seconded to the ACC.

- the first two words in line three and
- the first two words in line five.

41. After carefully examining this information, I am satisfied that:

- the first two words in line three do not concern the personal affairs of any person
- the first two words in line five concern the personal affairs of the applicant<sup>18</sup>
- as this information does not meet the threshold requirement that must be satisfied in order for section 44(1) of the FOI Act to apply, it is not exempt from disclosure under section 44(1) of the FOI Act.

**Two names are personal affairs information - is disclosure in the public interest?**

42. As set out above, I am satisfied that two names on folio 148 comprise personal affairs information, requiring me to consider the public interest in release of this information.

43. After carefully considering of all the evidence available to me and the context in which the two names are recorded, I am satisfied that the public interest in protecting and maintaining the personal privacy of these two persons:

- should be accorded substantial weight in the circumstances
- outweighs any public interest considerations favouring disclosure, including Government transparency and accountability, contributing to public debate on important issues, advancing the fair treatment of individuals (including the applicant) in dealings with Government agencies, revealing reasons and contextual information regarding Government decisions, and contributing to the administration of justice both generally and with respect to the applicant.

44. On this basis, I am satisfied that the two names are exempt from disclosure under section 44(1) of the FOI Act.

**Findings – Remaining Information on folio 148**

45. The remainder of this decision relates to whether the remaining relevant information on folio 148 can be released, that is:

- the first two words in line three
- the name comprised by the third and fourth words in line four and
- the first two words in line five

(collectively referred to as the **Remaining Information**).

***Does the Remaining Information fall within the scope of the FOI application?***

46. The answer to this question is ‘yes’.

47. The applicant requested:

*... all documents, created or brought into existence, or received by your Department, on or after 2 July 2007, to the present date, relating to:*

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<sup>18</sup> Section 44(2) provides that information is not exempt under section 44(1) ‘merely because it relates to information concerning the personal affairs of the [applicant]’.

1. *the cancellation of his visa subclass 457 Business (longstay) (Class C), which had an expiry date of 30 August 2010;*
  2. *the decision to detain our client, and his ongoing detention;*
  3. *the issue of a Criminal Justice Stay Certificate, or any other Criminal Justice Certificate in relation to our client, and / or any associated criminal justice visa;*
  4. *the making of a residence determination under subdiv B, Div 7, Part 2 of the Migration Act, in favour of our client;*
  5. *communications with other government Departments or agencies, regarding our client.*
48. After carefully considering the first two words in line three and the name comprised by the third and fourth words in line four on folio 148, and the context in which they appear, I am satisfied that this information is responsive to the application, specifically to point five as it relates to relevant communications with ACC. It may also be responsive to point one of the FOI application, given that:
- line one on folio 148 indicates that folio 148 was created on “Wed 8/8/07”<sup>19</sup>
  - in relation to the applicant’s visa, 20 the then Minister cancelled the visa on 16 July 2007, the Federal Court made an order of certiorari quashing the cancellation on 21 August 2007 and the Full Court of the Federal Court dismissed an appeal lodged by the then Minister on 21 December 2007
  - while folio 148 was created after the date on which the visa was cancelled, it was created before the two appeals were heard and could reasonably be expected to, at least in part, relate to those appeals.
49. After carefully considering the first two words in line five including the context in which they appear, I am satisfied that this information is responsive to point two of the FOI application as it relates to a step taken while the applicant was in detention and it is reasonable to assume that the step was relevant to the decision to continue the applicant’s detention.
50. In summary, I find that the Remaining Information falls within the scope of the FOI application.

***Is disclosure of the Remaining Information prohibited by a secrecy provision?***

51. On the information before me, I am satisfied that no secrecy provisions apply to the Remaining Information.
52. Accordingly, I must consider whether sections 38(a), 38(b), 46(1)(b), 41(1), 42(1)(e) or 43(1) of the FOI Act impact on release of the Remaining Information.

***Section 38(a) of the FOI Act***

53. Section 38(a) of the FOI Act states:

**38 *Matter affecting relations with other governments***

*Matter is exempt matter if its disclosure could reasonably be expected to –*

*(a) cause damage to relations between the State and another government; or*

*...*

*unless its disclosure would, on balance, be in the public interest.*

<sup>19</sup> Neither QPS, AFP nor ACC have submitted that “Wed 8/8/07” should be exempt from disclosure.

<sup>20</sup> See Commonwealth, Clarke Inquiry into the Case of Dr Mohamed Haneef, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (November 2008) vol 1, 162 where the timing of these events is noted.

54. Section 38(a) of the FOI Act requires consideration of two issues:

- Could disclosure of the information reasonably be expected to cause damage to relations between the State and another government? If so, a public interest consideration favouring non-disclosure is established.
- Would disclosure of the information be, on balance, in the public interest? If so, it can be released.

55. I accept the interpretation of the phrase ‘could reasonably be expected to’ as set out in *Attorney-General v Cockcroft*,<sup>21</sup> and observe that:

*...the proposed line of inquiry, while made in the context of the business affairs exemption contained in Commonwealth legislation is relevant in the context of the exemption contained in section 42(1)(h) of the FOI Act.*

*Accordingly ... I must examine whether it is reasonable as distinct from something that is irrational, absurd or ridiculous to expect that disclosing the [information] will ‘prejudice the system or procedure’ [in question].<sup>22</sup>*

56. In relation to the phrase ‘cause damage to relations to relations between the State and another government’, I note that the Full Court of the Federal Court considered the Commonwealth equivalent of section 38(a) of the FOI Act<sup>23</sup> in *Arnold (on behalf of Australians for Animals) v Queensland*<sup>24</sup> (**Arnold**), where Justice Wilcox found:

*...the words “relations between the Commonwealth and a State” refer to the total relationship between the Commonwealth and the relevant State. As is essential in a federation, there exists a close working relationship, over a wide spectrum of matters and at a multitude of levels, between representatives of the Commonwealth and representatives of each State. The word “relations” includes all of those contacts. It would not normally be correct to describe a falling out between particular individuals on each side as constituting damage to “relations” between the two governments, even if there was some loss of co-operation between those individuals. But a dispute may have ramifications sufficiently extensive for it to affect “relations” between the governments as such. Questions of degree arise. They can only be considered in the light of the facts of each case.<sup>25</sup>*

57. While section 38(a) of the FOI Act uses the words ‘relations between the State and another government’ rather than ‘relations between the Commonwealth and a State’, I am satisfied that Justice Wilcox’s observations in *Arnold* are relevant.

58. I also note the definition of ‘government’ set out in section 4 of the FOI Act:

**government** includes an agency and a Minister.

### **Could disclosure<sup>26</sup> damage relations between Qld and another government?**

59. The answer to this question is ‘no’ for the following reasons.

60. On the information available to me, I find that:

<sup>21</sup> (1986) 64 ALR 97 at 106 per Bowen CJ and Beaumont J. See also *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501 at 524 per French CJ.

<sup>22</sup> *VHL and Department of Health*, unreported, Queensland Information Commissioner, 20 February 2009 at paragraphs 52-53.

<sup>23</sup> Section 33A of the *Freedom of Information Act 1982* (Cth).

<sup>24</sup> (1987) 73 ALR 607.

<sup>25</sup> *Arnold*, 616.

<sup>26</sup> Be reasonably expected to cause.

- Queensland and Commonwealth police forces have a statutory obligation to cooperate<sup>27</sup>
- police cooperation and information sharing is subject to relevant laws, including freedom of information / right to information legislation
- if the Remaining Information is disclosed to the applicant:
  - it is not reasonable to expect that individual police officers will refuse to perform a statutory duty
  - it follows that it is not reasonable to expect that cooperation between State and Commonwealth police forces will be diminished
- even if there was some loss of cooperation between particular individual police officers, any ramifications that could reasonably be expected to result from such loss would not be sufficiently extensive to constitute ‘damage’
- there is no reasonable basis upon which to expect that disclosure of the Remaining Information could reasonably be expected to cause damage to relations between Queensland and the Commonwealth or, more specifically, between QPS, AFP and ACC.

61. On this basis, I find that the Remaining Information is not exempt from disclosure under section 38(a) of the FOI Act.

### **Section 38(b) of the FOI Act**

62. Section 38(b) of the FOI Act states:

**38 Matter affecting relations with other governments**

*Matter is exempt matter if its disclosure could reasonably be expected to –*

...

*(b) divulge information of a confidential nature that was communicated in confidence by or on behalf of another government; unless its disclosure would, on balance, be in the public interest.*

63. Section 38(b) of the FOI Act requires consideration of two issues:

- Could disclosure of the information reasonably be expected to divulge information of a confidential nature that was communicated in confidence by or on behalf of another government? If so, a public interest consideration favouring non-disclosure is established.
- Would disclosure of the information be, on balance, in the public interest? If so, it can be released.

64. I repeat and rely on my comments set out above regarding the phrase ‘could reasonably be expected to’ and the FOI Act’s definition of ‘government’.

65. I also note the following observations regarding “the necessary quality of confidence” for information to be ‘information of a confidential nature’:<sup>28</sup>

- Information must possess a sufficient degree of secrecy or inaccessibility for it to be the subject of a confidence. It is *‘only through the communication of*

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<sup>27</sup> See part 10, division 1A of the *Police Service Administration Act 1990* (Qld), section 8 of the *Australian Federal Police Act 1979* (Cth) and section 17 of the *Australian Crime Commission Act 2002* (Cth).

<sup>28</sup> These observations were made in the context of section 46(1)(a) of the FOI Act, but are also relevant in the context of section 38(b) of the FOI Act—see *Morris and Treasury Department* (1995) 3 QAR 1 (**Morris**) at paragraphs 61-62.

*inaccessible information that a confidence is reposed by the confider in the confidant*.<sup>29</sup>

- Also, information *‘may be considered as confidential between two parties because of the context in which it occurs. In these cases, confidentiality inheres not so much in the information itself, but in the association of the information with a particular context which the parties know attaches a special significance to the information*’.<sup>30</sup>

66. Further, I note the following statement about the phrase ‘communicated in confidence’:<sup>31</sup>

*I consider that the phrase ‘communicated in confidence’ is used in this context to convey a requirement that there be mutual expectations that the information is to be treated in confidence. One is looking then for evidence of any express consensus between the confider and confidant as to preserving the confidentiality of the information imparted; or alternatively for evidence to be found in an analysis of all the relevant circumstances that would justify a finding that there was a common implicit understanding as to preserving the confidentiality of the information imparted.*<sup>32</sup>

**Could disclosure<sup>33</sup> divulge information of a confidential nature that was communicated in confidence by or on behalf of another government?**

67. The answer to this question is ‘yes’ for the following reasons.

68. After carefully considering the Remaining Information and the context in which it was communicated and recorded, I am satisfied that the association of the information with a particular context attaches a significance to the information that renders it confidential in nature.

69. I am also satisfied that the Remaining Information was communicated:

- by a Commonwealth agency (that is, AFP) and therefore on behalf of the Commonwealth or “another government”
- to relevant police officers working on “Operation Rain”
- in circumstances where it is reasonable to assume that the parties to the communication shared an implicit understanding that the confidentiality of the information was to be preserved.

**Is disclosure in the public interest?**

70. The answer to this question is ‘yes’ for the following reasons.

71. On the evidence before me, I am satisfied that the following public interest factors favouring disclosure of the Remaining Information should be accorded substantial weight in the circumstances:

- promoting government transparency and accountability through allowing scrutiny of relevant law enforcement and investigative agencies regarding the conduct of

<sup>29</sup> *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (*B and BNRHA*) at paragraph 71(a), citing F Gurry, *Breach of Confidence* (1984) (Gurry) at 70.

<sup>30</sup> *B and BNRHA* at paragraph 71(g), citing Gurry at 78.

<sup>31</sup> This observation was made in the context of section 46(1)(b) of the FOI Act, but is also relevant in the context of section 38(b) of the FOI Act—again, see *Morris* at paragraphs 61-62.

<sup>32</sup> *B and BNRHA* at paragraph 152.

<sup>33</sup> Be reasonably expected to.

police and crime-related investigations and more specifically, the conduct of investigations concerning terrorism-related offences under the *Crimes Act 1914* (Cth) as amended by the *Anti-Terrorism Act 2004* (Cth)

- contributing to public debate on important issues in recognition that the common convenience and welfare of Australian society are advanced by discussion – the giving and receiving of information - about government and political matters<sup>34</sup>
- revealing reasons and contextual information regarding government decisions
- advancing the fair treatment of individuals (including the applicant) in dealings with government agencies and
- contributing to the administration of justice both generally and with respect to the applicant, including disclosing (where possible) sufficient information for the applicant to examine whether:
  - the investigation was conducted fairly and thoroughly, using appropriate methods to gather and test intelligence and evidence
  - reasonable decisions were made based on the available intelligence and evidence
  - the available evidence and intelligence was sufficient or insufficient to justify the formal actions taken.

72. On the other hand, I note that the ACC raised public interest factors favouring non-disclosure that may be summarised as prejudice to on-going and future criminal investigations, due to diminution in the level of cooperation between the Commonwealth and Queensland in relation to the investigation of nationally significant serious and organised criminal activity. I repeat and rely upon the matters set out above regarding this point in the context of section 38(a) and accordingly, find that such outcomes are unlikely and that this public interest factor favouring non-disclosure should be accorded little weight in the circumstances.

73. On the basis of the matters set out above, I find that on balance:

- the public interest factors favouring disclosure of the Remaining Information outweigh the public interest factors favouring non-disclosure
- the Remaining Information is not exempt from disclosure under section 38(b) of the FOI Act.

### **Section 46(1)(b) of the FOI Act**

74. Section 46(1)(b) of the FOI Act provides:

#### **46 Matter communicated in confidence**

(1) *Matter is exempt if—*

...

(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.*

75. Section 46(1)(b) of the FOI Act requires consideration of the following issues:<sup>35</sup>

- Are the following criteria satisfied?
  - the information consists of information of a confidential nature

<sup>34</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 570-1

<sup>35</sup> *B and BNRHA* at paragraphs 146 to 147.



- the information was communicated in confidence?
- disclosure of the information could reasonably be expected to prejudice the future supply of such information

If so, a public interest consideration favouring non-disclosure of the information is established.

- Does the section 46(2) exception to the section 46(1)(b) exemption apply?
- Would disclosure of the information be, on balance, in the public interest? If so, it can be released.

76. In relation to these criteria, I repeat and rely on my comments above regarding the phrases ‘information of a confidential nature, ‘communicated in confidence’ and ‘could reasonably be expected to’. I also note the following statement regarding ‘prejudice to future supply of such information’:

*Where persons are under an obligation to continue to supply such confidential information (e.g. for government employees, as an incident of their employment; or where there is a statutory power to compel the disclosure of the information) or persons must disclose information if they wish to obtain some benefit from the government (or they would otherwise be disadvantaged by withholding information) then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information. In my opinion, the test is not to be applied by reference to whether the particular confider whose confidential information is being considered for disclosure, could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of the sources available or likely to be available to an agency.<sup>36</sup>*

77. Each of the criteria must be satisfied to establish exemption from disclosure under section 46(1)(b) of the FOI Act. Before considering these criteria, I will examine whether the section 46(2) exception to the section 46(1)(b) exemption applies.

#### **Does the section 46(2) exception apply?**

78. One of the requirements of the section 46(2) exception is that the communication be made by the State, an agency or officer of an agency, or a Minister or his/her staff or consultant.<sup>37</sup> As the FOI Act is a Queensland enactment, the agencies and Ministers to which it applies are Queensland agencies and Ministers.

79. I am satisfied that the Remaining Information records AFP communications and therefore that the section 46(2) exception does not apply.

#### **Are the criteria satisfied?**

80. The answer to this question is ‘no’ for the following reasons.

81. For the reasons set out above in relation to the application of section 38(b) of the FOI Act, I am satisfied that the Remaining Information is information of a confidential nature and was communicated in confidence.

82. However, as set out above in paragraph 60, I do not consider it reasonable to expect that disclosure of the Remaining Information would diminish the level of cooperation between the Commonwealth and Queensland in relation to the investigation of nationally significant serious and organised criminal activity.

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<sup>36</sup> *B and BNRHA* at paragraph 161.

<sup>37</sup> The other requirement—that the matter in issue be ‘matter of a kind mentioned in section 41(1)(a)’—is discussed on the following pages of this decision.

83. On this basis, I am satisfied that:

- disclosure of the Remaining Information could not reasonably be expected to prejudice the future supply of such information
- the third criteria for establishing exemption is not satisfied
- the Remaining Information is not exempt from disclosure under section 46(1)(b) of the FOI Act.

**Section 41(1) of the FOI Act**

84. Section 41(1) of the FOI Act provides that:

**41 Matter relating to deliberative processes**

(1) *Matter is exempt matter if its disclosure—*

(a) *would disclose—*

- (i) *an opinion, advice or recommendation that has been obtained, prepared or recorded; or*
- (ii) *a consultation or deliberation that has taken place; in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and*

(b) *would, on balance, be contrary to the public interest.*

85. For information to qualify for exemption under this section, the following criteria must be satisfied:

- Would disclosure of the information disclose material of a type described in 41(1)(a)(i) or (ii) relating to deliberative processes?
- Does the section 41(2) exception or the section 41(3) exception to the section 41(1) exemption apply?
- Would disclosure of the information be, on balance, contrary to the public interest?

86. It should be noted that, unlike other exemption provisions within the FOI Act that incorporate a public interest test, there is no *prima facie* public interest consideration favouring non-disclosure within section 41(1) of the FOI Act. Finding that disclosure would be contrary to the public interest is a separate requirement for exemption which must be independently established.

87. In this regard, it is the responsibility of the party claiming the exemption to establish that:<sup>38</sup>

- specific and tangible harm to an identifiable public interest(s) would result from disclosing the material
- the harm is of sufficient gravity that, when weighed against competing public interest considerations which favour disclosure, it would, on balance, be contrary to the public interest.

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<sup>38</sup> *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 (**Eccleston**) at paragraph 140; *Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206 at paragraph 34.

**Would disclosure divulge information relating to deliberative processes?**

88. The answer to this question is ‘yes’ for the following reasons.
89. After careful examination of folio 148 in its entirety—including the Remaining Information—I am satisfied that:
- the folio is comprised by handwritten notes recording matters discussed during a meeting conducted by AFP as part of its investigation of the applicant
  - the notes were taken by a QPS officer involved in the investigation, who was retrospectively made a member of ACC for the purposes of the investigation<sup>39</sup>
  - the notes record various matters related to the investigation, such as steps that had been taken or were to be taken, and information that had come to hand.
90. Given the relevant context and case law,<sup>40</sup> I am satisfied that disclosure of the Remaining Information would disclose “consultations” and/or “deliberations” that took place during the “deliberative processes” involved in the functions of the Queensland government.

**Do any exceptions apply?**

91. The answer to this question is ‘no’ for the following reasons.
92. On the information available to me, I am satisfied that:
- the Remaining Information does not comprise any of the types of matter listed in section 41(2) or 41(3) of the FOI Act
  - neither exception applies in the circumstances of this review.

**Is disclosure contrary to the public interest?**

93. I repeat and rely upon the comments about public interest set out in paragraphs 71 and 72.
94. On balance, I am satisfied that:
- the public interest factors favouring disclosure of the Remaining Information outweigh the public interest factors favouring non-disclosure
  - disclosure of the Remaining Information is not contrary to the public interest
  - disclosure of the Remaining Information is in the public interest and therefore not exempt from disclosure under section 41(1) of the FOI Act.

**Section 42(1)(e) of the FOI Act**

95. Section 42(1)(e) of the FOI Act states:

**42 Matter relating to law enforcement or public safety**

(1) *Matter is exempt matter if its disclosure could reasonably be expected to -*

...

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<sup>39</sup> According to ACC’s submissions regarding the matter in issue on folios 147 and 148.

<sup>40</sup> *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551 at 560; *Re Waterford and Department of Treasury (No. 2)* (1984) 5 ALD 588 at 606; *VXF and Human Rights and Equal Opportunity Commission* (1989) 17 ALD 491 at 499-500; *Eccleston* at paragraphs 28-30; *Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 43 ALD at paragraphs 14 and 21.

(e) *prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law); or*

96. The following elements must be satisfied to establish a claim for exemption under section 42(1)(e) of the FOI Act:<sup>41</sup>

- Is there is a lawful method or procedure?
- Is the lawful method or procedure is used for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law)?
- Could disclosure of the information reasonably be expected to<sup>42</sup> prejudice that lawful method or procedure?

97. Section 42(1)(e) does not provide blanket protection for every method or procedure adopted by an agency. The methods and procedures used by an agency must be 'lawful'. I note the following comment in relation to the types of methods and procedures that will satisfy section 42(1)(e):

*Each agency will have developed (and will probably continue to develop and refine) methods and procedures to assist in the performance of its particular law enforcement responsibilities. Some methods and procedures may depend for their effectiveness on secrecy being preserved as to their existence, or their nature, or the personnel who carry them out, or the results they produce in particular cases. It is not possible to list the types of methods or procedures which may qualify for protection under section 42(1)(e) of the FOI Act. Each case must be judged on its own merits.*<sup>43</sup>

98. Section 42(5) of the FOI Act states that for the purpose of section 42, the term 'law' includes law of the Commonwealth, another State, a Territory or a foreign country.

**Is there a lawful method or procedure?**

99. The answer to this question is 'yes' as I am satisfied that the Remaining Information refers to particular lawful methods or procedures.

**Is it used regarding a contravention or possible contravention of the law?**

100. The answer to this question is 'yes' as I am satisfied that the lawful methods or procedures were considered or used in preventing, detecting, investigating or dealing with a contravention or possible contravention of Commonwealth counter-terrorism laws.

**Could disclosure reasonably be expected to prejudice the method or procedure?**

101. The answer to this question is 'no' for the following reasons.

102. I am satisfied that disclosure of the Remaining Information:

- would disclose methods and procedures that are very broad and non-specific in nature—that is, the involvement or contemplated involvement of an agency, and a well-known step taken in investigations
- would not disclose any information which is not already in the public domain.

<sup>41</sup> *T and Queensland Health* (1994) 1 QAR 386 (*T and QH*) at paragraphs 10-37

<sup>42</sup> I repeat and rely upon my earlier comments regarding the phrase 'could reasonably be expected to'.

<sup>43</sup> *T and QH* at paragraph 23.

103. While unable to set out more details findings,<sup>44</sup> I am satisfied that given the nature of the relevant lawful methods and procedures, their disclosure would not prejudice those methods or procedures, and the Remaining Information is therefore not exempt from disclosure under section 42(1)(e) of the FOI Act.

### **Section 43(1) of the FOI Act**

104. Section 43(1) of the FOI Act states:

#### **43 Matter affecting legal proceedings**

- (1) *Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.*

#### **Legal Professional Privilege**

105. The general principles of legal professional privilege are well settled and were summarised by the High Court of Australia in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*<sup>45</sup> as follows:

*It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.*

106. The legal professional privilege exemption set out in section 43(1) of the FOI Act reflects the requirements for establishing legal professional privilege at common law. In other words, it protects communications passing between a lawyer and a client where:<sup>46</sup>

- a) *the communication is made in the course of a professional relationship of lawyer and client; and*
- b) *the communication is confidential; and*
- c) *the communication is:*
  - (i) *from the client to the lawyer for the dominant purpose of seeking legal advice; or*
  - (ii) *from the lawyer to the client for the dominant purpose of providing legal advice; or*
  - (iii) *from a third party at the client's request for the dominant purpose of use in assisting the lawyer to provide legal advice;<sup>47</sup> or*
  - (iv) *from the lawyer or the client, or a third party at the request of the lawyer or the client, for the dominant purpose of use in or in relation to existing or anticipated legal proceedings.*

*Paragraphs (c)(i)-(iii) above describe the 'advice limb' of legal professional privilege, while paragraph (c)(iv) describes the 'litigation limb'.*

107. Legal professional privilege is established when these requirements are met.

<sup>44</sup>On account of section 87(3) of the FOI Act.

<sup>45</sup>[2002] HCA 49; (2002) 213 CLR 543 at paragraph 9.

<sup>46</sup>Emilios Kyrou, 'Under Attack: Legal professional Privilege' (2007) 81(3) LJ 32 at 34.

<sup>47</sup>*Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357.

### **Does legal professional privilege attach to the Remaining Information?**

108. The answer to this question is 'no' for the following reasons.
109. As set out above regarding section 38(b) and 46(1)(b), I am satisfied that the Remaining Information comprises information of a confidential nature that was communicated in confidence.
110. However, I am not satisfied that the Remaining Information comprises or records communications:
- made in the course of a lawyer-client relationship
  - for the dominant purpose of seeking legal advice.
111. Accordingly, I am satisfied that the Remaining Information is not subject to legal professional privilege and is therefore not exempt from disclosure under section 43(1) of the FOI Act.

### **DECISION**

112. I vary the decision under review and find that:
- the relevant information on folio 147 - that is, all text in lines three, four and seven to 16 (inclusive) - is exempt from disclosure under section 48(1) of the FOI Act
  - two names on folio 148 - comprised by the third word in line 15 and the first three words in line 18 - are exempt from disclosure under section 44(1) of the FOI Act
  - the Remaining Information - that is, the first two words in line three, the third and fourth words in line four and the first two words in line five - is not exempt from disclosure under the FOI Act.

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**J Kinross**  
**Information Commissioner**

**Date: 16 September 2010**