OFFICE OF THE INFORMATION COMMISSIONER (QLD))) S 189 of 1993 S 215 of 1993 (Decision No. 94016)

Participants:

S 189 of 1993

DR JOHN HEBDEN POPE
Applicant

- and -

QUEENSLAND HEALTH
Respondent

- and -

PHILIP SYDNEY HAMMOND
Third Party

S 215 of 1993

DR JOHN HEBDEN POPE
Applicant

- and -

QUEENSLAND HEALTH
Respondent

- and -

DR STEVEN JOHN ROBBINS
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - "reverse FOI" application - report of investigations into an allegation that the applicant had engaged in scientific fraud - report clears applicant of the allegations made - whether report is exempt under s.45(1)(c) of the *Freedom of Information Act 1992 Qld* - correct interpretation of "professional affairs" in the context of s.45(1)(c) - indicators as to what vocations may qualify as professions for the purpose of s.45(1)(c) - analysis of public interest considerations for and against disclosure of report - whether report is exempt matter under s.44(1) of the *Freedom of Information Act 1992 Qld* - explanation of the contrast between personal affairs and employment affairs - words and phrases: "professional affairs"; "personal affairs"; could reasonably be expected to".

Acts Interpretation Act 1954 Qld s.14A, s.14A(1), s.14B
Freedom of Information Act 1992 Qld s.4, s.5, s.5(1)(a), s.21, s.44(1), s.45, s.45(1), s.45(1)(a), s.45(1)(b), s.45(1)(c), s.45(1)(c)(i), s.51, s.51(2)(e), s.76(2), s.78(2), s.80, s.81, s.87, s.102(2)
Freedom of Information Act 1982 Cth s.43(1), s.43(1)(a), s.43(1)(b), s.43(1)(c), s.43(3), s.43(4)
Freedom of Information Amendment Act 1991 Cth
Freedom of Information Amendment Bill 1991 Cth
Freedom of Information Act 1982 Vic s.33(1) s.34
Freedom of Information Act 1989 NSW s.32(1)(c), Sch.1 cl.7(1)(c)
Freedom of Information Act 1991 SA s.27(1)(c), Sch.1 cl.7(1)(c)
Freedom of Information Act 1992 WA s.33(1)(c), Sch.1 cl.4(3)(a)
Medical Act 1939 Qld
National Health and Medical Research Council Act 1992 Cth s.49
Queensland Institute of Medical Research Act 1945 Qld s.3(2)

Anderson and Australian Federal Police, Re (1986) 4 AAR 414
Burton and Department of Housing, Local Government & Planning, Re (Information Commissioner Qld, Decision No. 94006, 18 April 1994, unreported)
Cannon and Australian Quality Egg Farms Limited, Re (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported)
Carr v Inland Revenue Commissioners [1944] 2 All ER 163
Caruth and the Department of Health, Housing, Local Government & Community Services, Re (Commonwealth AAT, No. W90/215, 18 June 1993, unreported)
Commissioners of Inland Revenue v Makse [1919] 1 KB 647
Currie v Inland Revenue Commissioners, Durant v Inland Revenue Commissioners[1921] 2 KB 332
Dyki v Federal Commissioner of Taxation (1990) 22 ALD 124
Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (Information Commissioner Qld, Decision No. 93002, 30 June 1993) (1993) 1 QAR 60
Green and Office of the Parliamentary Commissioner for Administrative Investigations, Re (Information Commissioner Qld, Decision No. 94015, 30 June 1994, unreported)
Harris v Australian Broadcasting Corporation (1983) 78 FLR 236
Hofman v Deol [1979] 1 NSWLR 640
R v Chemical Institute of Canada [1974] FC 247
Robbins Herbal Institute v Federal Taxation Commissioner (1923) 32 CLR 457
Stewart and Department of Transport, Re (Information Commissioner Qld, Decision No. 93006, 9 December 1993, unreported)
Toomer and Department of Primary Industries & Energy, Re (1990) 20 ALD 575
University of Melbourne v Robinson [1993] 2 VR 177
Williams and Registrar of the Federal Court of Australia, Re (1985) 8 ALD 219
Yabsley and Department of Education, Re (Information Commissioner Qld, Decision No. 94014, 29 June 1994, unreported)
Young v Wicks (1986) 79 ALR 448

DECISION

The decisions under review (being the decisions made on behalf of the respondent by Mr Peter Read, on 2 September 1993 and 29 October 1993, that the "Seawright Report" is not an exempt document under the *Freedom of Information Act 1992 Qld*) are affirmed.

Date of Decision: 18 July 1994

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. This is a "reverse-FOI" application by Dr Pope, the Director of the Sir Albert Sakzewski Viral Research Centre (the SASVRC), who opposes two decisions of Queensland Health to release a report by Professor Alan Seawright (referred to in these reasons for decision as the Seawright Report). Professor Seawright was appointed to investigate a complaint made by a former employee of the SASVRC, Dr Robbins, that Dr Pope had engaged in "scientific fraud" by knowingly publishing invalid biomedical research studies in an international scientific journal, the *International Journal of Cancer*. Professor Seawright is the Director of the National Research Centre for Environmental Toxicology, a Research Unit attached to the University of Queensland.

2. In external review No. S 189/93, the third party who applied under the *Freedom of Information Act 1992 Qld* (referred to in these reasons for decision as the FOI Act or the Queensland FOI Act) for

access to the Seawright Report is Mr Phillip Hammond, a journalist who writes on health and medical matters for the Brisbane daily newspaper, *The Courier-Mail*. In external review No. 215/93, the third party who applied under the FOI Act for access to the Seawright Report is the aforementioned Dr Robbins.

3. Mr Hammond's application for access to the Seawright Report was made at an earlier time than the application of Dr Robbins. Mr Hammond's application was considered by Ms Susan Harris (Manager, FOI and Administrative Law Section) of Queensland Health, and she informed Mr Hammond of her decision to grant access by letter dated 21 July 1993. Prior to making her decision, Ms Harris consulted with Dr Pope pursuant to s.51 of the FOI Act. A firm of solicitors, Minter Ellison Morris Fletcher, made submissions on behalf of Dr Pope, contending that the Seawright Report is exempt from disclosure under s.45(1)(c) and s.44(1) of the FOI Act.

4. In her decision, Ms Harris concluded that disclosure of certain comments contained within the Seawright Report satisfied the first and second elements of s.45(1)(c) in that they -

   (i) would disclose information concerning Dr Pope's professional affairs; and
   (ii) could reasonably be expected to have an adverse effect on those professional affairs.

Ms Harris then considered the third element of s.45(1)(c), the public interest balancing test. She identified a number of public interest considerations weighing for and against disclosure of the Seawright Report and concluded:

> *I consider, however, that the greater public interest will be served by the government demonstrating its accountability for the professional conduct of its employees and the provision of funds to public research projects. Moreover, given that the allegations* [of scientific fraud] *are already in the public arena, there is a very strong public interest in providing the community with the outcome of investigation of the allegations.*

5. In relation to s.44(1), Ms Harris was not prepared to accept that information relating to Dr Pope's work performance was information concerning his personal affairs. Accordingly, she decided to grant Mr Hammond full access to the Seawright Report.

6. By letter dated 18 August 1993, Dr Pope's solicitors applied, on Dr Pope's behalf, for internal review of Ms Harris' decision. The internal review was undertaken by Mr Peter Read (the Executive Director of the Policy and Planning Division of Queensland Health) who, by letter dated 2 September 1993, upheld the initial decision. Mr Read confirmed Ms Harris' findings on the application of both of s.44(1) and s.45(1)(c), and set out detailed reasons for decision, particularly in respect of the application of the public interest balancing test which is incorporated within both s.44(1) and s.45(1)(c) of the FOI Act. Mr Read's reasons for decision will be referred to below, since the respondent has relied on them as submissions in support of its case on external review. By letter dated 30 September 1993, Dr Pope's solicitors applied on his behalf for external review under Part 5 of the FOI Act. The result of that application is that, by virtue of s.51(2)(e) of the FOI Act, Queensland Health has been obliged to defer giving Mr Hammond access to the Seawright Report pending the outcome of Dr Pope's application for review.

7. Dr Robbins' FOI access request was made by letter dated 21 July 1993. Dr Pope was again consulted, and Dr Robbins' application followed a similar course to, and has now reached the same stage as, Mr Hammond's FOI access application. The decision which I am now reviewing, in that respect, is Mr Read's internal review decision dated 29 October 1993 to the effect that Dr Robbins was entitled to have access under the FOI Act to the Seawright Report.

8. Both Mr Hammond and Dr Robbins applied to the Information Commissioner, in accordance with s.78(2) of the FOI Act, to be participants in the external reviews numbered S 189/93 and S 215/93, respectively, and their applications were granted.

9. Since both applications for review under Part 5 of the FOI Act involve the same document and the same issues, they will be dealt with together in this decision.

The External Review Process

10. A copy of the Seawright Report was obtained and examined, together with copies of all correspondence between Queensland Health and the other participants concerning the processing of Mr Hammond's FOI access request. It quickly became apparent from examination of those documents that attempts under s.80 of the FOI Act to effect a settlement between the participants would almost certainly prove fruitless. Accordingly, a conference was convened on 28 October 1993 with the participants, and their legal representatives, in external review S 189/93. The conference was in the nature of a directions hearing. The issues in the external review were discussed, and directions were given setting a timetable for each participant to lodge evidence and written submissions, and (following exchange of evidence and submissions) submissions in reply, in support of their respective cases on the issues for determination.

11. The evidence presented on behalf of Dr Pope comprised a statutory declaration of Dr Pope executed on 26 November 1993, a statutory declaration of Professor Ralph Leonard Doherty executed on 29 November 1993, and a statutory declaration of Paul William Lee executed on 2 December 1993. The only evidence presented on behalf of Mr Hammond comprised Mr Hammond's own statutory declaration executed on 26 November 1993. Queensland Health did not wish to present any evidence. The evidence presented on behalf of the participants is discussed in greater detail below.

12. Dr Pope's second application for external review, objecting to the release of the Seawright Report to Dr Robbins, was received on 25 November 1993. The timetable of directions in the first matter had already been issued at that stage. Following completion of the preparatory steps in the first application for review, Dr Robbins was provided with a copy of the submissions and evidence received from the participants in that case. The opportunity was extended to Dr Robbins to provide any additional evidence and written submissions that he wished to file in respect of the second application for review. Dr Robbins replied by submitting that overwhelming evidence and arguments had already been provided by Mr Hammond and his representatives, and that he did not wish to add anything further as he considered that would be "an exercise in further wastage of time and taxpayers' monies".

The Relevant Exemption Provisions

13. The issues which arise in these external reviews concern the application of s.45(1)(c) and s.44(1) of the FOI Act. Section 45(1)(c) provides as follows:

> ***45.(1)*** *Matter is exempt matter if -*
>
> *...*
>
> *(c) its disclosure -*
>
> *(i) would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person; and*
>
> *(ii) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;*

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

14. Section 44(1) of the FOI Act provides as follows:

> ***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.*

Application of s.45(1)(c) of the FOI Act

15. In paragraphs 66 to 88 of my recent decision in *Re Cannon and Australian Quality Egg Farms Limited* (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported), I discussed the three elements which must be established to satisfy the test for exemption under s.45(1)(c) of the FOI Act.

16. In the context of this case, I must find the Seawright Report exempt from disclosure, by virtue of s.45(1)(c) of the FOI Act, if I am satisfied that:

(a) disclosure of the Seawright Report would disclose information concerning the business, professional, commercial or financial affairs of an agency or another person (s.45(1)(c)(i)); and

(b) its disclosure could reasonably be expected to have an adverse effect on those affairs (s.45(1)(c)(ii));

unless I am also satisfied that disclosure of the Seawright Report would, on balance, be in the public interest.

17. Section 81 of the FOI Act provides that in a review under Part 5 of the FOI Act, the agency which made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant. In the present case, therefore, the formal onus remains on Queensland Health to justify its decision that the Seawright Report is not exempt under s.45(1)(c). Queensland Health can discharge this onus, however, by demonstrating that any one of the three elements which must be established to found a valid claim for exemption under s.45(1)(c) cannot be made out. Thus, the applicant in a "reverse-FOI" case, while carrying no formal legal onus, must nevertheless, in practical terms, be careful to ensure that there is material before the Information Commissioner from which I am able to be satisfied that all elements of the exemption provision relied upon (in this case the three elements of s.45(1)(c)) are established.

18. As to the first element of s.45(1)(c) (which, as I explained in *Re Cannon* at paragraphs 67 to 77, involves the proper characterisation of the information in issue), I am satisfied that the information contained in the Seawright Report does not concern the business, commercial or financial affairs of Dr Pope. I consider that Beaumont J, sitting as a judge of the Federal Court of Australia, was clearly correct in *Young v Wicks* (1986) 79 ALR 448 when he made the following observations (at p.453) on the phrase "information ... concerning a person in respect of his business ... affairs" in s.43(1)(c) of the *Freedom of Information Act 1982 Cth* (the Commonwealth FOI Act):

> *... the applicant is employed by the Queensland Government as the senior pilot of the ministerial air unit. As a government employee, the applicant is not conducting any business or carrying on any commercial operation in her own right or on behalf of any other person. Her activities are carried out pursuant to her contract of government employment. It follows, in my view, that the information in the subject documents does not concern the applicant in respect of her "business affairs" within the meaning of s.43(1)(c)(i).*

19. Similarly, Dr Pope was, at all material times, an employee of a Queensland government authority, and the contents of the Seawright Report cannot be characterised as information concerning his business or commercial affairs. The relevant information is not of such a nature that it could be characterised as concerning the "financial affairs" (according to the ordinary meaning of that term as explained at paragraph 76 of *Re Cannon*) of Dr Pope, or indeed of any other person or agency. I should also add that the contents of the Seawright Report could not be characterised as information concerning the business or commercial affairs of any other person or agency.

20. Dr Pope does assert, however, that the contents of the Seawright Report concern his "professional affairs" for the purposes of s.45(1)(c) of the FOI Act. At paragraph 73 of my reasons for decision in *Re Cannon*, I said:

> *A question closely related to this characterisation exercise is the meaning of "business, professional, commercial or financial affairs". None of these terms is defined in the FOI Act, so they are to be given their ordinary meaning, or whichever of their accepted meanings is most appropriate to the statutory context. The only word which strikes me as presenting any difficulties in this regard is the word "professional", and I propose to give it detailed consideration in a forthcoming decision (no issue as to its meaning arises in the present case).*

Ascertaining the appropriate meaning of the word "professional" in the context of s.45(1)(c) necessitates an examination of rather more complex concepts (as evidenced by the following discussion) than are involved in giving meaning to the words "business", "commercial" and "financial".

Meaning of "Professional Affairs"

21. The words "professional affairs" are used in s.43(1) (the business affairs exemption) of the Commonwealth FOI Act but are not used in s.34 (the business affairs exemption) of the *Freedom of Information Act 1982 Vic* (the Victorian FOI Act). The words "professional affairs" are also used in s.32(1)(c) and Sch.1 cl.7(1)(c) of the *Freedom of Information Act 1989 NSW*, s.27(1)(c) and Sch.1 cl.7(1)(c) of the *Freedom of Information Act 1991 SA*, and s.33(1)(c) and Sch.1 cl.4(3)(a) of the *Freedom of Information Act 1992 WA*, but no decided cases have yet arisen in those jurisdictions in which the meaning of the words "professional affairs" has been considered. The case law on s.43(1)(c) of the Commonwealth FOI Act is therefore one of the few sources of assistance in interpreting the meaning of the words "professional affairs" in this context, although a difference in the wording of s.43(1)(c) of the Commonwealth FOI Act when compared with s.45(1)(c) of the Queensland FOI Act must be taken into account. Section 43(1)(c) of the Commonwealth FOI Act is in the following terms:

> ***43. (1)*** *A document is an exempt document if its disclosure under this Act would disclose:*
>
> *...*

> *(c) information (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his business or professional affairs or concerning the business, commercial or financial affairs of an organization or undertaking, being information:*
>
> *(i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his lawful business or professional affairs or that organization or undertaking in respect of its lawful business, commercial or financial affairs; or*
>
> *(ii) the disclosure of which under this Act could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.*

22. Section 43(1)(c) of the Commonwealth FOI Act makes a clear distinction between information "concerning a person in respect of his business or professional affairs" and information "concerning the business, commercial or financial affairs of an organization or undertaking ...". (Section 43(3) of the Commonwealth FOI Act provides that a reference to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth or a State or by a local government authority.) The making of this distinction would appear to produce the following results:

(a) both a person and an organisation or undertaking can have business affairs, that may qualify for protection under s.43(1)(c) from adverse effects through disclosure of information under the Commonwealth FOI Act; but

(b) if a person has commercial or financial affairs which cannot also be characterised as business affairs (presumably because the person is not engaged in running a business) those commercial or financial affairs are not eligible for protection under s.43(1)(c) (whereas they are eligible in the case of an organisation or undertaking); and

(c) if an organisation or undertaking is capable of having professional affairs, and such professional affairs cannot also be characterised as business, commercial or financial affairs, they are not eligible for protection under s.43(1)(c) (whereas professional affairs are eligible for protection in the case of a person).

23. There is logic behind the making of the distinction in (b) since there is little point in having a business affairs exemption extend to the commercial or financial affairs of natural persons who are not engaged in running a business. (I note that in *Re Stewart and Department of Transport* (Information Commissioner Qld, Decision No. 93006, 9 December 1993, unreported), I expressed the view (at paragraphs 103 and 79-80) that domestic commercial transactions, and financial affairs, of natural persons will ordinarily fall within the ambit of their "personal affairs" for the purposes of s.44(1) of the Queensland FOI Act). The distinction referred to in (c) may simply reflect an assumption that only natural persons are capable of entering a profession, and hence only natural persons are capable of having professional affairs (*cf.* paragraphs 60-62 below).

24. In the context of the phrase "concerning a person in respect of his business or professional affairs" in s.43(1)(c) of the Commonwealth FOI Act, the logical interpretation of the word "professional", in my opinion, is that it takes its colour from the neighbouring word "business", i.e., it refers to affairs relating to the running of a professional practice for the purpose of generating income from fees charged for the provision of professional services. The word "professional" may well have been inserted for more abundant caution in case providers of professional services might not have been thought of in some quarters as being engaged in running a business. For instance, only a few years

before the Commonwealth FOI Act was enacted, Lee J of the New South Wales Supreme Court made these observations in *Hofman v Deol* [1979] 1 NSWLR 640 at p.646:

> *... ordinarily one makes a distinction in the mind between the field of trade and commerce and the carrying on of a profession; and this distinction is most readily made, in my view, in regard to the professions of law, medicine and dentistry. Beyond these three, the readiness of the mind to dissociate a particular profession from the field of trade or commerce may be less marked; and it is unnecessary for me to concern myself with the question as to where the line is to be drawn, because law, and medicine, and dentistry, have always been regarded as professions in the fullest sense, and as standing separate and apart from the field of trade or commerce as those expressions are ordinarily used.*

25. Section 45(1) of the Queensland FOI Act is substantially modelled on s.43(1) of the Commonwealth FOI Act. Certainly s.45(1)(a) and s.45(1)(b) of the former are virtually identical to s.43(1)(a) and s.43(1)(b) respectively of the latter. Section 45(1)(c) of the Queensland FOI Act, however, has some significant differences from s.43(1)(c) of the Commonwealth FOI Act, one of which is that the wording of s.45(1)(c) of the Queensland FOI Act does not attempt to make a distinction of the kind referred to in paragraphs 22-23 above, referring instead in a compendious way to "information ... concerning the business, professional, commercial or financial affairs of an agency or another person". The word "agency" refers to an agency as defined for the purposes of the FOI Act, and the word "person" in this context must (as explained in *Re Cannon* at paragraph 34) include both corporations and natural persons. Thus no clear distinction is drawn in s.45(1)(c) of the Queensland FOI Act between certain categories of affairs which are eligible for protection only in relation to natural persons and other categories of affairs which are eligible for protection only in relation to organisations (including corporations and government agencies).

26. It appears that what the drafter of s.45(1)(c) of the Queensland FOI Act has done (perhaps following the lead set by cl.7(1)(c)(i) in Schedule 1 to the *Freedom of Information Act 1989 NSW*) is to take the four categories of affairs mentioned in s.43(1)(c) of the Commonwealth FOI Act and collapse them into one compendious description of the kinds of affairs intended to be covered by the provision, and which might apply distributively to agencies and other persons (both natural and corporate) as appropriate. It is difficult to know whether this is a case where the drafter believed that simplification of the Commonwealth provision could be achieved with the modern, plain English drafting style, but failed to appreciate the significance of the distinctions inherent in the wording of the Commonwealth provision, or whether there was a conscious policy choice to abandon those distinctions in the corresponding Queensland provision. I have noted what I take to be the logic in the distinction referred to at point (b) of paragraph 22 above, but perhaps the view was taken that it is not uncommon for information to qualify for exemption under more than one exemption category, and that there was no point in preserving the distinction drawn in s.43(1)(c) of the Commonwealth FOI Act at the expense of a simpler drafting style.

27. In any event, I must interpret the words which have been enacted by the Queensland Parliament. (I note that no reference to the meaning or scope of the phrase "professional affairs" in the context of s.45(1)(c) of the FOI Act is to be found in either the Attorney-General's Second Reading Speech or the Explanatory Memorandum in respect of the *Freedom of Information Bill 1991 Qld*, nor in the Electoral and Administrative Review Commission's Report on Freedom of Information (Serial No. 90/R6; December 1990), nor in any other extrinsic materials to which regard might be had in accordance with s.14B of the *Acts Interpretation Act 1954 Qld*.)

28. The basic object of s.45(1) of the FOI Act is to provide a means by which the general right of access to documents in the possession or control of government agencies can be prevented from causing unwarranted commercial disadvantage to persons and business entities engaged in private sector commercial activities (who supply information to government or about whom government collects information) and to government agencies which carry on commercial activities. In my opinion, the object of s.45(1)(c) and the objects of the FOI Act as a whole, are best served by giving the word "professional" a meaning which takes its colour from the words "business", "commercial" and "financial" which surround it in the context of s.45(1)(c). At paragraph 81 of my reasons for decision in *Re Cannon*, I observed that the common link among those three words is to activities carried on for the purpose of generating income or profits.

29. The four adjectives in the phrase "business, professional, commercial or financial affairs" were clearly not intended, because of the substantial overlap between them, to establish distinct and exclusive categories, but rather the phrase was intended to cover, in a compendious way, all forms of private sector commercial activity, and thereby to also cover commercial activities carried on by government agencies. The use of the words "professional affairs" was, in my opinion, intended to cover the work activities of persons who are admitted to a recognised profession, and who ordinarily offer their professional services to the community at large for a fee, i.e. to the running of a professional practice for the purpose of generating income.

30. The interpretation which I prefer as being the most logical in the statutory context under consideration is in harmony with what appears to be the correct approach to the interpretation of the phrase "professional affairs" in s.43(1)(c) of the Commonwealth FOI Act. The Senate Standing Committee on Legal and Constitutional Affairs in its 1987 "Report on the Operation and Administration of the Freedom of Information Legislation" (issued following its review of the Commonwealth FOI Act after five years experience of the Act's practical operation) said of the meaning of the words "professional affairs" in s.43(1)(c):

> *... with regard to self-employed persons ... the precise limits of 'profession' are not significant. For example, the work-related affairs of a self-employed real estate agent would fall within the scope of 'business' in the phrase 'business or professional affairs'. It would be unnecessary to decide if the occupation of real estate agent was a 'profession'.*
>
> *14.20 The issue with respect to employed professionals is less easily resolved because matters relating to their status as professionals may be closely entwined with their status as employees. For example, documents relating to the work of a salaried doctor may relate both to the employer's affairs and to whether the doctor is a fit person to retain a right to practice (and hence arguably to the employee's professional affairs).*
>
> *14.21 The Committee takes the view that the expression 'professional affairs' should be confined to activities analogous to business. The emphasis should be on the running of a medical, legal etc. practice, not an individual's membership of a professional body or entitlement to practice as a member of the profession.*
>
> *...*
>
> *14.23 To avoid possible doubts, the committee recommends that the Act be amended to make clear that 'professional affairs' relates to the running of a professional practice, not the status of an individual as a member of a profession.*

31. This recommendation by the Senate Committee was implemented by the *Freedom of Information Amendment Act 1991 Cth* which inserted a new subsection 43(4) in the Commonwealth FOI Act. The explanatory memorandum to the *Freedom of Information Amendment Bill 1991 Cth* explained the reason for the amendment as follows:

> *Clause 30 implements a Senate Committee recommendation to make clear that the exemption in s.43 of the Act, for documents the disclosure of which would unreasonably adversely affect a person in respect of his lawful professional affairs, relates to the running of a professional practice rather than the status of an individual as a member of a profession. Clause 30 inserts a new sub-section 43(4) to provide that for the purpose of s.43, information is not taken to concern a person in respect of the person's professional affairs merely because it is information concerning the person's status as a member of a profession.*

32. The interpretation of the phrase "professional affairs" in s.45(1)(c) of the Queensland FOI Act which I have stated in paragraph 29 above, is not only consistent with the preferred approach to interpretation of the same term in s.43(1)(c) of the Commonwealth FOI Act, but it is also, in my opinion, the interpretation that is most consistent with the object of s.45(1) of the Queensland FOI Act, and the interpretation that best furthers the objects of the Queensland FOI Act as a whole (*cf.* s.14A of the *Acts Interpretation Act 1954 Qld*). This is particularly so when one considers the position of persons who are admitted to membership of a recognised profession, but who practise their profession as salaried employees of a government agency.

33. It is a clear object of the FOI Act to enhance government's accountability (see s.5(1)(a) of the FOI Act), and this must include enhancing the accountability of government employees for the performance of their duties in the public interest. The FOI Act affords no specific exemption for information that might adversely affect an employee of a government agency in respect of his or her employment affairs, and this is only logical since to do so would be inimical to the attainment of one of the major objects of FOI legislation, i.e., enhancing government's accountability and keeping the community informed of government's operations. (I note in this regard that information relating to the discharge by a public sector employee of the duties of his or her employment is ordinarily not information that concerns the personal affairs of that employee for the purposes of s.44(1) of the FOI Act, as explained below at paragraphs 110-116.)

34. Professionals are employed by government agencies, and paid from public funds, to exercise the skills and knowledge attained through their professional training in pursuit of the public interest objectives which comprise the mission of the agency with whom they accept employment. It is difficult to see any reason why professionals employed in government agencies should not be just as accountable to the public they are employed to serve, for the discharge of their employment duties, as other government employees who are not members of a recognised profession. Yet if the word "professional" in s.45(1)(c) were interpreted as extending to employees of government agencies who are members of a recognised profession, it would allow them a possible avenue to resist scrutiny of their performance of their employment duties (through disclosure of information under the FOI Act) which is not available to other government employees.

35. Considerations of this kind appear to have influenced the decision of the Federal Court of Australia in *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236. Beaumont J held that the applicant, who was a solicitor employed by the ABC to manage its in-house legal department, was not entitled to rely on s.43(1)(c) of the Commonwealth FOI Act in respect of information which related to her discharge of the duties of that position, and which she claimed would, if disclosed, adversely affect her professional affairs. Beaumont J held that s.43(1)(c) was not available to the applicant for two reasons, the first of which turned on facts particular to the case, but the second of which is of more general importance. Beaumont J said (at p.250):

> *There is a more fundamental objection to the claim to this exemption. In my view, the benefit of the operation of s.43 is not available to a person within an agency or undertaking. Nor, in my view, is it available to the agency or undertaking itself: the section read in conjunction with s.3(1)(b) and the explanatory memorandum make it plain enough that it is a provision the object of which is to protect, within reasonable limits, the interests of third parties dealing with the agency or*

undertaking and supplying information to it in the course of that dealing ...

36. There may be room for some argument as to whether Beaumont J was mistaken in his view that s.43 was not available to the Australian Broadcasting Corporation itself, having regard to the terms of s.43(3) of the Commonwealth FOI Act which are noted above at paragraph 22 (although it appears from p.249 of the decision that Beaumont J was aware of s.43(3)). In any event, that issue is immaterial for the purposes of s.45(1) of the Queensland FOI Act, since the wording of s.45(1) makes it quite clear that the s.45(1) exemptions are available to an agency, as that word is defined for the purposes of the Queensland FOI Act.

37. However, Beaumont J's finding that s.43(1)(c) of the Commonwealth FOI Act was not available to a professional person employed by a Commonwealth agency clearly forms part of the *ratio decidendi* of the *Harris* case.

38. It is arguable that on a literal interpretation of s.43(1)(c) of the Commonwealth FOI Act, an employee of a Commonwealth agency is a person, and if that employee is also a member of a recognised profession, then that employee is capable of having professional affairs for the purposes of s.43(1)(c). Beaumont J, however, eschewed any literal interpretation of this kind in favour of an interpretation which he believed better served the objects of the legislation. Though Beaumont J did not refer to it, his finding was, in my opinion, also supportable on the basis that, in the context of s.43 as a whole, the word "professional" takes its colour from the neighbouring word "business", and refers to the running of a professional practice on a fee for service basis.

39. Beaumont J's view that the benefit of the operation of s.43(1)(c) of the Commonwealth FOI Act is not available to a person within an agency or undertaking has been accepted in the Commonwealth jurisdiction. Thus in *Dyki v Federal Commissioner of Taxation* (1990) 22 ALD 124, the Commonwealth AAT rejected a contention that information relating to the employment affairs of tax auditors employed by the Australian Taxation Office concerned those persons in respect of their professional affairs. The Tribunal relied (at p.136) on the passage from *Harris v ABC* set out above, and was also unpersuaded that the audit activities of a person employed by the Australian Taxation Office can properly be characterised as that person's "professional affairs".

40. In a supplementary submission to me dated 20 June 1994, the solicitors for Dr Pope argued as follows:

> *The meaning of section 45(1)(c)(i) has not been decided in Queensland.*
>
> *In relation to the equivalent section of the Commonwealth Act (section 43(1)(c)), Beaumont J stated in Harris v. Australian Broadcasting Corporation (1983) 78 FLR 236 at 250 that: "In my view, the benefit of the operation of s.43 is not available to a person within an agency or undertaking". His Honour did not expand on the reasoning for his view. He was followed on this point without comment, in re Dyki and Federal Commissioner of Taxation (1990) 22 ALD 124.*
>
> *With respect to His Honour's view in Harris, it is submitted that this interpretation should not be applied in Queensland.*
>
> *It is submitted that the exemption (subject to satisfying the requirements of the section) should be available to any person, regardless of whether they are employed by the government or otherwise. Any person may have professional affairs which may be adversely affected by release of certain information. These adverse consequences are not absent merely because the person is employed by the government.*
>
> *It has been suggested that, as the object of the Act is to enhance government's*

> *accountability, Parliament must have intended all government employees to be open to scrutiny, whether members of a recognised profession or not. With respect, this cannot be allowed to restrict the clear and unambiguous words of section 45(1)(c). The goal of accountability is satisfactorily addressed by the "public interest" qualification to the section.*

41. I have difficulty in accepting that submission. Although decisions of the Federal Court of Australia may not be strictly binding on a Queensland tribunal (in the way that decisions of the Supreme Court of Queensland or the High Court of Australia must be taken as binding) I consider that a decision of a superior court of record, especially the Federal Court of Australia which has accumulated expertise in the interpretation and application of the Commonwealth FOI Act, must be regarded as being of high persuasive authority. I note that Beaumont J's decision in *Harris v ABC* has not been doubted or criticised by other judges or tribunals in the Commonwealth jurisdiction, but appears to have been accepted and applied in that jurisdiction.

42. The position of Dr Pope, who was at all relevant times a salaried employee of a Queensland government authority, is, for the purposes of this issue, indistinguishable from the position of the applicant in *Harris v ABC*, who was admitted to membership of a recognised profession, but was a salaried employee of a Commonwealth government authority. As I have noted above in paragraph 38, the literal interpretation which Dr Pope's solicitors urge me to follow in their submission quoted above was also clearly available on the terms of s.43(1)(c) of the Commonwealth FOI Act, and Beaumont J was urged to adopt it by the applicant in *Harris v ABC*. Beaumont J refused to adopt the literal interpretation because it was inconsistent with the object of the provision and of the legislation as a whole. I note that s.14A(1) of the *Acts Interpretation Act 1954 Qld* provides that: *"In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation"*. I consider that I ought to follow Beaumont J's approach to the interpretation of the identical phrase "professional affairs" in an almost identical statutory context, unless I am satisfied that his approach was mistaken. It is clear, however, from my observations at paragraphs 32-34 and 38 above, that I consider that there are sound reasons which would support Beaumont J's view, certainly insofar as it would exclude from the ambit of the phrase "professional affairs" the employment affairs of a person admitted to a recognised profession who is employed by an agency subject to the Queensland FOI Act.

43. Although it is arguable that, on a literal construction, the words of s.45(1)(c) of the Queensland FOI Act extend to a person who is a member of a recognised profession, and who is employed by a government agency, I do not think, for the reasons advanced at paragraphs 32-34 above, that the legislature could have intended such a result. Such a result would raise other complexities: does a person have professional affairs when the person is admitted to membership of a recognised profession, but is employed by government in a capacity which does not require the person to provide the services associated with his or her profession - for example, a medical practitioner employed as a hospital administrator, or a solicitor employed as a consumer affairs investigator?

44. The interpretation which I have endorsed at paragraph 29 above would, in any event, ordinarily exclude professional persons employed by government, other than any who might be engaged in offering their professional services to the public for a fee. I am not sure how many professional persons employed by government would satisfy that requirement. Whether Beaumont J's decision in *Harris v ABC* should be followed so as to exclude them also from the scope of s.45(1)(c) is an issue that can be reserved for consideration if and when it should arise.

45. It might be objected that the total exclusion of professionals employed by government goes too far. Admission to membership of a profession generally entails certain obligations as to standards of conduct which go beyond the scope of employment or the engagement to provide professional services. Breach of those standards may result in disciplinary action, and in serious cases, exclusion from membership of the profession. (I note that these are the very kinds of matters which the Commonwealth Parliament intended to exclude from the scope of the phrase "professional affairs"

in s.43(1)(c) of the Commonwealth FOI Act, by the 1991 amendments referred to in paragraph 31 above.) Professional persons employed by government agencies, it could be argued, have professional affairs over and above the activities performed pursuant to their contracts of employment with government agencies. If an issue of this kind should arise in a future case, I am prepared to give it fresh consideration on the facts disclosed. There is one area in which I consider that a concession may well be appropriate. I have in mind the possibility that professional people, whether employed in the public or private sector, who volunteer their professional services for *pro bono* work, ought still to be able to claim that such work concerns their professional affairs, since, as noted below at paragraphs 61-62, a commitment to altruistic community service is, in theory (and fortunately, with many professionals, in practice), one of the identifying characteristics of a profession.

46. This possibility apart, however, unless the professional affairs of government employees arise as a result of an engagement to provide their professional services for a fee (e.g. pursuant to the limited right of private practice enjoyed by many professionals who are employed as academics in tertiary institutions, or staff specialists in public hospitals) they will not fall within what I consider to be the correct interpretation of professional affairs in the context of s.45(1)(c) of the Queensland FOI Act.

Does the Seawright Report Concern Dr Pope's Professional Affairs for the Purposes of s.45(1)(c)?

47. The supplementary submission dated 20 June 1994 from Dr Pope's solicitors also addressed the following argument on Dr Pope's status:

> *Should the above submission not be accepted, it is further submitted that Dr Pope does not fall within the qualification which has been suggested. Although, strictly speaking, Dr Pope is on the payroll of the Queensland Department of Health, this is for administrative purposes only. The Sir Albert Sakzewski Virus Research Centre, of which Dr Pope is the director, is an independent research organisation. It only receives a minor proportion of its funding from the Department of Health and, to this end, it is convenient for Dr Pope to be on that Department's payroll. He could not properly be regarded as an employee of a government agency or authority.*

48. I cannot see any substance in this submission. It is my understanding that the SASVRC is a body attached to the Royal Children's Hospital (whose Chief Executive Officer commissioned Professor Seawright to conduct his investigation and prepare the Seawright Report) and that it is a body for which the Brisbane North Regional Health Authority has administrative responsibility. In my opinion, Dr Pope in his capacity as Director of the SASVRC, is an employee of a Queensland government agency. In any event, however, the charge of "scientific fraud" relates to Dr Pope's conduct in 1984 and 1985 when he was a salaried employee of the Queensland Institute of Medical Research (QIMR). According to Dr Pope's *curriculum vitae* which is annexed to the statutory declaration filed by Dr Pope in these proceedings, Dr Pope was Deputy Director of the QIMR from 1969-1984 and Senior Principal Research Fellow at the QIMR from 1984-1987. The QIMR is a statutory body established under the *Queensland Institute of Medical Research Act 1945 Qld* for the purpose of research into any branch or branches of medical science (s.3(2)) particularly in relation to diseases of particular significance to Queensland.

49. The information contained in the Seawright Report relates to Dr Pope's activities as a salaried employee of the QIMR, a Queensland government agency. On the interpretation of "professional affairs" which I have endorsed at paragraph 29 above, I am not satisfied that the information contained in the Seawright Report is information which concerns the professional affairs of Dr Pope for the purposes of s.45(1)(c) of the FOI Act.

50. There is also some doubt as to whether Dr Pope is a member of a profession. Dr Pope is a research scientist (who describes his specialty as that of "virologist") and a very distinguished one. He holds the following degrees from the University of Queensland: B.Sc. (1953), M.Sc. (1958), Ph.D.

(1963), D.Sc. (1984). He is a member of the Australian Society for Immunology, the Clinical Oncological Society of Australia and ANZAAS (the Australian and New Zealand Association for the Advancement of Science). He is not, however, qualified as a medical practitioner entitled to be registered under the *Medical Act 1939 Qld*. A member of my staff has made recent inquiries of Ms Susan Harris of Queensland Health who advised that her initial decision under the FOI Act, and the decision of Mr Peter Read on internal review (both of which found that certain information in the Seawright Report concerns Dr Pope's professional affairs, and, if disclosed, could reasonably be expected to have an adverse effect on those affairs) proceeded on the (mistaken) assumption that Dr Pope was a medical practitioner engaged in medical research. Neither decision-maker was aware that Dr Pope is in fact a research scientist, albeit in areas related to medical research. Queensland Health does not wish to make a submission on the issue of whether a research scientist is a professional for the purposes of s.45(1)(c), since it is content to rest its case on the public interest considerations which it submits warrant disclosure of the Seawright Report.

51. In view of the conclusion which I have reached at paragraph 49 above, it is not strictly necessary for me to address the issue of whether a research scientist is a professional for the purposes of s.45(1)(c) of the FOI Act. However, I propose to make some general observations on the issue of how one assesses whether an occupation qualifies as a profession for the purposes of s.45(1)(c) of the FOI Act, in the hope that they may assist FOI decision-makers if the issue arises in future cases.

Who are Professionals for the Purposes of s.45(1)(c)?

52. The only occasion on which a like issue has been considered by a superior court of record in Australia, is the decision of Beaumont J of the Federal Court of Australia, applying s.43(1)(c) of the Commonwealth FOI Act in *Young v Wicks* (1986) 79 ALR 448. The applicant, who was the senior pilot of the ministerial air unit of the Queensland government, sought judicial review of a decision by an officer of the Commonwealth Department of Aviation to grant an application by an employee of Brisbane TV Ltd (Channel Seven) for access under the Commonwealth FOI Act to certain documents relating to the applicant. Beaumont J said (at p.453):

> *In my view, the air navigation activities of a pilot employed by government cannot properly be characterised as her "professional affairs".*
>
> *The ordinary dictionary definition of a profession is "a vocation requiring knowledge of some department of learning or science, esp one of the three vocations of theology, law and medicine [formerly known specifically as* the professions or the learned professions*]":* Macquarie Dictionary. *In* Bradfield v FCT *(1924) 34 CLR 1 at 7, Isaacs J said that the word "profession" is "not one which is rigid or static in its signification; it is undoubtedly progressive with the general progress of the community ...". The authorities are reviewed, in an industrial context, in* Re Social and Community Welfare Services (State) Award *(1984) 8 IR 364 at 365-6; and for a sociological perspective see Boreham, Pemberton & Wilson* The Professions in Australia *(1976), University of Queensland Press, pp 6-7. But, however progressive the concept of a "profession" may be, no attempt was made in the present case to adduce evidence of any usage which would indicate community acceptance of the air navigation activities of a pilot employed by government as "professional affairs". In the absence of any evidence of any such usage, it is not, in my opinion, open to the applicant to seek to extend the ordinary dictionary meaning of the term "professional affairs". That ordinary meaning should, in my view, be applied in s.43(1)(c)(i). In the result, this claim for exemption must fail.*

53. This passage was cited and applied in *Re Dyki and FCT* where Deputy President Gerber of the Commonwealth AAT said (at p.136):

> *(43) In this case, as in* Young v Wicks, *no attempt was made to adduce evidence*

> *that would indicate community acceptance of the audit function of officers in the ATO as "professional affairs". Some of these officers have a legal background, others have an accounting background whilst others are qualified purely by experience. The totality of ATO auditors does not represent a group of thoroughbreds similarly educated with knowledge of some department of learning or science. Instead, they resemble a real cross-breed where some of the group possess no academic qualifications at all. Those qualified only by experience surely cannot fall within the ordinary dictionary definition of profession viz "a vocation requiring knowledge of some department of learning or science". Thus, in the absence of evidence of community acceptance of the audit activities of ATO officers as "professional affairs", I am not prepared to extend the ordinary dictionary meaning of the term "professional affairs". The claim for exemption pursuant to s.43(1)(c) of the Act must fail.*

54. Further assistance can be obtained from cases which consider the meaning of the words "profession" and "professional" in other legal contexts. In *Commissioners of Inland Revenue v Makse* [1919] 1 KB 647, Scrutton LJ of the English Court of Appeal said (at p.657):

> *... a "profession" in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an operation which is substantially the production or sale or arrangements for the production or sale of commodities.*

55. In *Currie v Inland Revenue Commissioner*s, *Durant v Inland Revenue Commissioners* [1921] 2 KB 332, Scrutton LJ added a further possible identifying characteristic of a profession (at p.343):

> *... I myself am disposed to attach some importance on findings as to whether a profession is exercised or not to the fact that the particular man is a member of an organised professional body with a recognised standard of ability enforced before he can enter it and a recognised standard of conduct enforced while he is practising it. I do not for a moment say it settles the matter, but if I were deciding a question of profession I should attach some importance to that particular feature.*

56. Starke J of the High Court of Australia in *Robbins Herbal Institute v Federal Taxation Commissioner* (1923) 32 CLR 457 at p.461 considered that:

> *The word implies ... professed attainments in special knowledge as distinguished from mere skill, "knowledge" which is "to be acquired only after patient study and application" (*United States v Laws [*(1896) 163 US 258]). Thus many vocations may fall within the accepted and ordinary use of the word; such, for instance, as those of architects, accountants, engineers, journalists, bankers, and so forth. But whether a person in any given case carried on a profession is a question of degree and always of fact.*

57. In *Carr v Inland Revenue Commissioners* [1944] 2 All ER 163, du Parcq LJ of the English Court of Appeal said (at p.166-7):

> *I think that everybody would agree that, before one can say that a man is carrying on a profession, one must see that he has some special skill or ability, or some special qualifications derived from training or experience. Even there one has to be very careful, because there are many people whose work demands great skill and ability and long experience and many qualifications who would not be said by anybody to be carrying on a profession.*

> *Ultimately, one has to answer this question: Would the ordinary man, the ordinary reasonable man - the man, if you like to refer to an old friend, on the Clapham omnibus - say now, in the time in which we live, of any particular occupation, that it is properly described as a profession? I do not believe one can escape from that very practical way of putting the question, in other words, I think it would be in a proper case a question for a jury ... Times have changed. There are professions today which nobody would have considered to be professions in times past. Our forefathers restricted the professions to a very small number; the work of the surgeon used to be carried on by the barber, whom nobody would have considered a professional man. The profession of the chartered accountant has grown up in comparatively recent times, and other trades, or vocations, I care not what word you use in relation to them, may in future years acquire the status of professions. It must be the intention of the legislature, when it refers to a profession, to indicate what the ordinary intelligent subject, taking down the volume of the statutes and reading the section, will think that "profession" means.*

This passage has been referred to with approval by Lee J of the Supreme Court of New South Wales in *Hofman v Deol* [1979] 1 NSWLR 640 at p.646.

58. In the Canadian case of *R v Chemical Institute of Canada* [1974] FC 247 at p.251, Urie J of the Federal Court of Canada considered that:

> *Reference to standard dictionaries discloses the word "profession" in its broadest sense was first applied to the three learned professions of divinity, law, and medicine and subsequently to the military profession. During the centuries those categories have been expanded and subdivided and the word "profession" now is used more widely to refer to "a vocation in which a professed knowledge of some department of learning is used in its application to the affairs of others, or in the practice of an art founded upon it" (Shorter Oxford Dictionary, 3rd Edn).*

59. I find the first part of the dictionary definition quoted in this passage particularly apposite to the context of s.45(1)(c) of the FOI Act, since it accords with my view that the words "professional affairs" pertain to the running of a professional practice whereby professional services are ordinarily offered to members of the public (be they individuals, corporations or government agencies) on a fee for service basis. The other dictionary definition which I find helpful in this context is from *Black's Law Dictionary*:

> ***Profession***. *A vocation or occupation requiring special, usually advanced, education and skill; e.g. law or medical professions. Also refers to whole body of such profession.*
>
> *The labour and skill involved in a profession is predominantly mental or intellectual, rather than physical or manual.*
>
> *The term originally contemplated only theology, law, and medicine, but as applications of science and learning are extended to other departments of affairs, other vocations also receive the name, which implies professed attainments in special knowledge as distinguished from mere skill.*

60. There has also been a considerable body of academic writing on the qualities which define the concept of a "profession". For example, in J Disney, J Basten, P Redmond and S Ross, *Lawyers* (Law Book Co., 1977) the concept of professionalism is examined at Chapter 3 and reference is made to G. Millerson (*The Qualifying Associations: A Study in Professionalisation* (1964), p.5), who, in analysing the sociological literature, found that the traits most frequently mentioned as the essential elements of a profession were:

(1) skill based on theoretical knowledge;
(2) the provision of training and education;
(3) testing the competence of members;
(4) organisation;
(5) an ethical code of conduct; and
(6) altruistic service.

61. In the literature concerning the ethical conduct of the legal profession, there are also characteristics discussed which may be useful in identifying other "professions" for the purposes of s.45(1)(c) of the FOI Act. Thus, in *Harrison's Law and Conduct of the Legal Profession in Queensland* (2nd. Ed., G N Williams, The Lawyers Bookshop Press, 1984) it is said (at p.25) that:

> *A profession has been defined as a calling, admission to which requires special training, education, and character, and which has an idea of public service. The last element is the most important. It imposes on lawyers a special code of conduct and is the clue to the most important rules contained in that code.*

62. From the material discussed above, it is possible to distil the following set of indicators (not all of which, but certainly the first and fourth of which, I would regard as essential requirements) as to when a vocation answers the description of a "profession" for the purposes of s.45(1)(c) of the FOI Act:

(a) The vocation requires special advanced knowledge and skill with respect to some department of learning or science, which is used in its application to the affairs of others. The knowledge concerned has both a theoretical and practical aspect to it. The focus of the department of learning or science is primarily on the exercise of the intellect as opposed to performance of solely physical or manual skill. This factor would be characterised by completion of some form of tertiary study involving successful completion of assessment as a mandatory prerequisite for entry into the profession.

(b) As well as this study, requirements may exist for admission into, or by, a body or association that has control over membership of the group claiming to comprise the profession, perhaps by enforcing a recognised standard of ability as a prerequisite to entry.

(c) There be some ongoing requirement for good conduct by members of the profession, in the sense that commission of a breach of recognised standards of professional and ethical conduct will lead to disciplinary action being taken against the offender, with serious breaches resulting in loss of membership of the profession. This requirement will extend beyond satisfactory performance in the delivery of professional services, and will extend to a requirement that the person be of good character in the conduct of his or her life generally. These requirements give rise to professional codes of conduct which may either be established by the professional association itself, or by legislation. The professional code of conduct should not merely be voluntary; the obligation to comply with the code of conduct should be mandatory for all members of the profession.

(d) The aims of the professional group should include altruistic public service; members are intended to put the interests of the community before self-interest or the interests of their professional colleagues.

(e) There is widespread community acceptance and recognition of the vocation as a profession.

63. I do not propose to attempt to list all those vocations which could properly be described as "professions" according to these indicators. I consider that medical practitioner, dentist, barrister and solicitor, architect, chartered accountant and engineer certainly qualify, and doubtless several others. On the other hand, by way of example, I do not think that the occupation of journalist would qualify, since, although there are now tertiary courses in journalism and many journalists are highly educated, completion of advanced tertiary study is not yet a mandatory requirement for entry to that occupation. (This is consistent with the line of reasoning applied to tax auditors in *Re Dyki*, see paragraph 53 above.)

64. The question of Dr Pope's membership of a profession was briefly addressed in the supplementary submission lodged by Dr Pope's solicitors on 20 June 1994, as follows:

> *There would seem to be no difficulty in accepting that an employee of the government or one of its agencies may also be a member of a profession, for example the solicitor in Harris.*
>
> *In Young v. Wicks (1986) 13 FCR 85 at 90, Beaumont J applied the ordinary dictionary definition of a profession, being "a vocation requiring knowledge of some department of learning of science ...". He also recognised that the term would extend with the general progress of the community. In that case, no evidence was given that the community accepted the air navigation activities of a pilot as "professional affairs". Therefore His Honour declined to extend the ordinary dictionary meaning of the term.*
>
> *In this case, however, there can be no doubt that Dr Pope, being a research scientist, is a member of the recognised profession of medical research.*
>
> *If evidence is required on this point, reference is made to the affidavits filed earlier in this matter.*

65. Dr Pope's evidence includes an extensive *curriculum vitae*, detailing his qualifications and membership of associations (as noted at paragraph 50 above) and his imposing list of publications in respect of his research interests.

66. Professor Doherty (a former Director of the QIMR) has provided a statutory declaration in which he describes Dr Pope as a "scientist of the highest national and international repute, who has made outstanding contributions to knowledge".

67. The statutory declaration of Paul William Lee deposes that Mr Lee is the Chairman of the Committee of Management of the SASVRC and that he participates in the supervision of the Centre's performance in administration, including the performance of Dr Pope as Director of the Centre. Mr Lee deposes to his belief that Dr Pope has an excellent reputation as a Research Scientist and Virologist. The basis for his belief is his personal knowledge of the high regard in which Dr Pope is held by members of the scientific community both in Australia and internationally.

68. The evidence filed on behalf of Dr Pope does not address all of the indicators referred to in paragraph 62 above. It is possible that Dr Pope could establish to my satisfaction that his vocation as a research scientist and virologist qualifies him as a professional. Some of the indicators favour Dr Pope, e.g. his tertiary qualifications and advanced knowledge and skill in a specialised branch of learning or science, and the fact that the research in which he has engaged has been carried on for the benefit of the wider community.

69. On the other hand, I am not aware of any system of accreditation, or control of entry, to a profession of research science. I presume that any person with appropriate tertiary qualifications in science could commence work with a private sector or public sector employer engaged in activities which would allow the person, without reference to any kind of regulatory authority or professional association, to describe himself or herself as a research scientist.

70. No evidence is available to me which discloses the existence of a professional association which sets standards of conduct for research scientists. The standards which Professor Seawright adopted in the Seawright Report for assessing Dr Pope's conduct came from the National Health and Medical Research Council (NH&MRC) "Statement on Scientific Practice", issued in November 1990. The NH&MRC is a Commonwealth statutory authority established under the *National Health and Medical Research Council Act 1992 Cth* (although it appears to have been in existence for several years before that statute was passed, as an entity established by Order-in-Council). The functions of the NH&MRC which are relevant for present purposes include:

- to inquire into, issue guidelines on, and advise the community on, matters relating to public health research and medical research;

- to make recommendations to the Commonwealth on expenditure on public health research and training, and on medical research and training, including recommendations on the application of the Medical Research Endowment Fund established by s.49 of the *National Health and Medical Research Council Act 1992.*

71. As I understand that part of Dr Pope's submission which is set out at point 2.3 of the passage reproduced at paragraph 105 below, he is asserting that when the events dealt with in the Seawright Report occurred in 1985, there was little attention being paid to standards for the conduct of scientific research, and in the absence of a body responsible for setting and enforcing standards, these matters were essentially ones which required a personal assessment of his responsibilities.

72. It may be that certain ethical standards as to the conduct of scientific research are common to the international scientific community, and taught and enforced by Universities and their research institutions. I note in this regard that the NH&MRC Statement on Scientific Practice has most sections in common with the "Guidelines on Responsible Practices in Research and Problems of Research Misconduct" issued by the Australian Vice-Chancellors' Committee, also in November 1990. Neither the NH&MRC nor the Australian Vice-Chancellors' Committee, however, are analogous to a professional association regulating standards of conduct for its members.

73. I also have reservations as to whether there is widespread community acceptance and recognition that research scientists or virologists are professionals. Dr Pope's solicitors have asserted (in the submission set out at paragraph 64 above) that Dr Pope is a member of the recognised profession of medical research, presumably because his interests as a research scientist have concentrated in fields related to medical research. That may well be correct (although the evidence which the submission refers to, that of Professor Doherty and Mr Lee, does not really address the issue). If there is greater community recognition of medical research as a profession, it is probably attributable to the involvement in that field of many qualified medical practitioners, who are members of a well-recognised profession.

74. As noted at paragraph 51 above, this is an issue on which it is not strictly necessary for me to make a finding, and given that Dr Pope has not addressed evidence to this issue and the specific indicators and concerns to which I have referred, I do not propose to do so.

The Requirements of s.45(1)(c)(ii) - Adverse Effect

75. Queensland Health's decisions, both initially and at internal review stage, found that certain information in the Seawright Report concerns Dr Pope's professional affairs, and that its disclosure could reasonably be expected to have an adverse effect on Dr Pope's professional affairs. Again, in view of the conclusion I have reached at paragraph 49 above, it is not strictly necessary for me to address this issue. However, I think it appropriate to record my view that, if it were correct that the Seawright Report concerns Dr Pope's professional affairs for the purposes of s.45(1)(c) of the FOI Act, I do not think it can be said of most of the Seawright Report that its disclosure could reasonably be expected to have an adverse effect on Dr Pope's professional affairs.

76. At paragraph 80 of my reasons for decision in *Re Cannon,* I said:

> *80. The words "adverse effect" carry their ordinary meaning in this context. To get to s.45(1)(c)(ii), the information in issue must first have been properly characterised as information concerning one or more of the categories of affairs mentioned in s.45(1)(c)(i). The adverse effect contemplated by s.45(1)(c)(ii) must be an adverse effect on the business, professional, commercial or financial affairs of the agency or other person, which the information in issue concerns.*

77. In *Re Cannon*, I also addressed the meaning of the phrase "could reasonably be expected to" in s.45(1)(b) of the FOI Act (that phrase has an identical meaning, although applied in a different context, in s.45(1)(c) of the FOI Act):

> *62. The phrase "could reasonably be expected to" in s.45(1)(b) of the FOI Act bears the same meaning as it does in s.46(1)(b) of the FOI Act, which meaning was explained in* Re "B" and Brisbane North Regional Health Authority *at paragraphs 154-161. In particular, I stated at 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.

63. It is appropriate to record what was said by the Full Court of the Federal Court in Searle's *case (at p.176) about the comparable test in s.43(1)(b) of the Commonwealth FOI Act:*

> In the application of s.43(1)(b), there would ordinarily be material before the decision-maker which would show whether or not the commercial value of the information would be or could be expected to be destroyed or diminished if the information were disclosed. It would be for the decision-maker to determine whether, if there were an expectation that this would occur, the expectation was reasonable.
>
> In para 58 of its reasons, the Tribunal said:
>
> > A decision maker is required to make a judgment as to whether there is a "reasonable" basis for a claim that disclosure of information would destroy or diminish the commercial value of such information, as distinct from something that is "irrational, absurd or ridiculous".
>
> However, the question under s.43(1)(b) is not whether there is a reasonable basis for a claim for exemption but whether the commercial value of the information could reasonably be expected to be destroyed or diminished if it were disclosed. These two questions are different. The decision-maker is concerned, not with the reasonableness of the claimant's behaviour, but with the effect of disclosure. The Administrative Appeals Tribunal failed to determine that question and erred in law in this respect.

64. As is illustrated by the cases of Schering, Searle *and* Caruth *referred to above, an issue which commonly arises under this aspect of the test for exemption is whether the information in issue is already in the public domain, or is a matter of common knowledge in the relevant industry, and whether, therefore, disclosure under the FOI Act could reasonably be expected to diminish its commercial value.*

78. The following remarks from paragraph 83 from *Re Cannon* are also relevant:

> *83. For similar reasons to those noted in respect of s.45(1)(b) (see paragraphs 59, 60 and 64 above), if information is already in the public domain, or is common knowledge in the relevant industry, it will ordinarily be difficult to show that disclosure of that information under the FOI Act could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the agency which, or person whom, the information concerns.*

79. In the present case, the fact that Professor Seawright has undertaken an investigation into allegations of "scientific fraud" made against Dr Pope, and provided a report of his findings, is information which is already in the public domain (through the conduct of Dr Robbins, Mr Hammond and *The Courier-Mail*). It is also reasonably clear from evidence which Dr Pope has provided that the same facts are fairly widely known in the medical research community. The Seawright Report clears Dr Pope of the allegation that he is guilty of "scientific fraud". The Seawright Report does, however, make some comments about Dr Pope's judgment with respect to some related aspects of the incident

dealt with in the Seawright Report. Given that the allegations against Dr Pope have already been put in the public domain, I have difficulty in seeing how those parts of the Seawright Report which comprise Professor Seawright's finding that Dr Pope is not guilty of "scientific fraud" or "scientific misconduct", together with his findings as to the facts and circumstances which support that conclusion, could reasonably be expected to have an adverse effect on Dr Pope's reputation as a research scientist.

80. There is substantial evidence of Dr Pope's excellent reputation as a research scientist in the statutory declarations provided by Professor Doherty, Mr Lee and by Dr Pope himself (who annexes a detailed *curriculum vitae* recording his career achievements). It is certainly arguable that disclosure of the parts of the Seawright Report which comment on Dr Pope's judgment on some matters related to the incident under investigation, could reasonably be expected to have an adverse effect on Dr Pope's reputation as a research scientist. However, for reasons explained earlier, I do not consider that this brings that material within the scope of s.45(1)(c) of the FOI Act.

81. I also note that the Commonwealth AAT has been prepared to take a fairly robust approach to the likelihood of professional reputations being damaged by criticism. In *Re Caruth and the Department of Health, Housing, Local Government & Community Services* (Commonwealth AAT, No. W90/215, Deputy President Johnston, Major General Taylor, Mr S D Hotop, 18 June 1993, unreported), the respondent sought to apply s.43(1)(c)(i) of the Commonwealth FOI Act to documents containing assessments by professional evaluators and medical practitioners that were taken into account by the respondent in deciding whether to approve the marketing in Australia of a particular drug. The Tribunal said (at p.27-8):

> *In respect of documents 2 and 3, the respondent submits that the evidence of Dr Proudfoot shows that disclosure of the names of external evaluators could lead to public attacks upon their professional standing, whilst disclosure of the identity of doctors named in document 63 might subject those doctors to criticism in relation to their treatment. The Tribunal is not satisfied, however, that exemption under this heading can be sustained. The professional standing of external evaluators and reporting doctors will not be prejudiced by unwarranted criticism. If, on the other hand, criticism is warranted, there is no justification in exempting the information from disclosure.*

Application of the Public Interest Balancing Test in s.45(1)(c)

82. At paragraph 17 above, I noted that Queensland Health can discharge the onus which it carries in this review, by virtue of s.81 of the FOI Act, by demonstrating that any one of the three elements which must be satisfied to establish a valid claim for exemption under s.45(1)(c) cannot be made out. I also noted at paragraph 50 above, that Queensland Health did not wish to make a submission on the issue of whether research science is a profession for the purposes of s.45(1)(c), since it is content to rest its case on the public interest considerations which it submits warrant disclosure of the Seawright Report.

83. At paragraph 40 above, I set out the submissions by Dr Pope's solicitors as to why s.45(1)(c) of the Queensland FOI Act should not be interpreted so as to exclude from its ambit professional persons who are government employees. I note that the final sentence of that submission was: *"The goal of accountability is satisfactorily addressed by the 'public interest' qualification to the section".* It is fair to say that the submissions of all participants, including Mr Hammond, have proceeded on the assumption that the crucial issue in the application of s.45(1)(c) to the Seawright Report is the application of the public interest balancing test.

84. Queensland Health and Mr Hammond have assumed, and Dr Pope's solicitors have argued, that Dr

Pope could establish the first two elements of s.45(1)(c), thereby giving rise to a *prima facie* ground favouring non-disclosure, i.e. that disclosure of the Seawright Report could reasonably be expected to have an adverse effect on Dr Pope's professional affairs. Although the conclusion I have reached at paragraph 49 above negates the application of s.45(1)(c), I propose to consider and apply the public interest balancing test on the same basis as the participants have approached it. I approach the issue in this way because I am satisfied that Queensland Health's application of the public interest balancing test was clearly correct, and because I wish to make it clear to Dr Pope that, even if he has difficulty in accepting my finding that the Seawright Report does not concern his professional affairs (as that term is to be understood in the context of s.45(1)(c)), my ultimate finding would have been the same in any event, based on my view of the proper outcome of the application of the public interest balancing test in s.45(1)(c).

Evidence and Submissions Lodged by the Participants

85. Queensland Health lodged no evidence, but in Mr Read's reasons for decision on internal review dated 2 September 1993 (in respect of Mr Hammond's application for access) he sets out public interest considerations favouring disclosure of the Seawright Report, as follows (note: this extract has been edited so as to delete material which might disclose the contents of the document in issue in this review):

> *1. As stated by the original decision maker, the management of research projects conducted in public institutions is a public concern. The public interest is served by promoting open discussion of issues of public concern.*
>
> *2. The government is accountable for:*
>
> *(a) the funding of research projects conducted in public institutions;*
>
> *(b) the work practices of its employees; and*
>
> *(c) research conducted under its auspices that is published either interstate, nationally or internationally.*
>
> *This accountability is demonstrated by investigating alleged breaches of acceptable standards of research in publicly funded institutions.*
>
> *In my opinion this is a very powerful public interest argument. However, in your submission you claim that this is not a matter of public interest but goes solely to the reputation or public profile of Queensland Health. It does seem that this rationale is totally at odds with your later claim that Ms Harris failed to give sufficient weight to the protection of the reputation of the Sir Albert Sakzewski Virus Research Centre.*
>
> *3. The allegations of scientific fraud have been placed in the public arena, through media reports. In addition, the scientific community has become aware of the allegations through notification of the allegations to the NH&MRC and general discussion within that particular community. It is in the public interest to also make public the outcome of the investigation into the allegations.*

4. The Authority considered Professor Seawright's report into the allegations and determined that no case existed for a charge of scientific fraud or misconduct to be laid against Dr Pope. The Authority notified Dr Pope, the complainant, the Premier and other recipients of the letter containing the complainants' allegations, of this determination. However, it did not provide the above with the entire ambit of the conclusions reached by Professor Seawright.

The public interest is served by releasing the entirety of Professor Seawright's Report, given that release of only part of the Report by the Authority may be misleading.

5. Even though the allegations of scientific fraud relate to events in 1984-85, the allegations themselves and Professor Seawright's subsequent investigation are recent events. The Report is a recent document. The public interest lies in ensuring that professionals involved in the conduct of medical research are accountable for their standards of work practice. This is because the results of research may have an impact upon all facets of community life. In the field of medical research, there are ramifications in the clinical and educational arenas as well as in the public sphere. Independent investigations of alleged breaches of acceptable standards of practice are therefore considered to be a vital part of ensuring the efficacy of public sector research projects, even though some time may have lapsed since the research was conducted.

6. As stated by the original decision maker, the public has a right to know about potential problems with methodology in research projects undertaken in public institutions. Moreover, where allegations are made about problems in methodology in the field of medical research, there is an even stronger public interest in alerting not only the general community, but the scientific community at a national and international level, (particularly where the research has been published in an international journal).

7. ...

I have balanced the public interest arguments for and against release of the Report. I have taken into consideration your view that arguments against release of the Report were given insufficient weighting. I acknowledge that your client has a public interest in the Report not being released. However, as I have determined that the Report relates to Dr Pope's professional affairs (particularly in his capacity as a public sector employee), and not to his personal affairs, I have afforded this argument less weight. I have also found it difficult to place much weight on the reputations of the Centre and other research bodies which might be affected by release of the Report, given that the allegations of scientific fraud are already within the public arena. It is my view that it may be more damaging for the reputations of those bodies to have such allegations unresolved in the eyes of the public, than to have the outcome of the investigation also placed in the public arena.

I consider that the greater public interest is served by promoting open discussion of issues of significance to the medical and scientific communities (and ultimately to the community at large). Moreover, these issues have already been raised within the wider public sphere as the public has been made aware of the allegations of scientific fraud, the public is equally entitled to be made aware of the outcome of the investigation into the allegation.

> *The public interest also lies in the government being accountable for its expenditure of public funds on research projects by investigating, where required, the professional conduct of its employees involved in those research projects and making the public aware of the outcome of these investigations. The public interest for release is further strengthened by the fact that only part of Professor Seawright's conclusions have been released and then only to selected parties. I have therefore, decided to release the Report.*

86. Ms Harris' initial decision to give Dr Robbins access to the Seawright Report post-dated Mr Read's internal review decision in respect of the Hammond application. Ms Harris' decision letter in response to Dr Robbins' FOI access application is dated 9 September 1993 and largely reproduces Mr Read's internal review decision of 2 September 1993 (in the Hammond application) so far as public interest considerations favouring disclosure of the Seawright Report are concerned. Ms Harris considered that there was an additional public interest consideration favouring disclosure of the Seawright Report to Dr Robbins, who, as the original complainant, had an interest in being provided with details of the investigation (including methodology and outcome) which occurred as a result of his allegations. Dr Pope's solicitors made submissions, in support of the application for internal review of Ms Harris' decision, which challenged this, and the other public interest considerations relied upon as favouring disclosure. I do not think I need set out those submissions, nor Mr Read's response to them (in his internal review decision dated 29 October 1993) which resulted in Mr Read re-affirming the public interest considerations favouring disclosure of the Seawright Report upon which he had previously relied. On the additional public interest consideration raised by Ms Harris, and the challenge to it, Mr Read made these observations:

> *My interpretation of Ms Harris' point is somewhat different to yours. I do not think she was advocating that an individual could sustain an argument for public interest. Rather, I felt the point was that in this particular case the applicant, who was also the original complainant, should have access to the report and that the public interest would be served by him seeking the full outcome of his original complaint.*
>
> *I note your comment that it is absurd to assert that an individual can have a public interest. This begs the question of just how many people it takes to make a public interest argument. In any event I believe it is reasonable to conclude that an individual can represent a broader public interest, and that in some cases the public interest is served by taking action in relation to an individual.*

(Mr Read might also have referred to what I said at paragraph 55 of my reasons for decision in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (Information Commissioner Qld, Decision No. 93002, 30 June 1993; and now reported at (1993) 1 QAR 60). The relevant part of that paragraph is reproduced at paragraph 95 of this decision. I have subsequently accepted that there is a public interest in a person who has complained to a government agency having access to documents relevant to his or her complaint, this being consistent with the public interest in fair treatment of individuals by government agencies, and the public interest in accountability of government: see *Re Burton and Department of Housing, Local Government & Planning* (Information Commissioner Qld, Decision No. 94006, 18 April 1994, unreported) at paragraph 40; *Re Green and Office of the Parliamentary Commissioner for Administrative Investigations* (Information Commissioner Qld, Decision No. 94015, 30 June 1994, unreported) at paragraph 51.)

87. Mr Hammond has supplied a statutory declaration and a written submission which predominantly focus on the application of the public interest balancing test. Mr Hammond's statutory declaration contains evidence that Dr Robbins' allegations have been canvassed in the media (primarily in Mr

Hammond's own articles), and annexes a copy of a letter from the Premier of Queensland to Dr Robbins, informing Dr Robbins that Professor Seawright would conduct an inquiry into Dr Robbins' allegations. The following parts of Mr Hammond's statutory declaration are relevant to the application of the public interest balancing test in s.45(1)(c):

> *13. I was motivated in writing the original article on 18th March, 1993 in The Courier-Mail by my belief that the matter ought be published in the public interest. Before such publication I had spoken to both Dr Robbins and Dr Pope about the issue which had caused Dr Robbins to lodge a formal Grievance Application to the Brisbane North Region Head Office. I had canvassed with both Doctors and others involved in the controversy their respective views.*
>
> *14. I was also impressed by the fact that the issue involved medical research and the expenditure of considerable public monies in supporting the Research Centre.*
>
> *15. As the medical and health reporter for The Courier-Mail I had considered that I had a role in ensuring that publicly funded medical facilities are accountable in respect of the expenditure of public monies.*
>
> *16. When an Inquiry was instituted into the matter from the level of the Premier of Queensland, I naturally assumed that the Report of Professor Seawright would become public knowledge. On 24 November 1993 I spoke to Professor Alan Seawright and he advised me:-*
>
> *(a) that he had been asked by a Freedom of Information officer if he had any objection to his Report being made public;*
>
> *(b)* [that he had replied] *to the effect "How could I have any objection? If I have done a proper job it merits scrutiny by other people";*
>
> *(c) that he undertook the investigation on the assumption it was a public issue, and not an internal investigation;*
>
> *(d) it was never supposed to be a secret investigation and that he did not participate in secret investigations;*
>
> *(e) he always anticipated that the findings of his Report would be made public.*
>
> *17. ... In the absence of the publication of the Seawright Report it is impossible for the public to know whether in fact Dr Pope was cleared by Professor Seawright in his Report.*
>
> *...*
>
> *19. I have made enquiries to ascertain the level of public and private medical research funding and donations in Australia. Now produced and shown to me and marked with the letter "J" is a true copy of a Press Release from the Federal Minister for Health dated 2nd November, 1993. On 25th November, 1993 I spoke to Dr Graham Mann, University of Sydney, Westmead Hospital, Director of the Australian Society for Medical Research, who advised me:-*

(a) He has been studying Australian Bureau of Statistics data for 1990 compiled by the Research and Experimental Development Section;

(b) the Federal Department of Employment, Education and Training provides ABS [Australian Bureau of Statistics] *with some data on self reported information about research and development performed in universities and institutions;*

(c) Overall Dr Mann estimates that in 1991, being the latest year for which figures are available, approximately $400 million was spent in Australia on medical research;

(d) This includes around $110 million from the Federal Government, at least that much through the higher education system to research in the health area. In addition, medical research is performed as R and D for drug companies, and $45 million comes from non-profit private sources such as cancer funds, heart foundations and other charities.

20. I continue to seek a release of the Seawright Report. I remain of the view that this application is consistent with the Freedom of Information Act 1992 to extend as far as possible the right of the community to have access to information held by the Queensland Government.

88. Dr Pope's solicitors have not attempted to challenge the correctness of the evidence given at paragraph 16 of Mr Hammond's statutory declaration concerning Professor Seawright's attitude to the disclosure of the Seawright Report. Mr Read also makes the following comment (which is consistent with Mr Hammond's account of Professor Seawright's attitude) at page 6 of his internal review decision dated 2 September 1993:

> *I also note Professor Seawright's verbal comments to me that he is satisfied that he did all he could to investigate the matter, is strongly committed to his findings and has always assumed his report would be made public.*

89. Dr Pope's written submission was lodged prior to Mr Hammond's written submission, and should be referred to first. Dr Pope's submission asserts that disclosure of the Seawright Report is not, on balance, in the public interest, and advances the following arguments in support:

> *4. <u>DISCLOSURE OF THE SEAWRIGHT REPORT IS NOT, ON BALANCE, IN THE PUBLIC INTEREST</u>*
>
> *While there may well be factors which favour the disclosure of the Seawright Report as being in the public interest, the balance of all relevant considerations does not favour the disclosure of the Seawright Report.*
>
> *There are a number of factors which justify the exemption of the Seawright Report from disclosure as being in the public interest.*

4.1 ***The Resolution by the Brisbane North Regional Health Authority that Dr Pope has No Case to Answer***

Dr Pope's employer, the Brisbane North Regional Health Authority ("the Authority") has received and considered the Seawright Report.

On 24 June 1993, the Authority resolved that the Premier and the other recipients of the letter from Robbins should be advised that the Authority considered that no case exists for charges of scientific misconduct to be laid against Dr Pope.

On or about 29 June 1993, the Authority wrote to Dr Pope and to the recipients of the Robbins' letter advising of its decision in this respect.

As a consequence, it is in the public interest that matters be put to rest by the Authority's decision.

The Authority has found, after establishing an independent inquiry and considering the Seawright Report, that Dr Pope has no case to answer.

Moreover, in assessing the public interest in this respect, it is appropriate to have regard to the use that Mr Hammond, the applicant for disclosure, will make of the document to which access is sought.

As his statutory declaration discloses, Mr Hammond has previously caused a newspaper article to be published concerning Robbins' allegation. This article is the subject of legal proceedings by Dr Pope.

...

It is not in the public interest to allow access to the Seawright Report to Mr Hammond, given the likelihood of his use of the document in further press articles. To do so would be to promote press comment by Mr Hammond about Robbins' allegations when the Authority has already resolved that Dr Pope has no case to answer in respect of those allegations.

The likelihood that Mr Hammond will cause a newspaper article to be published about the Seawright Report may suggest that Robbins' allegations have some foundation. In light of the Authority's decision, this is not in the public interest.

It is in the public interest that the case be closed on Robbins' allegations. This is particularly so in light of:

- *the fact that Robbins' allegations (and, indeed, parts of Mr Hammond's newspaper article) concern events which occurred over eight years ago;*

- *Dr Pope's legitimate concern about the protection of his personal and professional reputation; and*

- *Dr Pope's concern that Mr Hammond may use the Seawright Report to publish (or cause to be published) imputations defamatory of Dr Pope.*

4.2 ***The Protection of the Reputation of the SASVRC***

In addition to the protection of Dr Pope's professional reputation, the disclosure of the Seawright Report to Mr Hammond may lead to unwarranted speculation or public concern about the reputation of the SASVRC.

The Seawright Report concerns an investigation of Dr Pope alone. However, Dr Pope is the director of the SASVRC. In some quarters, Dr Pope's professional standing may be equated with that of the SASVRC.

Mr Lee's statutory declaration canvasses the reputation of the SASVRC and the importance of protecting that reputation.

Disclosure of the Seawright Report may cause prejudice to the reputation of the SASVRC. Some of Professor Seawright's comments concerning Dr Pope may be interpreted as reflecting adversely on the SASVRC's reputation. This would be particularly unfortunate in light of:

- *the Authority's resolution that Dr Pope has no case to answer in respect of Robbins' allegations; and*

- *the fact that the Authority has, as Dr Pope understands it, terminated Robbins' employment.*

In these circumstances, disclosure of the Seawright Report may suggest that the Robbins' allegations have some merit and may thereby cause public concern about the reputation of the SASVRC.

It is in the public interest that outstanding research centres like the SASVRC be allowed to function without unwarranted and unjustified speculation about their scientific reputation.

4.3 ***The Protection of the Reputation of QIMR***

The Seawright Report concerns events which occurred at QIMR.

Disclosure of the Seawright Report may cause prejudice to the reputation of QIMR.

Indeed, disclosure of the Seawright Report may lead to speculation about the role of other QIMR researchers at the relevant time.

In light of the Authority's resolution that Dr Pope has no case to answer, disclosure of the Seawright Report may promote unwarranted and unjustified public disquiet about the reputation of QIMR.

90. A written submission on behalf of Mr Hammond was lodged by Messrs Thynne & Macartney, Solicitors. That submission addressed, at some length, the public interest considerations favouring disclosure of the Seawright Report, and the following extract adequately captures the substance of Mr Hammond's submissions without reproducing them in full:

...

17. The public interest is best served by an informed commentary on Dr Robbins' allegations, especially since these allegations have entered the public domain. A decision not to disclose the contents of the report would be inimical to informed public discussion.

18. Further, it ill-behoves Dr Pope, who has made claims to the effect that he has been "cleared" of Dr Robbins' allegations and who has presumably responded to inquiries made of him in similar terms, to prevent others from ascertaining whether he has in fact been "cleared".

...

28. Scientific and medical research is the subject of substantial public funding: see para.19 of Mr Hammond's statutory declaration.

29. The allegations made by Dr Robbins were regarded as being of sufficient substance and importance to justify an independent, publicly-funded investigation. Senior officers of government, including the Premier of Queensland, were involved in the decision to have such an independent report. The Premier's correspondence clearly indicates that the report was to be circulated to persons who received Dr Robbins' original letter (see Hammond exhibits "E", "F" and "G"). The report was not to be a secret report or to be prepared for the private information of the government. Professor Seawright himself anticipated that the report would be disclosed.

30. The report presumably consists of an account of the investigation undertaken by Professor Seawright, the evidence gathered by him, his reasoning, and his conclusions. A report of this character should be distinguished from a document which, by its nature, or by its authorship, might be expected or be intended to cause harm to an individual's professional reputation (e.g., a poison pen letter from an anonymous source).

31. A decision to refuse access to the report would only serve to encourage various parties to give incomplete, and perhaps misleading, accounts of its contents. Nothing could be further from the public interest. It is contrary to the public interest to permit speculation to continue as to the contents of the Seawright report.

32. Disclosure of the <u>contents</u> of Professor Seawright's report should not be confused with the subsequent publication of commentary (fair or otherwise) on the report. The Information Commissioner should not assume the role of a censor on the basis of an apprehension by Dr Pope that subsequent <u>commentary</u> on the report will affect the reputations of Dr Pope, the Centre, and the Queensland Institute for Medical Research. The Courts do not engage in the censorship, by means of interlocutory injunctions, of publications relating to matters of public interest, even in relation to publications which threaten to defame individuals.

33. There is nothing to demonstrate that any commentary on the report will be unfair or ill-informed. If, however, the disclosure of the report prompts unfair or defamatory commentary, then Dr Pope and others have legal redress available to them.

...

36. Any public discussion will encourage the exposure of fallacies and enable the views of different parties to compete for public acceptance. For example, if Dr Robbins' allegations have been found by Professor Seawright to be without any justification, and cannot be sustained in the light of the Seawright report, then this should be disclosed and debated in public.

37. The fact that disclosure of the Seawright report may lead to public discussion of the conduct of scientific research and its administration can not be a matter justifying non-disclosure in the public interest. Instead, the public interest will be served by promoting open discussion on these matters.

38. The disclosure of the Seawright report will advance the public interest upon which the Freedom of Information Act 1992 *is founded. The non-disclosure of the Seawright report will not deter further discussion of these matters. Instead, the non-disclosure of the Seawright report will lead to various parties giving varying accounts of its contents, and the public being left to speculate as to its contents. Such a situation is not in the public interest.*

91. Queensland Health elected not to lodge evidence or a written submission, being content to rest its case on the reasons given by Mr Read in support of his decisions on internal review. Mr Read, in a brief letter to me dated 20 January 1994, made the following observations and endorsed Mr Hammond's arguments in favour of release:

I believe that my decision regarding section 45(1)(c) is justified. The evidence provided by Dr Pope, namely statutory declarations as to his professional reputation from Paul Lee and Ralph Doherty and his own statutory declaration (including a curriculum vitae), does not change my view that the public interest weighs more heavily on release of the Report. It was not for me to make any judgment about the degree of eminence which Dr Pope held as a Scientist; I merely determined that his professional reputation would be affected but that the public interest was in favour of release (for the various reasons outlined in my decision).

...

Having read Phillip Hammond's statutory declaration and submission, I consider that his arguments in favour of release have added a different perspective to the debate, for example, the ability for informed public debate is constrained if all of the facts of the case are not known, and in fact have strengthened my arguments for release.

Findings on the Application of the Public Interest Balancing Test in s.45(1)(c)

92. The nature of the public interest balancing test incorporated within s.45(1)(c) of the FOI Act, and the correct approach to its application, are explained at paragraph 87 of my reasons for decision in *Re Cannon*.

93. In the present case, I think it is sufficient for me to say that the public interest considerations identified at points 1, 2, 5 and 6, and in the first sentence of the last paragraph, of the passage set out at paragraph 85 above from Mr Read's internal review decision of 2 September 1993, are clearly relevant to the issue of whether disclosure of the Seawright Report would on balance be in the public interest, and I find them to be of such compelling weight as to overwhelm any public interest

considerations favouring non-disclosure of the Seawright Report.

94. In comparison I do not find the public interest arguments claimed, in Dr Pope's written submission, to favour non-disclosure of the Seawright Report, to be particularly weighty or persuasive. Dr Pope's submission relies primarily on the finding by the Brisbane North Regional Health Authority, after consideration of the findings of Professor Seawright's independent investigation, that no case exists for charges of scientific fraud or scientific misconduct to be laid against Dr Pope, and consequently on the desirability of putting the whole matter to rest, without further exposing Dr Pope's reputation to media commentary. However, as Mr Read's internal review decision points out, there is, in addition to other relevant considerations, a public interest (which in my opinion carries substantial weight) in appropriate public scrutiny of, and accountability with respect to, the process and outcome of an investigation into alleged breaches of acceptable standards of research in publicly funded institutions.

95. In support of the contention that it is in the public interest that the case be closed on Dr Robbins' allegations, Dr Pope points to his "legitimate concern about the protection of his personal and professional reputation". In *Re Eccleston*, I said (at paragraph 55; also reported at (1993) 1 QAR 60, at p.80):

> *55. While in general terms, a matter of public interest must be a matter that concerns the interests of the community generally, the courts have recognised that: "the public interest necessarily comprehends an element of justice to the individual" (per Mason CJ in* Attorney-General (NSW) v Quin *(1990) 64 ALJR 627). Thus, there is a public interest in individuals receiving fair treatment in accordance with the law in their dealings with government, as this is an interest common to all members of the community.*

96. It is possible to envisage circumstances in which the public interest in fair treatment of individuals might be a consideration favouring non-disclosure of matter comprising allegations of improper conduct against an individual where the allegations are clearly unfounded and damaging, and indeed might even tell against the premature disclosure of matter comprising allegations of improper conduct against an individual which appear to have some reasonable basis, but which are still to be investigated and tested by a proper authority. In this case, however, I am dealing with a report into allegations of improper conduct against an individual, the report having been made by an independent investigator who has allowed the subject of the allegations a reasonable opportunity to answer adverse material. The weight to be accorded to public interest considerations (in the nature of fair treatment of individuals) which might favour non-disclosure of such a report must be judged according to the circumstances of each case. If allegations against an individual are found, on investigation, to lack any reasonable basis, and they involve no wider issues of public importance (such as whether proper systems and procedures are being followed in government agencies), the public interest in fair treatment of the individual might carry substantial weight in favour of non-disclosure (on the basis that the unsubstantiated allegations ought not to be further disseminated, even though accompanied by an exoneration). However, the public interest in accountability of government agencies and their employees (for the manner in which they expend public funds to carry out their allocated functions in the public interest) will generally always be in issue in such situations. In particular, there is a clear public interest in ensuring that allegations of improper conduct against government agencies and government employees, which appear to have some reasonable basis, are properly investigated, and that appropriate corrective action is taken where individuals, systems or organisations are found to be at fault, and that there is proper accountability to the public, in respect of both process and outcomes, in this regard. Each case must be judged on its own merits, and I consider that the weight of relevant public interest considerations (of the kind discussed in this paragraph) clearly favours disclosure of the Seawright Report.

97. Dr Pope's contention that there is a public interest in protection of the reputation of the QIMR is

deserving of little or no weight. Accountability of the QIMR and its employees for the conduct of the functions which the QIMR was established to pursue, is at the very heart of why disclosure of the Seawright Report is, in my opinion, in the public interest. The fact that the relevant events occurred some eight or nine years ago does not, in my opinion, lessen to any significant extent the weight to be accorded to that public interest consideration, and I note in this regard that the Queensland Parliament apparently considered that the objects of the FOI Act would be furthered by making provision, in s.10, that a person is entitled to apply under the FOI Act for access to a document regardless of when the document came into existence. Dr Pope's contention that disclosure of the Seawright Report may lead to unwarranted speculation or public concern about the reputation of the SASVRC is, in my opinion, altogether too remote and unlikely a prospect, to be accorded any substantial weight. Disclosure of the Seawright Report would demonstrate that the only connection between its contents and the work of the SASVRC is that Dr Pope (whose conduct in respect of one incident, when he was an employee of the QIMR in 1985, is the sole topic of the Seawright Report) is presently the Director of the SASVRC.

98. As to Dr Pope's claim that, in assessing the public interest, it is appropriate to have regard to the use that Mr Hammond is likely to make of the Seawright Report, if disclosed, I am generally in agreement with Mr Hammond's arguments in his submission (at paragraphs 11, 15 and 32 thereof; only the last of which is reproduced above) that these contentions are either irrelevant or deserving of no substantial weight. As I have stated in previous decisions (see *Re Stewart and Department of Transport*, in parenthesis at page 3 thereof, under point (b) of paragraph 9; and also *Re Yabsley and Department of Education* (Information Commissioner Qld, Decision No. 94014, 29 June 1994, unreported), at paragraphs 15 and 16) the issue of whether a document falls within the terms of an exemption provision is, with limited exceptions (not relevant in the context of this case), to be approached by evaluating the consequences of disclosure of the document in issue to any person entitled to apply for it (pursuant to the general right of access conferred by s.21 of the FOI Act) or as is sometimes said, "to the world at large". If the Seawright Report is not exempt on Mr Hammond's application, it is not exempt on the application of any interested person who seeks it under the FOI Act. On that basis it is difficult to see any logical problem with Mr Hammond disseminating the contents of the Seawright Report more widely. Release of a document under the FOI Act ordinarily means that there are no restrictions, apart from any imposed by the general law (s.102(2) of the FOI Act being relevant in this regard), on the uses to which the person granted access may put the document. If Mr Hammond obtains a copy of the Seawright Report under the FOI Act, he is entitled to put it to any lawful use. I do not think that Dr Pope's concern that Mr Hammond may use the Seawright Report to publish (or cause to be published) imputations defamatory of Dr Pope, if relevant at all, should be accorded any substantial weight.

99. While I accept Mr Hammond's contention that it is no part of the function of the Information Commissioner to attempt to regulate or censor any subsequent commentary on a document to be released under the FOI Act, I nevertheless express the hope that, if there is to be further media commentary (following disclosure of the Seawright Report under the FOI Act) on Dr Pope's employment affairs and reputation as a research scientist, it will comprise a fair and balanced coverage. I note that Professor Seawright was requested to provide an independent investigation and report for the purpose of enabling Dr Pope's employer, the Brisbane North Regional Health Authority (the BNRHA) to assess whether Dr Pope had a case to answer in respect of the charge of scientific fraud made by Dr Robbins. Professor Seawright considered that Dr Pope was not guilty of the charge (and the BNRHA confirmed that Dr Pope had no case to answer) but commented on some aspects of Dr Pope's judgment in relation to the incident. Dr Pope contends that those comments are not justified and has arguments to put in support of his contentions. It seems that, in some respects, Professor Seawright's comments may simply reflect an honest difference of opinion between two eminent research scientists on what constituted acceptable practice in the circumstances of the case. Above all, it should be noted that Dr Pope's career as a research scientist has been a long, and by any objective standards, a distinguished one, and his work has been of

substantial benefit to the Queensland community. This perspective ought fairly to be borne in mind in any commentary on the single incident which is the subject of the Seawright Report.

100. The eminence of a person's reputation does not, however, entitle the person to be excused from continued scrutiny of the person's performance as an employee of a publicly-funded institution. When stripped to its essentials, this case is about the accountability of a government employee for the conduct of his employment duties at the QIMR, a body established with public funds to pursue medical research in the interests of the Queensland community. It is also about accountability for the process and outcome of an investigation conducted into allegations that appropriate standards for the conduct and reporting of research had been breached by a particular employee of the QIMR in one instance. Disclosure of material concerning topics such as these goes to the very essence of what freedom of information legislation was intended to achieve (*cf.* s.4 and s.5 of the FOI Act). In my opinion, the relevant public interest considerations overwhelmingly favour disclosure of the Seawright Report, and would outweigh by a very clear margin any public interest favouring non-disclosure that would arise if (contrary to my findings at paragraph 49 above) it were found that the Seawright Report concerns Dr Pope's professional affairs, and its disclosure could reasonably be expected to have an adverse effect on Dr Pope's professional affairs.

101. I can understand Dr Pope's resentment of the behaviour of Dr Robbins which has swept events which occurred almost a decade ago into the public arena. Interested members of the public can make their own judgments of Dr Robbins' behaviour. According to information which I have received in the course of this review Dr Robbins was a staff member of the QIMR in 1984-85 but was not a member of Dr Pope's research group and had no personal knowledge of what was going on in Dr Pope's research laboratory. Dr Robbins must have acquired information on which he based his allegations against Dr Pope, indirectly, either at that time or subsequently, but did not seek to raise his allegations against Dr Pope until the early 1990's when he was in dispute with Dr Pope about a separate set of events which occurred at the SASVRC where Dr Robbins was an employee and Dr Pope was the Director. Dr Robbins then sought to canvass his allegations against Dr Pope in a very public fashion. Irrespective of what may be thought of Dr Robbins and his motives (given the timing and manner of his raising of the allegations against Dr Pope) the fact remains that if there appeared to be some reasonable basis for the allegations, it was in the public interest that the allegations be made to, and investigated by, a proper authority. For the reasons discussed above, I remain satisfied that the Seawright Report concerns matters which affect the public interest, and that disclosure of the Seawright Report would, on balance, be in the public interest.

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

Submissions by the Participants

102. When Queensland Health's initial decision-maker, Ms S Harris, consulted Dr Pope, in accordance with s.51 of the FOI Act, to obtain his views on whether the Seawright Report was an exempt document or could be released to Mr Hammond, Dr Pope's solicitors made a submission to Ms Harris that the Seawright Report was exempt under s.44(1) of the FOI Act. In her initial decision, Ms Harris dealt with that submission as follows:

Your views have been based on the following decisions:

(a) *Department of Social Security -v- Dyrenfurth*
(1988) 80 ALR 533

(b) *Re Toomer and Department of Primary Industries and Energy*
(1990) 20 ALD 275

I have read these decisions, together with the more recent case of Colakovski -v- Australian Telecommunications Corporation (1991) 100 ALR 111.

Mr Justice Lockhart, in Colakovski, confirmed the view taken in Dyrenfurth that "in the ordinary course, statements in documents which relate to a person's work performance or capacity to work do not constitute information regarding his 'personal affairs'" (my emphasis).

...

The Federal Court stated in Dyrenfurth that:

> It is sufficient for present purposes to indicate our view that information relating to the personal affairs of a person such as information concerning his or her state of health, the nature or condition of any marital or other relationship, domestic responsibilities or financial obligations may legitimately be regarded as affecting the work performance, capacity or suitability for appointment or promotion of that person. In those circumstances, it is conceivable that an assessment of work performance, capacity or suitability for appointment or promotion might contain such information.

This view has been supported in Colakovski.

Accordingly, I would find it difficult to accept that Professor Seawright's findings about your client concern his personal affairs, as the findings relate purely to his work performance. Professor Seawright, in his assessment of your client's conduct and competence in his professional capacity, has found no need to take into account Dr Pope's health, marital or other relationship, domestic responsibilities, financial obligations or any other information that falls within what is commonly accepted to be 'personal affairs'.

I note that you have referred to Re Toomer which appears to challenge the established view that, ordinarily, information relating to a person's vocational competence would not be regarded as relating to that person's personal affairs. In that case, the Administrative Appeals Tribunal found that information relating to Mr Toomer's vocational competence was of an exceptional kind in that it criticised his personality and attacked his competence, in a way that destroyed his professional reputation and made it impossible for him to perform the duties of his employment. The Tribunal said that the information went far beyond the realm of the ordinary assessment of work capacity or performance, and thus fell within the concept of 'personal affairs' for the purposes of amending incomplete, incorrect, out of date and misleading information.

I have difficulty in comparing this with allegations investigated and reported by Professor Seawright. The expectation for scientific research is that it will be conducted within certain parameters, and that individuals will observe standard practices of the discipline involved in the research.

...

The investigation of your client's conduct was undertaken by an independent person, adopting the definition of 'scientific misconduct' contained within the NH & MRC Statement on Scientific Practice. The investigator's report contained no criticism of your clients' personality or other personal traits. Rather, the investigation and ensuing report were a standard response to allegations of breaches of acceptable standards of work practice within a particular discipline.

...

Assessment of your client's work performance did not go beyond the realm of the "ordinary" assessment of work capacity or performance. As stated above, investigations of alleged breaches form part of the ordinary processes for monitoring professional conduct.

...

I therefore have concluded that comments made in the report about your client's work performance do not constitute personal affairs for the purposes of section 44 of the FOI Act.

103. In the application for internal review lodged by Dr Pope's solicitors, the following arguments were put:

3. <u>Errors of law in Relation to Application of Section 44</u>

That Ms Harris erred in law in deciding that the Seawright Report did not relate to the personal affairs of Dr Pope and was therefore exempt from disclosure under Section 44 of the Freedom of Information Act ("the FOI Act").

Ms Harris erred in law by:

(a) Failing to apply the principles stated in persuasive Federal decisions relating to the meaning of "personal affairs" in Federal FOI legislation, in particular the decision of His Honour Justice Wilcox in Bleicher v ACT Health Authority (1990) 97 ALR 732 *(which was not reconsidered on the appeal reported at (1991) 101 ALR 17).*

(b) By not giving sufficient weight to the decision in Re Toomer and Department of Primary Industries and Energy (1990) 20 ALD 275.

104. In his internal review decision, Mr Read dealt with these submissions as follows:

I have considered the following cases in relation to your submissions:

(a) <u>Department of Social Security -v- Dyrenfurth</u> (1988) 80 ALR 533.

(b) Colakovski -v- Australian Telecommunications Corporation (1991) 100 ALR 111.

(c) Bleicher -v- ACT Health Authority (1990) 96 ALR 732.

(d) Re Toomer and Department of Primary Industries and Energy (1990) 20 ALD 275.

I am of the opinion that the view taken by the original decision maker about the cases is correct.

In respect of the four cases I have considered, I note that Dyrenfurth, Colakovski, and Bleicher were Federal Court cases and thus of higher authority than the decision in Re Toomer in the Administrative Appeals Tribunal.

The basic proposition on personal affairs stated by Beaumont J in Re Williams is:

> "In my opinion, the reference in the Act to the 'personal affairs' of a person was intended to have its ordinary dictionary meaning, that is to say, to refer to matters of private concern to an individual. It is not necessary to attempt an exhaustive definition of the phrase. It will suffice, for present purposes, to say that, ordinarily, information as to the work capacity and performance of a person is not private in that sense. It is something observed by others and commonly discussed by those involved in that work. Ordinarily, information as to a person's vocational competence is not something which is treated as confidential. Prima facie at least, it is not part of his or her 'personal affairs'."

The Dyrenfurth case clarified the position that in some cases, information about a person's vocational competence could also be construed as coming within the definition of 'personal affairs'. The Justices noted:

> "some assessments of work capacity and performance or vocational competence, exceptional though his Honour thought they might be, would contain information relating to the personal affairs of their subjects."

The Justices also provided some guidance as to what might constitute the type of information which would relate to personal affairs. In particular, they noted:

> "It is sufficient for present purposes to indicate our view that information relating to the personal affairs of a person such as information concerning his or her state of health, the nature or condition of any marital or other relationship, domestic responsibilities or financial obligations may legitimately be regarded as affecting the work performance, capacity or suitability for appointment or promotion of that person. In those circumstances, it is conceivable that an assessment of work performance, capacity or suitability for appointment or promotion might contain such information."

The Bleicher case confirms this position and goes further by suggesting that:

> "The more correct statement, according to *Dyrenfurth*, is that such matters ordinarily will not constitute 'personal affairs' but may do so in exceptional cases."

The question then, is whether this is an 'exceptional case' in the terms expressed in Bleicher. The documentation does not support such a view nor has it been argued in your submission on behalf of your client or by Dr Pope himself.

Professor Seawright limits his comments to the scientific practice of Dr Pope seen in the context of what Professor Seawright considers to be acceptable scientific practice. These are not matters which constitute 'personal affairs' as defined by the case law on the subject nor do they represent an 'exceptional case' in terms of the Bleicher case.

All of this has been properly canvassed by the original decision maker. The documents were considered, the relevant case law was reviewed and the appropriate tests applied.

I simply cannot accept your submission that Ms Harris erred in law by not giving sufficient weight to the Toomer case. You advance no argument as to the deficiency of her analysis nor do you submit an alternative construction of how the Toomer principles could be applied to give a different outcome in this particular case.

Your assertion that insufficient importance was attached to the Toomer case appears to be at odds with the lengthy consideration of that case articulated in Ms Harris' reasons for her decision. It would also be at odds with the relative importance of the Toomer decision vis-à-vis the other cases quoted above, particularly given that Toomer was not cited in the later cases of Bleicher and Colakovski.

I agree with Ms Harris' assessment that the decision in Re Toomer related to a particular set of facts, and that the facts in this case are substantially different.

I therefore affirm the view taken by the original decision maker about the Federal cases relating to 'personal affairs' and her arguments and conclusion that comments made in the Report about your client's work performance do not constitute personal affairs for the purpose of section 44 of the FOI Act.

105. Dr Pope's solicitors have again argued, in this review under Part 5 of the FOI Act, that the Seawright Report is exempt under s.44(1) of the FOI Act. Their submission is in the following terms:

> *2. THE SECTION 44(1) EXEMPTION*
>
> *The Seawright Report relates to the personal affairs of Dr Pope. It goes beyond an assessment of Dr Pope's vocational competence and contains discussion of matters which relate to Dr Pope's personal reputation and character.*

2.1 ***The Limitation of the Seawright Report to matters concerning Dr Pope***

If the Seawright Report was simply concerned with an investigation of scientific competence in relation to certain research conducted in 1985, it seems likely that it would have included a discussion of the role of ... the other researcher involved in the experiment. Instead, the Seawright Report concerned itself only with an investigation of Dr Pope's role in that research.

Presumably, the limitation of Professor Seawright's investigation in this way can be explained only by the circumstances surrounding the establishment of his investigation.

Professor Seawright was charged to investigate certain allegations made against Dr Pope by one Steven Robbins, an employee of the laboratory directed by Dr Pope, the Sir Albert Sakzewski Virus Research Centre ("the SASVRC"). Those allegations were part of an ongoing series of complaints made by Robbins about Dr Pope. In particular, those allegations were directed to Dr Pope's personal character, including allegations of dishonesty on the part of Dr Pope. Those allegations were not *made through appropriate channels within the Queensland Department of Health nor were they made to the Queensland Institute of Medical Research ("QIMR") the laboratory where the research concerned took place. Instead, Robbins chose to publish his allegations to the Premier of Queensland, the Queensland Minister of Health and the Federal Minister of Health. In Dr Pope's submission, the publication of Robbins' allegations to these persons speaks for itself.*

The allegations made by Robbins sought to call into question Dr Pope's personal reputation and character. Professor Seawright's investigation also canvassed those matters relating to Dr Pope's personal affairs.

2.2 ***The Allegation Concerning Dr Pope's*** Curriculum Vitae

Specifically, the Seawright Report traverses an allegation of dishonesty made by Robbins in relation to Dr Pope's curriculum vitae. *... This particular allegation (and the discussion of it in the Seawright Report) does not concern Dr Pope's vocational competence. It relates solely to his personal affairs - namely, his honesty and integrity as an individual.*

2.3 ***The Seawright Report's Assessment of Dr Pope's "judgment"***

Furthermore, the Seawright Report contains an assessment of Dr Pope's "judgment". Leaving aside the issue of whether it was even open to him to make such an assessment, it is not stated by Professor Seawright whether this is an assessment of Dr Pope's personal or professional "judgment". Indeed, it may well be the case that Professor Seawright's assessment of Dr Pope's judgment concerns both his personal and professional affairs.

In any event, the matters to which Professor Seawright refers that may have involved Dr Pope's "judgment" raise what can be described as personal responsibilities on the part of Dr Pope. When these events occurred in 1985, there was much less attention on the standards for the conduct of scientific research. Indeed, the NH & MRC Statement on Scientific Practice was not promulgated until November 1990. When these events occurred in early 1985,

any matters which arose for Dr Pope's consideration involved a personal *assessment of his responsibilities.*

To the extent that Professor Seawright assesses Dr Pope's "judgment", he is assessing (at least in part) Dr Pope's personal judgment. The issues which Professor Seawright outlined as being relevant necessarily involve a personal decision on the part of Dr Pope, notwithstanding their professional overtones. In 1985, there was far from any commonly accepted standard of appropriate conduct in situations concerning the publication of scientific papers. Therefore, any action (or, in Dr Pope's case, any alleged omission) in relation to a paper submitted for publication at such a time raises questions personal to the decision-maker.

2.4 ***Summary***

The Seawright Report's appraisal of Dr Pope's judgment relates to his personal affairs.

The expression "personal affairs" in section 44(1) is not defined in the Act.

Some guidance may be obtained from similar decisions under similar provisions of the Federal legislation. However, these decisions are not binding on an interpretation of the Queensland legislation.

Following the reasoning of the Federal Court in Bleicher v. ACT Health Authority *(1990) 96 ALR 372, an assessment of vocational competence does not normally fall within the penumbra of "personal affairs". However, the matters canvassed by the Seawright Report go beyond an assessment of Dr Pope's suitability for his position as director of the SASVRC. Indeed, the conduct investigated occurred before Dr Pope was appointed to that position.*

...

Moreover, the Seawright Report is the result of allegations made about Dr Pope's character and honesty.

In these circumstances, the Seawright Report relates to Dr Pope's personal affairs.

Matters of public interest are set out in section 4 of these submissions.

106. Mr Hammond's submission on this issue was comparatively brief:

23. In making submissions, Mr Hammond is under the obvious disadvantage of not having access to the Seawright report in order to make full submissions, but relies upon the decision-maker's view that information relating to Dr Pope's work performance was not information concerning his "personal affairs" within the meaning of s.44(1).

24. Reliance is placed upon the extensive discussion of the meaning of "personal affairs" in The Commissioner of Police v. The District Court of New South Wales & Anor *(unreported, New South Wales Court of Appeal, Kirby P., Mahoney JA and Clark JA, 2.9.93)* [now reported at (1993) 31 NSWLR 606] *especially per Kirby P.*

at pp.29-30, per Mahoney JA at 20-23.

Reliance is placed on the observations of Kirby P. at p.33 [(1993) 31 NSWLR at p.627] *that the Act:*

> "... must be approached by decision-makers with a general attitude favourable to the provision of the access claimed. It is important that the decision-makers (and especially in tribunals and courts which set the standards) should not allow their approaches to be influenced by the conventions of secrecy and anonymity which permeated public administration in this country before the enactment of the Act and its equivalents."

107. Queensland Health elected not to provide a further submission, again being content to rely on the reasons stated in Mr Read's internal review decisions to justify its position that the Seawright Report is not an exempt document under s.44(1) of the FOI Act.

Personal Affairs and Employment Affairs

108. In my reasons for decision in the case of *Re Stewart*, I identified the various provisions of the FOI Act which employ the term "personal affairs" and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) as it appears in the FOI Act (see paragraphs 79 to 114 of *Re Stewart*). In particular, I there said that information concerns the "personal affairs of a person" if it relates to the private aspects of a person's life; and that while there may be a substantial grey area in the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes affairs relating to -

- family and marital relationships;
- health or ill-health;
- relationships with and emotional ties with other people; and
- domestic responsibilities or financial obligations.

109. Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, based on a proper characterisation of the matter in question.

110. Issues as to whether information concerning a person's employment affairs relate to the person's personal affairs (for the purposes of exemption provisions which correspond to s.44(1) of the Queensland FOI Act) have been considered in many decisions arising under the Commonwealth FOI Act and the Victorian FOI Act. The most influential of the earlier decisions has been *Re Williams and Registrar of the Federal Court of Australia* (1985) 8 ALD 219, where the applicant applied to the Commonwealth AAT for review of a decision refusing him access under the Commonwealth FOI Act to documents that formed part of the selection papers relating to an employment position unsuccessfully sought by the applicant. Beaumont J, sitting as a presidential member of the Commonwealth AAT, held (at p.221):

> *In my opinion, the reference in the Act to the "personal affairs" of a person was intended to have its ordinary dictionary meaning, that is to say, to refer to matters of private concern to an individual. It is not necessary to attempt an exhaustive definition of the phrase. It will suffice, for present purposes, to say that, ordinarily, information as to the work capacity and performance of a person is not private in that sense. It is something observed by others and commonly discussed by those involved in that work. Ordinarily, information as to a person's vocational*

> *competence is not something which is treated as confidential. Prima facie at least, it is not part of his or her "personal affairs".*

111. At paragraphs 33-36 of my reasons for decision in *Re Stewart*, I demonstrated that Beaumont J's views have been repeatedly endorsed by the Federal Court of Australia, albeit with some minor qualifications which are there explained.

112. At paragraph 83 of my reasons for decision in *Re Stewart*, I endorsed what was said by Deputy President Hall of the Commonwealth AAT in *Re Anderson and Australian Federal Police* (1986) 4 AAR 414 at p.433-4, with respect to persons who are employees of other persons, corporations or governments. Deputy President Hall's observations were as follows:

> *In my view acts, matters or things done by a person in a representative capacity on behalf of another person, body or organisation, would not normally be said to relate to that person's "personal affairs". In such cases, the document does not relate to the person's personal affairs because there is no relevance between the information contained in the document and any matter personal to the applicant ...*

113. That this principle applies to persons acting in their representative capacity as employees of an organisation was confirmed in paragraphs 84 and 85 of my reasons for decision in *Re Stewart*:

> *84 This principle is consistent with principles stated in (and the general approach of) the judgments of the New South Wales Court of Appeal in* Commissioner of Police v the District Court of New South Wales and Perrin (Perrin's *case) (Kirby P, Mahoney JA, Clarke JA; 2 September 1993),* [now reported at (1993) 31 NSWLR 606] *a case which involved the application of the personal affairs exemption in clause 6(1) of Schedule 1 to the New South Wales FOI Act; see for example per Kirby P at p.29-30* [(1993) 31 NSWLR at p.625]*:*
>
> > ... it cannot properly be said that the disclosure of the names of police officers and employees involved in the preparation of reports within the New South Wales Police can be classified as disclosing information concerning their personal affairs. The preparation of the reports apparently occurred in the course of the performance of their police duties. What would then be disclosed is no more than the identity of officers and employees of an agency performing such duties. As such, there would appear to be nothing personal to the officers concerned. Nor should there be. It is quite different if personnel records, private relationships, health reports, or (perhaps) private addresses would be disclosed. Such information would attract the exemption. But the name of an officer or employee doing no more than the apparent duties of that person could not properly be classified as information concerning the personal affairs of that person. The affairs disclosed are not that person's affairs, but the affairs of the agency.
>
> *85 In the particular context of government employees it would be inimical to the attainment of one of the major objects of FOI legislation (i.e. enhancing government's accountability and keeping the community informed of government's operations) if disclosure of records relating merely to the performance by a public servant of his or her duties could be resisted on the basis that they related to the public servant's personal affairs. In my opinion, Perrin's case was clearly correctly decided and ought to be followed in Queensland (in preference to earlier decisions which are necessarily*

> *inconsistent with it, such as* Re Perton and Department of Manufacturing and Industry Development *(1991) 5 VAR 149).*

114. To these passages, I also add my specific endorsement of the observations concerning s.33(1) (the personal affairs exemption) of the Victorian FOI Act made by Eames J of the Supreme Court of Victoria in *University of Melbourne v Robinson* [1993] 2 VR 177 at p.187:

> *The reference to the 'personal affairs of any person' suggests to me that a distinction has been drawn by the legislature between those aspects of an individual's life which might be said to be of a private character and those relating to or arising from any position, office or public activity with which the person occupies his or her time.*

115. In *Commissioner of Police v The District Court of NSW and Anor* (1993) 31 NSWLR 606, the appellant argued (see p.621) that the "personal affairs" exemption (Sch.1, cl.6) in the *Freedom of Information Act 1989 NSW* should not be interpreted so as to undermine the "traditional anonymity" of public servants, including police officers. Ministers and agency heads, such as the Commissioner, were responsible to, and answerable before, parliament and the people, but (it was argued) ordinary officers and employees should be able to go about their affairs without unnecessary disclosure of their involvement in particular decisions. That argument was decisively rejected by Kirby P (at p.622 and p.625-6) who said (at p.626-5):

> *It is contrary to the achievement of the purposes of the Act. ... How can the fundamental principles of "openness, accountability and responsibility" be achieved ... if the anonymity which was said to be part of the problem is preserved by the construction of cl.6(1) urged upon this Court?*

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

Findings on the Application of s.44(1)

117. In my opinion, the basic approach adopted by Ms Harris and Mr Read in the passages from their respective decisions (set out at paragraphs 102 and 104 above) is clearly correct, and accords with the analysis I subsequently made in *Re Stewart*. I expressed doubts (at paragraph 102 of *Re Stewart*) about the decision in *Re Toomer and Department of Primary Industries & Energy* (1990) 20 ALD 575, where it was held that an assessment of work capacity or performance containing criticism of a person's personality or an attack on professional or technical reputation is personal and falls within the meaning of "personal affairs" in s.48 of the Commonwealth FOI Act. I said:

> *I have difficulty in seeing how it is possible, ordinarily, to undertake an assessment of an employee's work performance and capacity, or vocational competence, without dealing in that person's reputation for the performance of employment duties. There may be a line to be drawn between assessments which reflect on reputation for the conduct of employment duties, and assessments which reflect on a person's general reputation or personality, though I expect that in many instances it could prove a difficult line to draw.*

118. If there is such a line to be drawn, then I have no doubt that the contents of the Seawright Report fall clearly on the side which would exclude it from consideration for exemption under s.44(1). I have examined the contents of the Seawright Report, and in my opinion it is properly to be characterised as information concerning the performance by Dr Pope of his duties and functions as an employee

of a government agency, rather than as information concerning his personal affairs. I specifically agree with the findings made by Ms Harris in her initial decision that the Seawright Report contains no criticism of Dr Pope's personality or other personal traits. Rather, the investigation by Professor Seawright and his ensuing report were made in response to allegations of breaches of acceptable standards of work practice within Dr Pope's discipline. I also agree with Mr Read's finding in his internal review decision, as follows:

> *Professor Seawright limits his comments to the scientific practice of Dr Pope seen in the context of what Professor Seawright considers to be acceptable scientific practice. These are not matters which constitute 'personal affairs' as defined by the case law on the subject nor do they represent an 'exceptional case' in terms of the Bleicher case.*

119. I do not accept Dr Pope's contention that the information in the Seawright Report concerns his personal reputation, character and judgment, which constitute his personal affairs for the purposes of s.44(1) of the FOI Act. The information in the Seawright Report concerns Dr Pope's reputation and judgment in respect of the performance of his employment duties.

120. Dr Pope's submission singles out for special attention the third last paragraph of the Seawright Report. Dr Pope's solicitors have characterised this, at part 2.2 of the submission set out at paragraph 105 above, as involving an allegation of dishonesty made by Dr Robbins in relation to Dr Pope's *curriculum vitae*. A *curriculum vitae* is essentially an individual's record of his or her work history and career achievements, and generally comprises information relating to the person's employment affairs. It may, however, contain some details relating to the person's personal affairs (e.g. home address, marital status and details of family relationships, and etc.). The aspect of Dr Pope's *curriculum vitae* in issue here, however, does not concern information of that nature.

121. I am precluded from going into any detail about the nature of the allegation and the way it has been dealt with in the third last paragraph of the Seawright Report, for fear of disclosing the matter in issue (*cf.* s.76(2) and s.87 of the FOI Act). I can say, however, that I understand how it could be perceived by Dr Pope that this paragraph of the Seawright Report traverses an allegation of personal dishonesty made against Dr Pope, and how it could be argued that this particular allegation, and the discussion of it in the Seawright Report, go beyond investigation of Dr Pope's work conduct. But, with respect, I think that argument proceeds from an isolated focus on the third last paragraph without due regard to the context of the Seawright Report as a whole. In my opinion, Dr Robbins' allegation concerning Dr Pope's *curriculum vitae*, although it arguably does imply personal dishonesty on the part of Dr Pope, was made in the belief that it afforded circumstantial evidence, albeit from after the event, which might assist Professor Seawright to draw the inference that Dr Pope knowingly published invalid biomedical research studies in the *International Journal of Cancer*. Whether that belief was reasonable, or such an inference was reasonably open, is doubtful (I do not think that, if an experienced lawyer had been the investigator, it would have been given much attention). But there is no suggestion in the context of the report that this allegation by Dr Robbins was being addressed as a separate issue divorced from the charge of 'scientific fraud".

122. In my opinion, the third last paragraph of the Seawright Report is inextricably bound up with Professor Seawright's account of his investigation and findings in respect of the allegations that Dr Pope had knowingly published invalid biomedical research studies, or put another way, that Dr Pope breached acceptable standards of work practice within his discipline. If, however, it can be argued that, because this paragraph deals with suggestions of personal dishonesty on Dr Pope's part, the paragraph concerns Dr Pope's personal affairs, I am satisfied in any event that the public interest considerations favouring disclosure of the Seawright Report (as discussed above at paragraphs 93-100) warrant a finding, on the application of s.44(1), that disclosure of this paragraph (in common with the rest of the Seawright Report) would, on balance, be in the public interest.

123. I should reinforce that by clearly stating that the same public interest considerations which I found, in the context of s.45(1)(c) of the FOI Act, to overwhelmingly favour disclosure of the Seawright Report (see paragraph 100 above) likewise apply with similar force and to the same effect on the application of the public interest balancing test incorporated within s.44(1) of the FOI Act. Thus, even if the applicant were able to persuade me that the Seawright Report comprises information concerning his personal affairs for the purposes of s.44(1) of the FOI Act, the public interest considerations favouring disclosure of the Seawright Report, dealt with at paragraphs 93-100 above, satisfy me that disclosure of the Seawright Report in its entirety would, on balance, be in the public interest.

Conclusion

124. For the reasons given above, I find that the Seawright Report is not exempt from disclosure under s.45(1)(c) or s.44(1) of the FOI Act, and I affirm the decisions under review.

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F N ALBIETZ
INFORMATION COMMISSIONER