OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 99001
Application S 160/96

Participants:

ALAN CHAMBERS
Applicant

DEPARTMENT OF FAMILIES, YOUTH AND COMMUNITY CARE
Respondent

JENNY GRIBAUDO
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - formal grievance lodged against applicant and others - applicant seeking access to record of interview between grievance investigators and union officer - promise of confidential treatment given in respect of information supplied to grievance investigators by union officer - whether that information qualifies for exemption from disclosure to the applicant under s.46(1)(a) or s.46(1)(b) of the *Freedom of Information Act 1992* Qld - whether promise of confidential treatment overridden to the extent required to comply with s.99 of the *Public Service Management and Employment Regulation 1988* Qld, as then in force - whether matter in issue comprised information of a confidential nature as against the applicant - whether disclosure of the matter in issue could reasonably be expected to prejudice the future supply of like information.

FREEDOM OF INFORMATION - refusal of access - whether disclosure could reasonably be expected to have a substantial adverse effect on the management by an agency of its personnel - application of s.40(c) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - whether matter in issue can properly be characterised as information concerning the personal affairs of a person other than the applicant - application of s.44(1) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.21, s.25, s.40(c), s.44(1), s.46(1), s.46(1)(a), s.46(1)(b)
Freedom of Information Act 1982 Vic s.33(1)
Public Service Regulation 1997 Qld s.15, s.16(2)
Public Service Management and Employment Regulation 1988 Qld s.99, s.99(1)

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Cairns Port Authority and Department of Lands, Re (1994) 1 QAR 663
Holt & Reeves and Department of Education; Ors, Re (Information Commissioner Qld, Decision No. 98004, 20 April 1998, unreported)
McCann and Queensland Police Service, Re (1997) 4 QAR 30
Murphy and Queensland Treasury & Ors, Re (1995) 2 QAR 744
Pemberton and The University of Queensland, Re (1994) 2 QAR 293
Pope and Queensland Health, Re (1994) 1 QAR 616
Shaw and The University of Queensland, Re (1995) 3 QAR 107
State of Queensland v Albietz [1996] 1 Qd R 215
Stewart and Department of Transport, Re (1993) 1 QAR 227
University of Melbourne v Robinson [1993] 2 VR 177

DECISION

I set aside the decision under review (being the decision made by Mr D A C Smith on behalf of the Department dated 19 September 1996). In substitution for it, I find that the matter in issue is not exempt from disclosure to the applicant under the *Freedom of Information Act 1992* Qld.

Date of decision: 7 April 1999

....
F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of a decision of the Department of Families, Youth and Community Care (the Department) to refuse him access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to a record of interview with the third party, prepared by the appointed investigators of a formal grievance lodged against the applicant and two other persons. The grievance was lodged by an employee (hereinafter referred to as "the complainant") of the Public Trust Office, where, at the relevant time, the applicant was employed as Deputy Director, Human Resource Management.

2. By letter dated 21 March 1996, the applicant sought access, under the FOI Act, to a large number of documents concerning the grievance investigation. By letter dated 31 May 1996, Mr V Jeppesen of the Department decided to grant access in full to 170 folios. However, Mr Jeppesen decided that the whole of 155 folios, and parts of a further 10 folios, were exempt matter under s.40(c) of the FOI Act.

3. The applicant sought internal review of one aspect only of Mr Jeppesen's decision, namely, his decision to refuse access to the record of interview between the grievance investigators and the third party, Ms Gribaudo, who was an industrial officer with the public sector union of which the complainant was a member. The internal review decision (made by Mr D A C Smith on behalf of the Department on 19 September 1996) affirmed Mr Jeppesen's decision to refuse access to the record of interview with Ms Gribaudo on the basis that it was exempt matter under s.40(c) of the FOI Act. By letter dated 14 October 1996, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Smith's decision.

External review process

4. A copy of the document in issue was obtained and examined. It is a two page record of an interview conducted with Ms Gribaudo on 6 October 1995. It forms an attachment to the grievance report prepared by Ms C Ahern and Mr K Gall of the Department, following their investigation of the complainant's grievance. It sets out Ms Gribaudo's views which were critical of the management of the Public Trust Office (including the applicant) with respect to the handling of the concerns raised with management by the complainant, and by Ms Gribaudo on behalf of the complainant.

5. When Ms Gribaudo was informed of my review, she wrote to me objecting to disclosure of the document in issue, and providing a statutory declaration dated 28 April 1997. She was subsequently granted status as a participant in this review.

6. In order to better understand the circumstances surrounding the interview with Ms Gribaudo, I requested that the Department provide me with additional information. It did so by letter dated 12 May 1997, attaching a number of documents including a copy of the relevant grievance procedures for the Department, and a copy of the grievance report.

7. By letter dated 17 February 1998, Assistant Information Commissioner Sammon suggested to the applicant that he might apply to the Department for access to the record of interview with Ms Gribaudo pursuant to s.16(2) of the *Public Service Regulation 1997* Qld, a provision which appeared to confer on officers of the public service (like the applicant) a right of access to information of the kind in issue, but a right that was unqualified by any specific exceptions (unlike the extensive exceptions to the right of access conferred by s.21 of the FOI Act that are contained in the exemption provisions in Part 3, Division 2 of the FOI Act). Section 16(2) of the *Public Service Regulation* provides:

> ***Access to employee's record***
>
> ...
>
> ***(2)*** *A public service employee may, at a time and place convenient to the relevant department—*
>
> *(a) inspect any departmental record about the employee; and*
>
> *(b) take extracts from, or obtain a copy of details in, the record.*

8. By letter dated 27 February 1998, the applicant applied to the Department, under s.16(2) of the *Public Service Regulation*, for access to the record of interview with Ms Gribaudo. The applicant provided me with a copy of the Department's response dated 16 March 1998, which said: "*... the material in issue is not specifically a 'departmental record about (yourself)'. Rather, it is a record of an interview with a Union official representing a member other than yourself. It is not material which would be placed on a file relating to yourself. Accordingly, there is some question as to the applicability of s.16 of the* Public Service Regulation *to the documents.*". The Department suggested to the applicant that dealing with the matter under the FOI Act would seem the most appropriate course to adopt.

9. With all due respect to the Department, it is clear that the document in issue contains information about the applicant's work performance, and that it answers the description of a "departmental record about the employee" (a point which the Department appeared to acknowledge and accept in the third and fourth paragraphs on p.3 of its subsequent written submission dated 9 September 1998, lodged with me for the purposes of my review). Nor is it in any way relevant, according to the language used in s.16(2) of the *Public Service Regulation*, that the document in issue might not be placed on a file relating to the applicant. (In any event, I have difficulty in seeing how a file on the investigation of a grievance lodged against the applicant, as well as two other persons, could be characterised as something other than a file relating to the applicant.) However, the applicant elected not to take steps to enforce the right of access conferred by s.16 of the *Public Service Regulation*, indicating instead that he wished to have me proceed to deal with his application for review under Part 5 of the FOI Act. (I should point out that s.16 of the *Public Service Regulation*, and the provisions of the FOI Act, create distinct rights. The fact that an FOI application is being processed is no basis for refusal to comply with a valid application under s.16 of the *Public Service Regulation*.)

10. Thereafter, I wrote to the Department, and to Ms Gribaudo, conveying my preliminary view (and my reasons for forming it) that the document in issue did not qualify for exemption from disclosure to the applicant under s.40(c) of the FOI Act, and inviting them to lodge evidence and submissions in support of their respective cases for exemption. Ms Gribaudo replied on 2 July 1998, stating that she had no further submissions to make, but that she continued to oppose disclosure of the document in issue because it concerned the personal affairs of the complainant. The Department provided a written submission dated 9 September 1998 in support of its case for exemption. Having regard to the submissions made by the Department and Ms Gribaudo, I will consider below whether any part of the document in issue qualifies for exemption under s.40(c), s.44(1) or s.46(1) of the FOI Act.

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

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

> ***46.(1)*** *Matter is exempt if—*
>
> *(a) its disclosure would found an action for breach of confidence; or*
>
> *(b) it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*

12. I discussed the requirements to establish exemption under s.46(1)(a) in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279. The test for exemption is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency faced with an application, under s.25 of the FOI Act, for access to the information in issue. I am satisfied that there is an identifiable plaintiff (Ms Gribaudo) who would have standing to bring an action for breach of confidence.

13. In *Re "B"*, I indicated that there are five cumulative criteria that must be satisfied in order to establish a case for protection in equity of allegedly confidential information:

    (a) it must be possible to specifically identify the information in issue, in order to establish that it is secret, rather than generally available information (see *Re "B"* at pp.303-304, paragraphs 60-63);

    (b) the information in issue must possess "the necessary quality of confidence"; i.e., the information must not be trivial or useless information, and it must possess a degree of secrecy sufficient for it to be the subject of an obligation of conscience, arising from the circumstances in or through which the information was communicated or obtained (see *Re "B"* at pp.304-310, paragraphs 64-75);

    (c) the information in issue must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see *Re "B"* at pp.311-322, paragraphs 76-102);

    (d) it must be established that disclosure to the applicant for access under the FOI Act would constitute a misuse, or unauthorised use, of the confidential information in issue (see *Re "B"* at pp.322-324, paragraphs 103-106); and

    (e) it must be established that detriment is likely to be occasioned to the original confider of the confidential information in issue if that information were to be disclosed (see *Re "B"* at pp.325-330, paragraphs 107-118).

14. In *Re "B"* (at pp.337-341; paragraphs 144-161), I considered in detail the elements which must be established in order for matter to qualify for exemption under s.46(1)(b) of the FOI Act. In order to satisfy the test for *prima facie* exemption under s.46(1)(b), three cumulative requirements must be established:

    (a) the matter in issue must consist of information of a confidential nature;

    (b) that was communicated in confidence; and

    (c) the disclosure of which could reasonably be expected to prejudice the future supply of such information.

    If the *prima facie* ground of exemption is established, it must then be determined whether the *prima facie* ground is displaced by the weight of identifiable public interest considerations which favour the disclosure of the particular information in issue.

15. In her statutory declaration, Ms Gribaudo made the following statements that are relevant to a consideration of the application of s.46(1) of the FOI Act:

    > *... [T]he information in question was material obtained in confidence, being information provided to the grievance investigators confidentially and on condition that it was to be used only for the limited purpose of the grievance proceedings. ... I and my employer Union are particularly concerned that if this material is released members would be reluctant to participate in future proceedings thereby seriously hindering the proper functioning of grievance processes. ...*

> *As to the question of whether any of the information contained in the record of interview was raised regularly either with Mr Martin* [another person against whom the grievance was lodged] *or Mr Chambers in meetings or conferences convened during the course of the grievance process, I say:*
>
> - *during the course of the grievance process the information and the issues resulting from that information were raised with Mr Martin and Mr Chambers.*
> - *the document in question nevertheless has the necessary quality of confidentiality being received in circumstances which imported an obligation of confidence and, as such, it is unnecessary for the provider and the recipient of the information to be the only ones with knowledge of it.*

16. For its part, the Department relied on a statement made to a member of my staff by one of the grievance investigators (Ms Ahern), as follows:

> *... we had given a verbal undertaking to all persons interviewed that we would be recording the information they gave us and that we, the investigators, would not be sharing the information with any other parties - the records of interview would form part of the report to the Director-General.*

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

18. Moreover, in my view, the assurances of confidentiality given by the grievance investigators in this case were not only potentially in conflict with a common law duty to accord procedural fairness, but were in actual conflict with principles stated in the published procedures of the Department for handling grievance investigations (see paragraphs 27-29 below), and with the Department's obligations under s.99 of the now superseded *Public Service Management and Employment Regulation 1988* Qld (the PSME Regulation), which was in force at the time of the grievance investigation, and which provided:

> ***Reports to be noted by officers***
>
> ***99.(1)*** *A report, item of correspondence or other document concerning the performance of an officer which could reasonably be considered to be detrimental to the interests of that officer, shall not be placed on any official files or records relating to that officer unless the officer has initialled the document and has been provided with—*

(a) a copy of the document; and

(b) the opportunity to respond in writing to the contents of the document within 14 days of receipt of the copy.

***(2)** When an officer responds in writing, the response shall also be placed on the official file or record.*

***(3)** Where an officer refuses to initial a document, it may nevertheless be placed on the file or record but the refusal shall be noted.*

19. In *Re Holt & Reeves and Department of Education; Ors* (Information Commissioner Qld, Decision No. 98004, 20 April 1998, unreported), I said (at paragraphs 49 and 50):

> *49. It is well established that an obligation of confidence, whether equitable or contractual, can be overridden by compulsion of law, in particular by a statutory provision compelling disclosure of information: see, for example,* Smorgon v ANZ, FCT v Smorgon *(1976) 134 CLR 475 at pp.486-490. The existence of a provision like s.99 of the PSME Regulation could arguably forestall the recognition and enforcement of an equitable obligation of confidence in respect of information that would be (or would inevitably become) subject to disclosure pursuant to an obligation imposed by statute or delegated legislation. ...*
>
> *50. Section 99 and s.103 of the PSME Regulation required the interpretation and application of some rather vague terms such as "official files or records relating to the officer" and "departmental file or record held on the officer". Moreover, under s.99 of the PSME Regulation, the obligation to disclose adverse information to an officer arose only at the point prior to placement of the adverse information on any official files or records relating to the officer. ... An equitable obligation binding the Department not to disclose certain information may subsist until such time as it is overridden by the application of a provision in a statute or delegated legislation obliging disclosure. ...*

20. In its letter to me dated 12 May 1997, the Department advised that a separate file was created in relation to the grievance and was held in a secure area in the Department's industrial section. The Department indicated that copies were not held on personnel files relating to individual officers. While I indicated in *Re Holt & Reeves* that there could be some difficulties in delineating the precise scope of the phrase "any official files or records relating to that officer", I have no doubt that a file or record relating to the investigation of a formal grievance against a named officer falls squarely within the natural and ordinary meaning of that phrase. I do not consider that a reasonable construction of that phrase involves limiting its sphere of application to the main personnel file on a particular officer.
I do not consider it appropriate to construe a provision that was obviously intended to confer a substantial entitlement on public service officers (i.e., to be informed of information concerning their performance which could reasonably be considered to be detrimental to their interests) in such a way that the entitlement could be negated simply by strategic placement of a document on a particular file.

21. Nor can I see any justification for construing the relevant phrase as if it read "any official files or records relating exclusively to that officer". It would be highly artificial, and subversive of the obvious intent of the provision, to construe it as though information detrimental to the interests of two officers was not to be disclosed to either because it was not placed on an official file or record relating exclusively to either one of them, or that it was not to be disclosed to one of them because it was placed on an official file or record relating to the other. In this case, the applicant was one of three subjects of a grievance lodged by the complainant. A separate file was created in relation to that grievance, and I consider that it was an official file relating to the applicant. Likewise, the record of interview with Ms Gribaudo was an official record relating to the applicant.

22. Further, from my examination of the record of interview with Ms Gribaudo, I am satisfied that it answers the description of a "document concerning the performance of an officer [the applicant]". It addresses issues concerning the way in which the applicant, as a manager, dealt with issues/complaints raised by, or on behalf of, the complainant. In its written submission dated 9 September 1998, the Department argued that the record of interview with Ms Gribaudo could not reasonably be considered to be detrimental to the applicant's interests (within the terms of s.99(1) of the PSME Regulation) because:

   - *no disciplinary proceedings will be taken against Mr Chambers in respect of the matters referred to in the document;*
   - *the document is not to be placed on Mr Chambers' personnel file;*
   - *the document will not be taken into account in assessing Mr Chambers' suitability for promotion, or for the purpose of taking some action adverse to Mr Chambers (e.g., an involuntary transfer).*

23. However, I cannot accept, in the context which the language of s.99 contemplates, that the requirements of s.99 were intended to apply according to an assessment of whether or not some formal action adverse to a particular officer would ultimately be taken. Section 99 required an assessment of the situation prior to a document being placed on an official file or record relating to a particular officer. The provision required an assessment of whether information concerning the performance of a particular officer could reasonably be expected to be detrimental to his/her interests. The obvious intent of the provision was to allow an officer to be made aware of criticism or other detrimental information concerning his/her performance, and to afford the officer an opportunity to respond to it, prior to that information being placed on an official file or record relating to the officer. Giving the words of s.99(1) of the PSME Regulation their natural and ordinary meaning, I consider that the Department was obliged to provide the applicant with a copy of the record of interview with Ms Gribaudo for initialing, prior to it being placed on the file relating to the investigation of the formal grievance lodged against the applicant and two other persons.

24. I should note that I have formed that conclusion as a step in the process of applying exemption provisions in the FOI Act to the matter in issue before me. I am not in a position to make a substantive ruling as to compliance or non-compliance with s.99(1) for any purpose other than considering the application of the FOI Act. I do so in this case merely to determine whether, in the terms I discussed in paragraph 49 of *Re Holt & Reeves*, there was a legislative provision compelling disclosure of the document in issue, so as to override, by compulsion of law, any equitable obligation of confidence that might be thought to have been created by the conduct of the grievance investigators in promising confidential treatment of information supplied to them by witnesses. In my view, both the Departmental grievance investigators and Ms Gribaudo, as a union officer, ought reasonably to have known of the existence of s.99(1) of the PSME

Regulation. The touchstone in assessing whether criterion (c) to found an action in equity for breach of confidence (see paragraph 13 above) has been satisfied, lies in determining what conscionable conduct requires of an agency in its treatment of information claimed to have been imparted to the agency in confidence. In my view, conscionable conduct on the part of an agency requires compliance with applicable legislative provisions. In the circumstances of this case, I consider that any understanding of confidential treatment, on which a case for exemption under s.46(1)(a) or s.46(1)(b) of the FOI Act could be based, was necessarily subject to the condition/exception that, or was necessarily overridden to the extent that, the information given to the grievance investigators by Ms Gribaudo could not be treated in confidence as against the applicant (nor the other subjects of the grievance, although that is not relevant for present purposes) beyond the time when disclosure to the applicant, in accordance with s.99(1) of the PSME Regulation, was required.

25. I should note that, on pages 5 and 6 of its written submission dated 9 September 1998, the Department endeavoured to put an argument (albeit in somewhat equivocal terms) to the effect that legislative provisions comparable to s.99 of the PSME Regulation should not be construed as though they were intended to override equitable obligations of confidence (such as the Department contended had accrued with the promise by the grievance investigators to treat in confidence information provided to them by Ms Gribaudo). I consider that it is well established on the authorities (*Smorgon's* case, cited in the extract from *Re Holt and Reeves* which is reproduced at paragraph 19 above, is but one example) that legislative provisions requiring disclosure of particular information will, to the extent required for compliance with the particular legislative provision, override any equitable or contractual obligation of confidence attaching to information that is caught by the terms of the legislative provision (see also F. Gurry, Breach of Confidence, Clarendon Press, 1984, at p.359 and the cases there cited). I do not accept that any considerations relevant to the importance, for the efficacy of grievance investigations, of honouring promises of confidential treatment, warrant any reading down of the natural and ordinary meaning of the language used in s.99 of the PSME Regulation (or the provisions which superseded it), and I am reinforced in that view by the matters addressed in paragraphs 27-29 below.

26. It is possible to think of examples where the application of the natural and ordinary meaning of the language of s.99 of the PSME Regulation (and its successor provision) could lead to inappropriate consequences (such as the example given in the last sentence of the extract from the Department's submission quoted at paragraph 41 below; i.e., the suggestion that an officer of the public service must be informed of allegations of serious wrongdoing received by a Department against the officer, when or before the allegations are referred to the Criminal Justice Commission or the police for investigation - which could allow time for destroying evidence, tampering with witnesses, or otherwise prejudicing the investigation).
But that is not the present case, which, in my view, involves no absurd or unreasonable result, but rather falls squarely within the core of the purpose or object which those provisions were intended to achieve. In my view, it could prove a difficult exercise to place on the language used in the current provisions (namely, s.15 and s.16 of the *Public Service Regulation 1997*) an interpretation which the words are capable of bearing, and which could avoid inappropriate consequences of the kind adverted to above. Rather, there seems to me to be a case for careful consideration of whether amendments are necessary to introduce qualifications/exceptions to the rights and obligations that have been provided for in broad and unqualified terms in the current provisions.

27. Even if s.99 of the PSME Regulation had not required disclosure to the applicant of the document in issue, it appears that the applicable written policies and procedures of the Department would have required the same result. With its letter dated 12 May 1997, the Department provided me with a copy of Policy Practice and Procedure Memorandum 91/9, dated 27 September 1991, which applied at the relevant time. In addition to the statutory provisions referred to above, there are provisions in the memorandum and supporting documentation which suggest that the management practices of the Department at the time envisaged disclosure of adverse material to staff in the position of the applicant. For example, clause 2.5 of the memorandum states:

> *Documents relating to the grievance and its investigation will be placed on the file of the officer who has made the grievance. If the documents contain material that could be considered detrimental to the interests of the employee making the grievance, <u>or to any other employee</u>, then the provisions of Regulation 46* [which became s.99] *of the* Public Service Management and Employment Regulations *must be complied with.* [my underlining]

28. This, at the very least, suggests that the Department gave the words "files or records relating to that officer" in the former Regulation 46 (which became s.99 of the PSME Regulation) a broad interpretation, *viz.*, as potentially requiring disclosure to persons other than the officer on whose personnel file the material was placed.

29. I also note that clause 3.3 of the memorandum draws the attention of investigating officers to the Public Sector Management Commission (PSMC) Guidelines for Investigating Officers. I set out below relevant extracts from the version of those Guidelines dated December 1991:

> *Explain that any complaints will be put to other parties to the dispute and that any document likely to be detrimental to another employee (including the notice of grievance) will have to be shown to the person/s concerned.*
> *Apart from this, however, the process is confidential.* [This appears in a section headed "Interviewing the aggrieved employee".]
>
> ...
>
> *Where documents exist (such as the notice of grievance) that could reasonably be considered to be detrimental to the interests of the employee, these should be provided to the employee. The procedure for formally responding to these documents should also be explained. (See the comments below about respondent to reports).* [This appears in a section headed "Interviewing other employees party to the grievance".]
>
> ...
>
> *Public Servants are to be shown any document which could reasonably be considered to be detrimental to their interests and given a chance to respond.*
> *(See Appendix B.) PSMC recommends that a similar practice be adopted for other Public Sector employees.* [This appears in a section headed "Responding to reports".]

30. The record of interview with Ms Gribaudo includes negative comments about the performance of the applicant as a manager. In my view, a document which contains comments of that kind could reasonably be considered to be detrimental to the interests of the applicant, and therefore was required to be disclosed to the applicant under the terms of s.99 of the PSME Regulation, under the applicable published procedures of the Department, and under the PSMC Guidelines for Investigating Officers. In such circumstances, I am not satisfied that the third criterion for exemption under s.46(1)(a) of the FOI Act (see paragraph 13 above), nor the second requirement for exemption under s.46(1)(b) of the FOI Act (see paragraph 14 above), can be established in respect of the matter in issue.

31. Further, I note that Ms Gribaudo has conceded in her statutory declaration that the information and issues addressed in her record of interview with the grievance investigators were raised with the applicant in meetings and conferences during the performance of her duties as a union officer (see paragraph 15 above). I consider that the matter in issue lacks the necessary quality of confidence, as against the applicant, to qualify for exemption from disclosure to the applicant under either s.46(1)(a) or s.46(1)(b) of the FOI Act.

32. Further, I do not consider that disclosure of the matter in issue could reasonably be expected to prejudice the future supply of like information to the Department. The matter in issue consists of comments by a union officer about the management of the Public Trust Office.
I am not satisfied that union officers would in future be dissuaded from expressing concerns about management's handling of staff grievances, merely because the document in issue was disclosed to the applicant. Raising concerns with, and about, management is one of the key roles of unions, and nothing before me suggests that any union officer would be less likely to do their job in this regard, if the document in issue is disclosed. I therefore find that the third requirement for exemption under s.46(1)(b) of the FOI Act (see paragraph 14 above) is not satisfied, with respect to the matter in issue.

33. I find that the matter in issue does not qualify for exemption from disclosure to the applicant under s.46(1)(a) or s.46(1)(b) of the FOI Act.

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

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

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

35. I have considered the application of s.40(c) of the FOI Act in *Re Pemberton and The University of Queensland* (1994) 2 QAR 293, *Re Murphy and Queensland Treasury & Ors* (1995) 2 QAR 744, *Re Shaw and The University of Queensland* (1995) 3 QAR 107, and
Re McCann and Queensland Police Service (1997) 4 QAR 30. The focus of this exemption provision is on the management or assessment by an agency of the agency's personnel. The exemption will be made out if it is established that disclosure of the matter in issue could

reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of its personnel, unless disclosure of the matter in issue would, on balance, be in the public interest.

36. I analysed the meaning of the phrase "*could reasonably be expected to*", by reference to relevant Federal Court decisions interpreting the identical phrase as used in exemption provisions of the *Freedom of Information Act 1982* Cth, in *Re "B"* at pp.339-341, paragraphs 154-160. In particular, I said in *Re "B"* (at pp.340-341, paragraph 160):

> *The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.*

The ordinary meaning of the word "expect" which is appropriate to its context in the phrase "could reasonably be expected to" accords with these dictionary meanings: "to regard as probable or likely" (Collins English Dictionary, Third Aust. ed); "regard as likely to happen; anticipate the occurrence ... of" (Macquarie Dictionary, 2nd ed); "Regard as ... likely to happen; ... Believe that it will prove to be the case that ..." (The New Shorter Oxford English Dictionary, 1993).

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

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

Substantial adverse effect

39. In Mr Jeppesen's initial decision on behalf of the Department, he stated in part:

> *The Public Sector Management Commission (the PSMC) standard issued in June 1991 concerning grievances places an obligation on the Department to provide a fair and equitable working environment for all of its employees.*
> *To ensure that this result is achieved and maintained, the Department is obligated to thoroughly investigate all grievances.*
>
> *To enable the Department to conduct such investigations in an effective and unbiased fashion, it is essential that the investigating officer be able to apprise him or herself of all relevant information. Often this information will be extremely sensitive. Accordingly, the process would be undermined if potential complainants, witnesses and parties to the grievance were not offered some confidentiality regarding their sensibilities and information they had provided.*

> *Further, it is my view that should the documents concerned be released, there is a strong likelihood that parties to a grievance procedure would be reluctant to provide information to the Department, thus having a substantial adverse effect on the management of the Department's personnel.*

40. Ms Gribaudo has informed me that the information disclosed during the course of her discussions with the grievance investigators, as recorded in the document in issue, was provided to her in confidence by the complainant. Ms Gribaudo has stated that much of that information, some of which came from the complainant's personnel file, was to be used only for the limited purpose of the grievance proceeding. In essence, Ms Gribaudo claims the information contained in the document in issue is confidential in nature and was disclosed to the grievance investigators for the sole purpose of the grievance investigation.

41. The substantial adverse effects claimed by the Department are the loss of confidentiality, diminished confidence in, and general undermining of, the grievance process. In its submission dated 9 September 1998, the Department stated:

> *It is the view of the Department that there are serious organisational implications if officers of the public service are unable to lodge grievances or provide information to investigators in relation to grievances particularly when express undertakings of confidentiality have been given to all parties involved. Of particular concern is where the aggrieved person is junior in status to the person subject to the grievance.*
>
> *Furthermore the document in issue which relates to an interview with Ms Gribaudo of the State Public Service Federation Queensland raises issues relating to membership and representation by trade unions.* [The] *preliminary view also raises concerns as to whether there are industrial/legal implications of the proposed decision.*
>
> *Consultations with Ms Gribaudo have indicated that if such a decision was to be made the Union's position would be that grievance procedures would be inevitably undermined and they may advise members not to participate.*
>
> *The preliminary view also raises the question as to whether any exemption provided under the FOI Act could ever apply if the documents are to the detriment of the applicant who is an officer of the public service. For example, if this was the case, material relating to current CJC and police referrals would have to be provided to the alleged perpetrators if* [such person is] *an officer of the public service.*

42. The major concern of both the Department and Ms Gribaudo appears to be directed towards the potential for disclosure of information provided by staff members in general, and junior officers who have grievances in particular. However, the source of information in this case was a union officer. The document in issue does not support Ms Gribaudo's claim that the information in it was provided to her in confidence by the complainant. The document in issue contains concerns raised by Ms Gribaudo about Ms Gribaudo's interactions with management, including the applicant.

43. As I indicated at paragraph 32 above, it is only to be expected that in dealing with grievances by staff members there will, from time to time, be disagreements between union officials and management as to how a grievance should be dealt with. It is not surprising that a union official, when providing information to grievance investigators, may be critical of aspects of the performance of managers. I do not consider that disclosure of the information provided by Ms Gribaudo to the applicant would be likely to make her, or any other union officer, less likely to perform their duties by highlighting areas in which they consider that management performance has been lacking. Nor do I consider that disclosure of the document in issue, which merely highlights a union officer's concerns about the way in which management has dealt with an employee's grievances, could reasonably be expected to cause officers of the Department, or of the Public Trust Office, to refrain from making grievances or providing information to grievance investigators in the future.

44. Given the nature of the information in issue, and the fact that it comes from a union officer, I am not satisfied that its disclosure could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency (whether it be the Department or the Public Trust Office) of its personnel. I therefore find that the matter in issue is not exempt from disclosure to the applicant under s.40(c) of the FOI Act.

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

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

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

46. In applying s.44(1) of the FOI Act, one must first consider whether disclosure of the matter in issue would disclose information that is properly to be characterised as information concerning the personal affairs of a person. If that requirement is satisfied, a *prima facie* public interest favouring non-disclosure is established, and the matter in issue will be exempt, unless there exist public interest considerations favouring disclosure which outweigh all identifiable public interest considerations favouring non-disclosure, so as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.

47. In my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, 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 pp.256-257, paragraphs 79-114, of *Re Stewart*). In particular, I said that information concerns the "personal affairs of a person" if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:

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

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

48. Although she did not make any detailed submissions on the point, Ms Gribaudo submitted that the matter in issue concerned the personal affairs of the complainant, and should not be disclosed.

49. In *Re Stewart*, I indicated that, ordinarily, information which concerns an individual's work performance or other work-related matters does not concern that individual's personal affairs (see pp.261-264, paragraphs 91-102). In *Re Pope and Queensland Health* (1994) 1 QAR 616, after reviewing relevant authorities (at pp.658-660), I expressed the following conclusion at p.660 (paragraph 116):

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

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

50. Also, in *Re Pope*, I specifically endorsed the following observations, concerning s.33(1) (the personal affairs exemption) of the *Freedom of Information Act 1982* Vic, 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* <u>*relating to or arising from any position, office or public activity*</u> *with which the person occupies his or her time.* [emphasis added]

51. From my examination of the matter in issue, I am not satisfied that any of it can be properly characterised as information concerning the complainant's personal affairs. The interview mainly addressed the performance of management in the handling of the complainant's concerns about her treatment. I find that the matter in issue does not qualify for exemption under s.44(1) of the FOI Act.

Conclusion

52. For the foregoing reasons, I set aside the decision under review (being the decision made by Mr D A C Smith on behalf of the Department, and dated 19 September 1996). In substitution for it, I find that the matter in issue is not exempt from disclosure to the applicant under the FOI Act.

....
F N ALBIETZ
INFORMATION COMMISSIONER