OFFICE OF THE INFORMATION COMMISSIONER (QLD)	**)** **)**	S 222 of 1993 (Decision No. 95023)

Participants:

JOHN PAUL MURPHY
Applicant

- and -

QUEENSLAND TREASURY
Respondent

- and -

OTHERS
Third Parties

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - matter in issue comprising names of officers of the Office of State Revenue, and one officer of the Australian Taxation Office, appearing on documents concerning the applicant's land tax affairs - whether the names of officers appearing in that context constitute information concerning their personal affairs - *Freedom of Information Act 1992* Qld, s.44(1).

FREEDOM OF INFORMATION - whether disclosure of the names of agency officers could reasonably be expected to endanger a person's life or physical safety - *Freedom of Information Act 1992* Qld, s.42(1)(c).

FREEDOM OF INFORMATION - whether disclosure of the names of agency officers could reasonably be expected to prejudice the effectiveness of a method or procedure for the conduct of audits by an agency - *Freedom of Information Act 1992* Qld, s.40(a)

FREEDOM OF INFORMATION - whether disclosure of the names of agency officers could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel - *Freedom of Information Act 1992* Qld, s.40(c).

FREEDOM OF INFORMATION - whether disclosure of the names of agency officers could reasonably be expected to have a substantial adverse effect on the conduct of industrial relations by an agency - *Freedom of Information Act 1992* Qld, s.40(d).

Freedom of Information Act 1992 Qld s.5(1)(a), s.21, s.40(a), s.40(c), s.40(d), s.42(1)(c), s.42(1)(e), s.44(1), s.47(1)(a), s.49, s.78, s.78(2), s.78(3), s.81
Acts Interpretation Act 1954 Qld s.14B(1)
Constitution Act 1975 Vic s.95(1)
Freedom of Information Act 1982 Cth s.37(1)(c), s.40, s.40(1)(c), s.40(1)(d), s.40(1)(e), s.41(1)
Freedom of Information Act 1989 NSW Sch.1 cl.6
Freedom of Information Act 1982 Vic s.31(1)(e), s.33(1)
Industrial Relations Act 1990 Qld s.6
Judicial Review Act 1991 Qld

Anderson and Australian Federal Police, Re (1986) 4 AAR 414
Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft (1986) 64 ALR 97
"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Borthwick and Health Commission of Victoria, Re (1985) 1 VAR 25
Byrne and Gold Coast City Council, Re (Information Commissioner Qld, Decision No. 94008, 12 May 1994, unreported)
Cairns Port Authority and Department of Lands, Re (Information Commissioner Qld, Decision No. 94017, 11 August 1994, unreported)
Colakovski v Australian Telecommunications Corporation (1991) 100 ALR 111
Commissioner of Police v The District Court of New South Wales and Perrin (1993) 31 NSWLR 606
Department of Agriculture and Rural Affairs v Binnie [1989] VR 836
Dyki and Federal Commissioner of Taxation, Re (1990) 22 ALD 124
Heaney and Public Service Board, Re (1984) 1 AAR 336
Lander and Australian Taxation Office, Re (1985) 17 ATR 173
Lawless and Secretary, Law Department, Re (1985) 1 VAR 42
McCarthy and Australian Telecommunications Commission, Re (1987) 13 ALD 1
Mallinder and Office of Corrections, Re (1988) 2 VAR 566
Mann and Australian Taxation Office, Re (1985) 7 ALD 698, 3 AAR 261
Matthews and the Department of Social Security, Re (Commonwealth AAT, N90/363, 2 December 1990, Purvis J, unreported)
News Corporation Limited v National Companies and Securities Commission (1984) 57 ALR 550
Pepperell and Ministry of Housing and Construction, Walden & Anor, Re (1989) 3 VAR 191
Perry and Victoria Police, Re (1990) 4 VAR 131
Perton and Department of Manufacturing and Industry Development, Re (1991) 5 VAR 149
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Searle Australia Pty Ltd v Public Interest Advocacy Centre & Anor (1992) 108 ALR 163
Simons and Victorian Egg Marketing Board, Re (1985) 1 VAR 54
Stewart and Department of Transport, Re (1993) 1 QAR 227
"T" and Queensland Health, Re (1994) 1 QAR 386
Thies and Department of Aviation, Re (1986) 9 ALD 454
Toren and Secretary, Department of Immigration and Ethnic Affairs, Re (Commonwealth AAT, Q93/578, 8 March 1995, Forgie DP, unreported)
Ward and Victoria Police, Re (1986) 1 VAR 334
Z and Australian Taxation Office, Re (1984) 6 ALD 673

DECISION

1. I set aside the decision under review, being the decision of the respondent's principal officer, Mr Henry R Smerdon, made on 5 November 1993.

2. In substitution for it, I decide that the applicant has (in accordance with s.21 of the *Freedom of Information Act 1992* Qld) a right to be given access to the matter that has been withheld from him pursuant to the terms of the decision under review, the respondent having failed to satisfy me that any of the matter thus withheld from the applicant is exempt matter under the *Freedom of Information Act 1992* Qld.

Date of Decision: 19 September 1995

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INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse him access to certain matter contained in documents to which he has otherwise been given access, being documents relating to the land tax affairs of a company, of which the applicant is a Director, and which is the Trustee of the applicant's family Trust. The deleted matter comprises the names of several officers (some since retired) of the Office of State Revenue (the OSR), and one officer of the Australian Taxation Office.

2. On 24 June 1993, Mr Murphy applied for access under the *Freedom of Information Act 1992* Qld (the FOI Act, or the Queensland FOI Act) to -

> *... the complete land tax file relating to dealings of Milglade Pty Ltd with the Office of State Revenue (OSR); the contents of files relating to Assessment Number 10991/EO5839; internal memoranda, notes, correspondence or other computer stored information relating to or concerning Milglade Pty Ltd and/or concerning its Directors, specifically but not limited to Mr John Paul Murphy; any other information/documents which are in the official files held or created personally by any member of the staff of OSR, specifically but not limited to Mr D. Abberton, Mr Redlich and Ms J. Macdonnell; records, either computer based or otherwise disclosing the identity of the enquiry staff member who initially took an enquiry from Milglade Pty Ltd on 21 or 22 June 1993 between 2.00 pm and 5.00 pm; and any other records, notes, memoranda or correspondence whether computer stored or otherwise and whether created for purely internal purposes or not, concerning Milglade Pty Ltd or its Directors.*

3. On 19 August 1993, Ms Natalie Barber, on behalf of the respondent, decided to give Mr Murphy access to all documents identified as falling within the terms of Mr Murphy's FOI access application (comprising some 218 pages), subject to the deletion of matter on 8 pages, comprising references to the names of officers involved in various investigations and the names of other persons having dealings with the OSR. This was claimed to be exempt matter under s.44(1) of the FOI Act.

4. Mr Murphy applied for internal review on 2 September 1993. On 20 September 1993, Mr Michael Sarquis, on behalf of the respondent, affirmed Ms Barber's initial decision relying on s.44(1), and also justified the deletions by reference to s.42(1)(c) of the FOI Act, on the basis that "*dealings in the land tax matter have on occasions been less than cordial and in such circumstances the Department is cautious in releasing officers' names*".

5. Mr Murphy wrote to Mr Sarquis on 22 September 1993 arguing that neither the decision on 19 August 1993, nor the decision on 20 September 1993, were accompanied by adequate reasons, and that both decisions were void as a matter of law. Mr Murphy suggested that "*the whole process be restarted and done according to law*". While I do not think either decision was void as a matter of law, the respondent decided to act in accordance with Mr Murphy's suggestion. Mr Sarquis wrote to Mr Murphy advising that the original decision and internal review decision had been revoked and that the respondent would remake the decision within 45 days of the date of receipt of Mr Murphy's letter dated 22 September 1993.

6. On 27 October 1993, Mr Murphy wrote to me applying for external review of Mr Sarquis' decision of 20 September 1993. However, in view of the fact that Mr Sarquis' decision had been revoked at Mr Murphy's suggestion, Mr Murphy agreed with my proposal that he should await the respondent's fresh decision.

7. On 8 November 1993, the then Under Treasurer, Mr Henry Smerdon, made a fresh decision granting access to the same 218 pages that were the subject of Ms Barber's decision, with the same eight pages subject to the same deletions, the deleted matter being claimed to be exempt under s.44(1) and s.40(c) of the FOI Act. It is unnecessary to set out Mr Smerdon's reasons for decision, which have been revised and expanded upon in the submissions lodged on behalf of the respondent in this review.

8. By letter dated 23 November 1993, Mr Murphy applied to me for review, under Part 5 of the FOI Act, of Mr Smerdon's decision.

External Review Process

9. The documents in issue were obtained and examined. They comprise eight pages of handwritten and typewritten notes, bearing dates between April-May 1991 and March-April 1993, from which the names of certain officers have been deleted.

10. I wrote to Mr Smerdon on 11 August 1994 conveying my preliminary views on the application of s.44(1) and s.40(c) of the FOI Act to the matter in issue, and requesting confirmation that the respondent did not contend that s.42(1)(c) of the FOI Act was applicable. I also extended an opportunity for the respondent to lodge any evidence or written submissions on which it wished to rely to support a case that the matter in issue is exempt matter under the FOI Act.

11. I also wrote to each officer whose name had been deleted from the documents in issue, enclosing a copy of my letter to Mr Smerdon dated 11 August 1994. I invited each officer to inform me whether he or she objected to disclosure of his or her name to Mr Murphy, and drew each officer's attention to the entitlement under s.78 of the FOI Act to apply to be a participant in the review.

12. Two retired officers of the OSR wrote to me raising concerns about the release of their names. An officer of the Australian Taxation Office also responded stating that he had no objection to the disclosure of his name to the applicant. By letter dated 16 September 1994, the Crown Solicitor informed me that he had been instructed to act on behalf of Queensland Treasury and eight officers currently employed in the OSR, whose names had been deleted from the documents in issue.

13. I also received a letter dated 28 September 1994 from the State Public Services Federation (Queensland) (the SPSFQ) purporting to represent individual members of the SPSFQ affected by the decision under review, and making application to participate in the review. I entertained doubts as to whether the SPSFQ was entitled to status as a participant in the review. However, following consultation with Mr Murphy, I wrote to the SPSFQ on 30 September 1994 in the following terms:

> *Section 78(2) of the FOI Act permits "any person affected by the decision the subject of the review" to apply to me to participate in the review. Section 78(3) of the FOI Act confers on me a discretion to allow such a person to participate in the review in such way as I direct.*
>
> *I have significant reservations about whether the SPSFQ is a "person affected by the decision the subject of the review", for the following reasons:*
>
> 1. *You state in your letter dated 28 September 1994 that this matter affects the SPSFQ because it represents the individual members concerned. I have, however, received advice from the Crown Solicitor that he has been instructed to act for the eight officers employed in the Office of State Revenue who are directly affected by the decision under review. Thus, the eight officers, the disclosure of whose names is in issue, have become participants, and have competent legal representation.*
>
> 2. *You state that this matter affects the SPSFQ on the basis that the matter is of grave concern to all your members in the Office of State Revenue and that this case has the potential to impact on all the rights of public servants in Queensland. I have doubts, however, as to whether these concerns are sufficient to elevate the SPSFQ to a position where it can be regarded as a person affected by the decision, the subject of the review.*
>
> *I have consulted the applicant, Mr Murphy, as to whether or not he objects to the SPSFQ participating in this review. Although Mr Murphy can see no basis in principle for the SPSFQ to assert an entitlement to participate in this review, he is more concerned by the prospect of a prolonged legal battle, over a peripheral issue of this kind, causing a further delay in the final resolution of his application for review. On that basis, and in the interests of a speedy resolution of this review, he is prepared to consent to the SPSFQ participating in this review, in such manner as I direct. I am, therefore, prepared to allow the SPSFQ to participate in this review, but this should not be regarded as setting any precedent for future cases of a similar kind.*
>
> *I now extend to you the opportunity to lodge evidence and/or a written submission in support of any case you wish to make that the names of officers of the Office of State Revenue were properly deleted from the documents in issue because they comprised exempt matter under the FOI Act.*

14. While I have allowed the SPSFQ to participate in this review, primarily because of the stance adopted by Mr Murphy, I remain unconvinced that the SPSFQ is entitled, under the language of s.78 of the FOI Act, to the status of a participant in the review. Thus I have not named the SPSFQ as a participant in the heading to this decision and reasons for decision. Ultimately, the SPSFQ lodged a short written submission stating merely that it relied upon the submissions and evidence lodged on behalf of the respondent, before making several suggestions to me as to how I should

conduct the review. The officers and retired officers whose names are in issue are entitled to the status of participants, but they have not been named as such for obvious reasons.

15. It is indicative of the complexity of some of the issues that are capable of arising under the FOI Act that in this case, in which the information in issue comprises no more than the names of several public servants appearing in documents to which the applicant has otherwise been given access, the following material was lodged by the participants in support of their respective cases:

(a) for the respondent, and the eight officers employed in the OSR whose names are in issue -

a written submission of some 50 pages, dated 21 October 1994.

ten statutory declarations, and one letter of objection, from officers and former officers of the OSR, the names of most of whom are in issue (and from which, names and other identifying material were deleted, when this evidence was provided to the applicant for response).

a statutory declaration of Mr Michael Sarquis, executed on 20 October 1994.

a statutory declaration of Ms Jane Macdonnell, executed on 21 October 1994.

a written submission, dated 1 February 1995, in reply to the applicant's evidence and submissions.

a supplementary submission, dated 13 March 1995.

a statutory declaration of Mr Don Abberton, executed on 13 March 1995.

(b) for the applicant -

a written submission of some 49 pages.

an affidavit of Robert Victor Harris, sworn 1 December 1994.

an affidavit of Peter John Byrnes, sworn 2 December 1994.

an affidavit of John Paul Murphy, sworn 4 December 1994.

an affidavit of Davinka Wanigesekera, sworn 5 December 1994.

a supplementary submission, dated 6 April 1995, in response to the respondent's supplementary submission.

During the course of the review, I also called for and examined a copy of the relevant land tax file (to which the applicant had obtained access, subject to the deletion of the names of officers which are now in issue).

16. By letter dated 5 January 1995, the respondent's solicitor was informed that Mr Murphy had requested that he be permitted to cross-examine a number of people (some of whom had not even lodged evidence in the respondent's case). I sought the respondent's views on this procedural issue. By letter dated 19 January 1995, the respondent submitted that procedural fairness, in the context of this case, did not require that Mr Murphy be permitted to cross-examine the persons he had nominated, but that if cross-examination was to be permitted, the respondent would wish to cross-

examine Mr Murphy and his supporting deponents. In light of the respondent's arguments, I formed the view that the fair and proper disposition of this review did not require cross-examination by any participant of the witnesses who had given formal evidence on behalf of another participant.

17. By virtue of s.21 of the FOI Act, Mr Murphy has a legally enforceable right to be given access to the matter in issue unless it falls within the terms of one of the statutory exceptions to the right of access which are provided for in the FOI Act itself. The primary question, therefore, is not "Why should Mr Murphy have access to the matter in issue?" but rather "Why should Mr Murphy not have access to the matter in issue?" The respondent's answer is that the matter in issue is exempt under several provisions of the FOI Act. Pursuant to s.81 of the FOI Act, the respondent has the onus of establishing that the decision under review was justified or that I should give a decision adverse to the applicant. The respondent's case is summarised at p.1 of its first written submission, as follows:

> *1.1.3 The main competing interest to access in this case is the ability of individuals who happen to be officers in the public service to go about their work (in an accountable manner) but without fear of intimidation, harassment or reprisals which may lead to:*
>
> > *a reasonable expectation of endangering their lives or physical safety (including mental health) - (s.42(1)(c));*
> >
> > *prejudice the effectiveness of a method or procedure for the conduct of ... audits by an agency - (s.40(a));*
> >
> > *a substantial adverse effect on the management or assessment by an agency of the agency's personnel - (s.40(c));*
> >
> > *a substantial adverse effect on the conduct of industrial relations by an agency - (s.40(d)).*
>
> *1.1.4 This can be done by preventing disclosure of information concerning the personal affairs of such officers which includes not giving their names to a stranger who is unaware of their names - (s.44(1)).*

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

18. Section 44(1) 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.*

19. In my letter dated 11 August 1994 to the respondent, I conveyed the following preliminary views on the application of s.44(1) to the matter in issue, and invited the respondent to lodge submissions to persuade me to the contrary:

> *In my view, the claim for exemption under s.44(1) of the FOI Act, in respect of the names of officers of the Office of State Revenue, must now be regarded as untenable in light of the clarification of the relevant scope of the phrase "information concerning the personal affairs of a person" given by the judgments of the New South Wales Court of Appeal in* Commissioner of Police v The District Court of New South Wales and Perrin *(1993) 31 NSWLR 606 (*Perrin's *case). Relevant*

> *passages from the judgments in that case are set out, and endorsed, in my decisions of* Re Stewart and Department of Transport *[(1993) 1 QAR 227], at paragraphs 84 and 88, and* Re Pope and Queensland Health *(Information Commissioner Qld, Decision No. 94016, 18 July 1994, unreported), at paragraphs 113 and 115. The actual decision in* Perrin's *case is directly applicable to the matter in issue in this review. The New South Wales Court of Appeal held that the names of police officers (and other employees of the New South Wales Police Service) involved in the preparation of reports in the performance of their employment duties could not properly be classified as information concerning the personal affairs of those police officers (and other employees). Likewise, in my view, the names of employees of the Office of State Revenue appearing in documents relating to the performance of their employment duties cannot properly be classified as information concerning the personal affairs of those employees, for the purposes of s.44(1) of the FOI Act. (See also my conclusion at paragraph 116 of* Re Pope.*)*

20. The respondent has provided me with submissions detailing a number of arguments aimed at dissuading me from the preliminary view that I expressed in my letter of 11 August 1994. I have considered those arguments carefully, but I find none of them convincing.

21. First, the respondent has referred me to a large number of decisions of the Victorian Administrative Appeals Tribunal (the Victorian AAT), applying s.33(1) of the *Freedom of Information Act 1982* Vic (the Victorian FOI Act), which have held that a person's name forms part of a person's personal affairs. That position appears to have become established with the decision in *Re Simons and Victorian Egg Marketing Board* (1985) 1 VAR 54, and adhered to by the Victorian AAT in many subsequent cases. It has been held that the names of public servants constitute their personal affairs (see *Re Perton and Department of Manufacturing and Industry Development* (1991) 5 VAR 149 at p.150) with the fact that their names appear in a context relating to the performance of their duties as public servants having been treated as a factor going to whether disclosure would be unreasonable, under the terms of s.33(1) of the Victorian FOI Act which is framed as follows:

> ***33(1)***. *A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).*

22. It is probably enough to deal with the respondent's submissions on this issue to say that I reaffirm the view (which I first stated in *Re Stewart and Department of Transport* (1993) 1 QAR 227 at p.259, paragraph 85) that I am satisfied of the correctness of the reasoning in the decision of the NSW Court of Appeal in *Commissioner of Police v The District Court of New South Wales and Perrin* (1993) 31 NSWLR 606 (*Perrin's* case) which is to be preferred to any tribunal decisions based on reasoning which is necessarily inconsistent with *Perrin's* case. However, I will make some further explanatory comments.

23. In my reasons for decision in *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. 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.

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.

24. In *Re Stewart* at pp.259-261 (paragraphs 86-90), I classified "names, addresses and telephone numbers" as falling within the grey area of the ambit of the phrase "personal affairs". Let me first say that I consider that a person's name, in isolation, does not ordinarily constitute information concerning that person's personal affairs. I consider that Mahoney JA was correct in *Perrin's* case when he said (at p.638):

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

25. The problem is that a person's name almost invariably appears in a document in the context of surrounding information. It is the characterisation of a person's name, in the context of the information which surrounds it, that gives rise to difficulties. Thus in *Colakovski v Australian Telecommunications Corporation* (1991) 100 ALR 111, Lockhart J said (at p.119):

> *There is a real question as to whether the name and telephone number can answer the description of 'information relating to the personal affairs' of that person under s.41(1)* [of the *Freedom of Information Act 1982* Cth, as then in force]. *Viewed as an abstract conception I would be inclined to the view that it could not, but such questions are not considered by courts in the abstract.*

26. Thus, while disclosure of a person's name, in the abstract, would not ordinarily be a disclosure of information concerning that person's personal affairs, disclosure of that name in the context in which it appears may disclose information concerning the person's personal affairs (or it may not - there is always a question of the proper characterisation of the matter in issue, in its context, which must be addressed in each particular case).

27. There is also the possibility that information which would be exempt because it is identified with a particular individual and hence would disclose information concerning that person's personal affairs can be rendered non-exempt by the deletion of the person's name (or other identifying information): see *Re Stewart* at p.258 (paragraph 81), wherein I referred to *Re Borthwick and Health Commission of Victoria* (1985) 1 VAR 25, and paragraphs 25-31 of *Re Byrne and Gold Coast City Council* (Information Commissioner Qld, Decision No. 94008, 12 May 1994, unreported)).

28. In the present case, the context in which the names in issue appear is clearly a context in which the named persons are referred to as public servants involved in the performance of their duties of office. For the reasons which I gave in *Re Pope and Queensland Health* (Information Commissioner Qld, Decision No. 94016, 18 July 1994, unreported) at paragraphs 110-115, I adhere to the view which I expressed at paragraph 116 of *Re Pope*:

> *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.*

29. Two passages from prior decisions, which I endorsed in *Re Stewart* and *Re Pope*, are, in my opinion, directly applicable to the matter in issue in this case. The first is from the decision of Deputy President Hall of the Commonwealth Administrative Appeals Tribunal (the Commonwealth AAT) in *Re Anderson and Australian Federal Police* (1986) 4 AAR 414 (at pp.433-4):

> *In my view, the fact that a document may refer to a person by name does not necessarily mean that the document relates to that person's 'personal affairs': cf* Re Witheford and Department of Foreign Affairs *(1983) 5 ALD 534 at 539. There are many circumstances in which a person may be referred to in correspondence or other documents without the documents containing information with respect to that person's personal (or 'non-business') affairs. Correspondence signed in the course of one's business, profession or employment is an obvious example. Documents signed as the secretary of a social club or sporting body would normally be of a similar nature. 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: cf* Department of Airforce v Rose *(1976) 425 US 352 at 371.*

30. The second passage is from the judgment of Kirby P in *Perrin's* case (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.*

31. The next argument advanced by the respondent was that *Perrin's* case is distinguishable for the purposes of the Queensland FOI Act, for the following reasons (given at pp.47-48 of the respondent's first submission):

> ...
>
> *6.16.1 An important factor in the case was the terms of the Minister's second reading speech when he introduced into the NSW Parliament the Freedom of Information Bill. Where relevant the Minister's speech contained the following remark:-*
>
> > This feeling of powerlessness stems from the fact that electors know that many of the decisions which vitally affect their lives are made by, or on advice from, *anonymous public officials*, and are frequently based on information which is not available to the public. The government is committed to

remedying this situation ... *(See Kirby P at p.612).*

Kirby P remarked at pp.625-626:-

> If there is ambiguity in the phrase [personal affairs] it is legitimate for the Court to have regard to the Minister's second reading speech. This made it abundantly plain that one object of the Act was to breach the wall of anonymity of public servants.
>
> ...
>
> Secondly, if the argument that the mere mention of the name of an officer was, in every case, the disclosure of information concerning the personal affairs of a person, it would carry the consequence that all documents disclosed under the Act would be subject to deletion of the names of all officers concerned or at least consideration in every case of whether disclosure of those names would be unreasonable. It is legitimate to test the Commissioner's proposition in this way. So expressed, it is clearly unacceptable. It is contrary to the Minister's statement that the government was committed, by the Act, to remedy the situation produced by the "feeling of powerlessness" derived from decisions vitally affecting individuals made, in effect, by "anonymous public officials". How can the fundamental principles of "openness, accountability and responsibility" be achieved to remedy that situation 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.

A reading of the Honourable the Attorney-General's second reading speech when introducing the Freedom of Information Bill into Queensland indicates no such assertive statement as is referred to above. Therefore, the interpretation in Perrin's case was heavily influenced by matters not relevant in Queensland.

32. I do not think there is any substance in this attempt by the respondent to distinguish *Perrin's* case. Of the three judges of the New South Wales Court of Appeal, only Kirby P made a reference to the relevant Second Reading Speech which was in any way linked to an expression of views on the proper interpretation and application of the phrase "personal affairs". Clarke JA did make a reference in his judgment to the Second Reading Speech, but did not refer to the particular passage from the Second Reading Speech which is singled out in the respondent's submissions. The reference by Clarke JA (at p.643) was a general one made only for the purpose of indicating the general intention behind the relevant legislation. It is clear that Clarke JA reached his conclusion by interpreting the ordinary meaning of the relevant phrase in its statutory context (at p.644):

> *Even on that basis* [i.e. that the words "personal affairs" should not be interpreted narrowly], *I am unable to accept the proposition that the name of a person must necessarily be a matter concerning that person's personal affairs. It seems to me that, generally speaking, the Act is concerned with "the affairs" of individuals and that as a matter of ordinary English a person's name would not be considered as falling within that concept.*

Mahoney JA reached a similar conclusion (at p.638) without making any reference in his judgment to the

NSW Second Reading Speech.

33. A fair reading of the judgment of Kirby P shows that His Honour did not consider there to be any ambiguity as to the meaning or proper application of the phrase "personal affairs" in the circumstances of *Perrin's* case, such as to require resort to the Second Reading Speech. Rather, the Second Reading Speech was referred to as providing further reinforcement to the position which His Honour had reached by reference to *Colakovski's* case and his own interpretation of the plain language of the exemption provision in issue. Mahoney JA and Clarke JA reached similar conclusions, uninfluenced by the Second Reading Speech.

34. Moreover, the fact that the Second Reading Speech of the Queensland Attorney-General introducing the *Freedom of Information Bill 1991* Qld contained no specific reference to the proposed legislation being intended to overcome the traditional anonymity of public servants, does not mean that this was not a necessary concomitant of the avowed object of the Queensland FOI Act to "enhance government's accountability". In *Re Pope*, I said (at paragraph 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 think there is sufficient indication in the legislative history of the Queensland FOI Act, and in the history of freedom of information legislation generally in Australia, to establish that this legislation is intended to enhance the accountability of individual government officials.

35. Indeed the history of the Commonwealth administrative law reform package, which (following recommendations made in the "Fitzgerald Report" at pp.128-129) Queensland has sought to adopt and improve upon, shows that it was largely developed in response to manifest inadequacies in the traditional methods for holding the executive government to account, i.e. through parliamentary review and the doctrine of ministerial responsibility (see M. Allars, Introduction to Australian Administrative Law, Butterworths, 1990, at pp.18-19, paragraphs 1.32-1.34; Electoral and Administrative Review Commission, Appeals from Administrative Decisions, Issues Paper No. 14, June 1991, Serial No. 91/I4, at pp.6-7, paragraphs 2.4-2.8), and to the perceived need for avenues of accountability which could be readily invoked by individual citizens, concerned or aggrieved with some aspect of government administration, to hold government agencies and individual government officials to account for their actions and decisions. Thus, for example, individual officials may be required to explain and justify their administrative decisions, in writing, to persons whose interests are adversely affected by their decisions (see Part 4 of the *Judicial Review Act 1991* Qld) and may be required to account for the legality and procedural fairness of their decisions before the Supreme Court, under reformed and simplified procedures provided for in the *Judicial Review Act 1991* Qld.

36. Freedom of information legislation, too, has always been recognised as a means for holding individual officials to account. In its 1979 "Report on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978", the Senate Standing Committee on Constitutional and Legal Affairs devoted considerable attention to the impact of freedom of information legislation on the doctrine of ministerial responsibility and the tradition of anonymity of public servants (see, for example, paragraphs 4.9-4.63 of the Report). Some of the Senate Committee's conclusions were:

> *Freedom of information legislation is a means not only of ensuring the more direct accountability of public servants to the public, but also of ensuring greater*

> *accountability of public servants to their ministers. It is in the interests of ministers themselves to expose the advice of their officials to wider scrutiny so as to improve the quality of that advice and ensure that all possible options have been canvassed.* [at paragraph 3.21]
>
> *This shift in the balance of power between the elected government and the professional public service has important implications for freedom of information legislation. In essence it means that the public service should be made more open to public scrutiny and more accountable for its actions than has traditionally been the case.* [at paragraph 4.40]
>
> *The political system, whatever its form or nature, should exist to one end only: not the convenience of the government, but the service of the people. To this end, no views about the supposed nature of the Westminster system should prevent the strengthening of the accountability of all parts of the government to the people from being achieved.* [at paragraph 4.61]
>
> *Very often people have alleged that the Westminster system is under attack by freedom of information legislation when what is actually under attack is their own traditional and convenient way of doing things, immune from public gaze and scrutiny. We are indeed seeking to put an end to that. What matters is not the convenience of ministers or public servants, but what contributes to better government.* [at paragraph 4.62]

37. Thus, in recommending that the introduction of freedom of information legislation in Queensland be examined by the proposed Electoral and Administrative Review Commission, the "Fitzgerald Report" said (at p.129):

> *The importance of the legislation lies in the principles it espouses, and its ability to provide information to the public and to Parliament. It has already been used effectively for this purpose in other Parliaments. Its potential <u>to make administrators accountable</u> and keep the voters and Parliament informed are well understood by its supporters and enemies.* (my emphasis)

38. Finally, the respondent sought to rely on a remark by Kirby P in *Perrin's* case at p.626 (to the effect that the decision of the Victorian AAT in *Re Perton* may be justified by the Victorian AAT's reliance upon the prohibition contained in s.95(1) of the *Constitution Act 1975* Vic), in conjunction with an assertion by the respondent that cl.4.3 of the Code of Conduct for officers of the Queensland Public Service (clause 4.3 deals with the situations in which public comment by officers on political or social issues is unacceptable) is similar to s.95(1) of the *Constitution Act 1975* Vic.

39. It is clear, however, from p.151 of *Re Perton*, that the Victorian AAT, having found (simply by following prior decisions of the Victorian AAT) that the names of the relevant officials constituted information concerning their personal affairs, regarded the legal prohibition on public comment by Victorian public servants as going to the issue of whether disclosure of the officials' names would be an unreasonable disclosure in terms of s.33(1) of the Victorian FOI Act, because the officials would not be able to defend themselves. When the reasoning of the NSW Court of Appeal in *Perrin's* case is applied to it, *Re Perton* was wrongly decided on the threshold issue of whether the names of the officials, in the context of the documents in issue, constituted information concerning their personal affairs. The issue of unreasonable disclosure should not, on that view, even have arisen for consideration.

40. Kirby P's remark that the decision in *Re Perton* may be justified by the prohibition contained in s.95(1) of the *Constitution Act 1975* Vic is inexplicable in terms of His Honour's own approach to

the meaning and application of the phrase "personal affairs", and (fatally for the respondent's argument) the approach of the other two members of the NSW Court of Appeal to that issue. Unless Kirby P only intended to indicate that the Victorian AAT's decision on the application of the unreasonable disclosure test may be justified (despite its mistaken approach to the threshold issue), the remark by Kirby P on which the respondent's argument depends must logically be disregarded.

41. I note that the Queensland Code of Conduct provisions fall far short of the blanket prohibition on public comment by Victorian public servants, imposed by s.95(1) of the *Constitution Act 1975* Vic. The Queensland provisions relate to public servants making unauthorised public comment on matters relating to their agencies; they have nothing to do with preserving outdated notions of the anonymity of public servants at the expense of accountability to the public for the performance of their duties.

42. I do not think there is any substance in the respondent's attempts to distinguish *Perrin's* case on the question of the proper interpretation and application of the phrase "personal affairs". I am satisfied that the matter in issue in the present case, given the context described at paragraph 28 above, does not comprise information concerning the personal affairs of the officials whose names are in issue, for the purposes of s.44(1) of the FOI Act.

The application of s.42(1)(c) of the FOI Act

43. The major focus of the respondent's evidence has been on s.42(1)(c) of the FOI Act which provides:

> ***42.(1)*** *Matter is exempt matter if its disclosure could reasonably be expected to -*
>
> *...*
>
> *(c) endanger a person's life or physical safety;*

44. 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 (the Commonwealth FOI Act), in my reasons for decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, at pp.339-341, paragraphs 154-160. Those observations are also relevant here. 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).

45. The question posed by s.42(1)(c) is to be examined objectively by the decision-maker authorised to determine questions of access under the FOI Act, in light of the relevant evidence: see *News Corporation Ltd v National Companies and Securities Commission* (1984) 57 ALR 550, per Fox J at p.555.

46. At one place in its first submission (at pp.23-24), the respondent suggests that the application of s.42(1)(c) turns on whether the person(s) allegedly exposed to danger hold a reasonable expectation

of harm:

> *An apprehension of danger or physical harm is sufficient if it can reasonably be expected whether or not it is ever carried out. Examples demonstrate this.*
>
> *(i) A person jokingly says he will kick another off the planet.*
>
> *(ii) A person says he will "get you" and "get even" yet unknown to the other may not intend doing anything other than creating fear.*
>
> *The exemption would not apply in the first case as harm could not reasonably be expected. The exemption would apply in the second example because the first person holds a reasonable expectation of harm.*
>
> ...
>
> *On the material available the officers whose names have been withheld hold a reasonable expectation that their lives may be endangered or that they may suffer physical harm. This satisfies the exemption.*

47. With respect, that is clearly not a correct approach to the application of s.42(1)(c). The question of whether disclosure of certain matter could reasonably be expected to endanger a person's life or physical safety is to be objectively judged by the authorised decision-maker under the FOI Act, in the light of all relevant evidence, including any evidence obtained from or about the claimed source of danger, and not simply on the basis of what evidence is known to persons claiming to be at risk of endangerment. In a review under Part 5 of the FOI Act, the authorised decision-maker is the Information Commissioner.

48. Section 37(1)(c) of the Commonwealth FOI Act is, for practical purposes, virtually identical to s.42(1)(c) of the Queensland FOI Act. Cases decided under the former provision are capable of affording useful guidance in the interpretation and application of s.42(1)(c) of the Queensland FOI Act. There is also a counterpart to these provisions in s.31(1)(e) of the Victorian FOI Act, although it has substantial differences: for example, instead of the phrase "could reasonably be expected to", s.31(1)(e) of the Victorian FOI Act employs the words "would, or would be reasonably likely to"; it also contains words which restrict the range of persons, the endangerment of whose lives or physical safety is protected against, to a defined class. Nevertheless, the words "endanger the lives or physical safety of persons" which appear in s.31(1)(e) of the Victorian FOI Act are, for practical purposes, virtually identical to the words "endanger a person's life or physical safety" in s.42(1)(c) of the Queensland FOI Act. Victorian cases interpreting and applying the words "endanger the lives or physical safety of persons" are capable of affording guidance in the interpretation and application of the equivalent words in s.42(1)(c) of the Queensland FOI Act.

49. The leading case in Victoria is the decision of the Full Court of the Supreme Court of Victoria in *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836. In that case, the documents in issue were "Returns of animal usage for experimental purposes" submitted by registered experimenters in accordance with the requirements of the *Protection of Animals Act 1966* Vic. The particular information claimed to be exempt comprised the names and signatures of individual experimenters and the names of the institutions where experiments took place. A passage from the judgment of Marks J, on which the respondent places specific reliance, is as follows (at p.844):

> *... if it were assumed that experimenters are not to be visited with danger or risk to their physical safety either through harassment, pressure or some form of violent persuasion, there appears little value to anyone in their being identified in the way sought. ... It is not necessary to show that the risk to which s.31(1)(e) refers is from*

> *the respondent himself but rather from anyone should the information become generally known.*
>
> *It must also be acknowledged that exemption applies where it "would be reasonably likely" that there be a* danger *to physical safety, not that physical harm will occur.*
>
> *The risk of endangerment might well be thought to be greater than that of physical harm. The risk to be guarded against is of an experimenter being placed under threat, that is, in a position where he or she might or might not be physically harmed.*

50. In *Binnie's* case, there was evidence from one of the registered experimenters that both he and his department had received bomb threats after a prior appearance on television in a discussion about animal experimentation. Evidence was also given of bomb threats to animal experimenters in Western Australia, and instances of physical violence in the United Kingdom. The source of danger that was in contemplation in *Binnie's* case was of physical violence inflicted upon people in the vicinity of institutions conducting animal experiments, by unknown persons having heightened emotional reactions to the conduct of experiments on animals (see also per Young CJ at pp.837-8). The comments of Marks J must be viewed in that context.

51. In its submission in reply (at p.2, paragraph 1.4; p.4, paragraph 1.9; p.5, paragraph 1.12) the respondent asserts that a reasonable expectation of harassment or pressure is sufficient to satisfy s.42(1)(c) of the Queensland FOI Act. That assertion is, in my opinion, based on a misreading of the first sentence in the passage quoted above from the judgment of Marks J in *Binnie's* case. I think it is clear that Marks J was referring to harassment or pressure involving danger to the physical safety of persons. Indeed, given the terms of the exemption provision with which he was dealing, Marks J could not have been referring to anything else. (In light of the evidence before him, it appears that what Marks J had in contemplation was the actions of persons, strongly opposed to the conduct of experiments on animals, in the vicinity of institutions engaged in the conduct of such experiments.)

52. With one qualification, I accept the correctness of the passage quoted above from *Binnie's* case. I think Marks J was correct in drawing attention to the fact that the relevant words require an evaluation of the expected consequences of disclosure in terms of endangering (i.e. putting in danger) a person's life or physical safety, rather than in terms of the actual occurrence of physical harm. The last sentence in the quoted passage, however, seems to me to place an unnecessary, and (taken out of context) potentially misleading, gloss on the words chosen by the legislature. The risk to be guarded against is that of a person's life or physical safety being endangered by disclosure of the information in issue.

53. It is clear from *Binnie's* case itself, and other decided cases, that a source (or sources) of danger to the life or physical safety of persons must be in contemplation, and there must be evidence of a risk that disclosure of information in issue would endanger a person's life or physical safety. (The extent of the evidence of risk, and the likelihood of the risk, needed to satisfy the test of exemption may vary according to the different phrasing used between the Commonwealth/Queensland exemption provisions and the Victorian exemption provision. I have already set out at paragraph 44 above the test applicable under s.42(1)(c) of the Queensland FOI Act.)

54. Thus, in *Re Ward and Victoria Police* (1986) 1 VAR 334, the Victorian AAT found that there was a real risk of physical harm being sustained by a police informant if his identity was revealed and "circulated in the drug related crimes industry". On the other hand, in *Re Lawless and Secretary, Law Department* (1985) 1 VAR 42, the applicant had been convicted of murder, and sought material relating to the alleged retraction of evidence of the chief witness for the prosecution. The Tribunal, constituted by Rowlands J (President), found that any resentment the applicant may wish

to display towards the witness would flow from the series of events including her evidence, retraction and reinstatements, rather than the specific information in issue, and held that the evidence did not support the ground for exemption. The Tribunal decided that the apprehended danger to persons must arise from the disclosure of the specific document in issue, rather than from other circumstances, and that evidence of the risk of violence must be produced.

55. In *Re Matthews and Department of Social Security* (Commonwealth AAT, N90/363, 21 December 1990, Purvis J, unreported), the applicant, a social security claimant, had a long and documented history of violence towards persons and property. The AAT referred to the applicant's history of "severe verbal abuse, threats, property damage and physical abuse towards departmental staff". The information found to be exempt under s.37(1)(c) of the Commonwealth FOI Act was the nature of recommended action in dealing with the applicant in future.

56. In *Re Mallinder and Office of Corrections* (1988) 2 VAR 566, the Victorian AAT was satisfied that if the contents of the documents that were the subject of the claim for exemption were disclosed, there was a risk to the physical safety of the authors identified in the contents. The Victorian AAT noted that the applicant had a history of violence, was serving a 13 year sentence for wounding with intent to do grievous bodily harm, and had a number of prior convictions including convictions for crimes involving physical violence. In *Re Pepperell and Ministry of Housing and Construction; Walden & Anor* (1989) 3 VAR 191, the Victorian AAT held that s.31(1)(e) was not made out in circumstances where the applicant (a serving police officer) objected to the disclosure of a letter of complaint to the respondent about his neighbour (a tenant of the respondent), because the evidence did not establish more than a remote possibility of danger to the applicant's family by release. In *Re Perry and Victoria Police* (1990) 4 VAR 131, the Victorian AAT held that exemption under s.31(1)(e) was established on the basis of evidence that the applicant had stated to a police officer in the precincts of the Tribunal that she was prepared to kill to prove her innocence (of a murder charge to which the documents in issue related).

57. Finally, in *Re Toren and Secretary, Department of Immigration and Ethnic Affairs* (Commonwealth AAT, Q93/578, 8 March 1995, Deputy President Forgie, unreported) the Commonwealth AAT found that, despite evidence of personal vendettas and obvious bad blood between the applicant's brother and the author of the documents in issue (a Mr Wachtel), it was not satisfied that a case for exemption under s.37(1)(c) of the Commonwealth FOI Act had been established. The Tribunal's approach to this case, which I consider to have been correct, is captured in the following extract from pp.18-21 of the decision:

> *The question I must ask, therefore, is whether ... disclosure of any of the documents under the FOI Act would, or could reasonably be expected to, endanger the life or physical safety of any person. I can answer that question only if I have regard to both the contents of the documents themselves and to any other relevant material. The only other relevant material in this case concerns relations between the Toren brothers and Mr Wachtel. The most obvious person whose life and physical safety I should consider is Mr Wachtel. Paragraph 37(1)(c) is not, however, limited to concern about the author of the document but directs attention to "any person". In this case, therefore, I should look also to whether the life or physical safety of any other person would be endangered were access to the document given under the FOI Act. The only people who could conceivably come within that description would be officers of the Department, Mr Wachtel's family, Mr Toren and Mr Toren's brother. There is no evidence on which I could draw any conclusion that the life or physical safety of officers of the Department would, or could reasonably be expected to, be endangered by disclosure of any of the documents. I will confine myself, therefore, to considerations relating to Mr Wachtel, Mr Wachtel's family, Mr Toren and Mr Dan Toren.*

...

... I find that, in September 1988, the relationship between Mr Dan Wachtel and Mr Dan Toren had soured to a point where the behaviour of neither entirely met an appropriate minimum standard in relation to their dealings with or concerning each other. Some of the aspects related to business but some, such as Mr Wachtel's involvement in Mr Toren's citizenship application, went beyond strictly business matters. On the basis of the Arbitrator's decision, I find that both Mr Dan Toren and Mr Wachtel had engaged in personal vendettas. Despite all of the personal vendettas and obvious bad blood between Mr Dan Toren and Mr Wachtel, I am not satisfied that either has made any threat of physical harm to the other. There is no evidence that Mr Toren, as opposed to his brother, has been engaged in, or caught up in, that personal vendetta.

Personal vendettas and bad blood, however undesirable, are not inevitably accompanied by physical harm, or the threat of it, by one person to another. They may be carried out in quite subtle ways by, for example, besmirching another's character or setting out to attract another's customers and so destroy his or her business. Neither of these means of implementing a personal vendetta necessarily involves any action that would endanger the life or physical safety of any person although they may cause immeasurable harm to a person. They could, for example, cause such emotional damage to a person, or ruin him or her financially, that they could be said to "destroy" his or her life. It is difficult to say that those subtle ways would or could reasonably be expected to endanger a person's life or physical safety unless the "destruction" of the person's life were so great that the person who is the object of the personal vendetta were driven to commit suicide or harm himself or herself in some way. There is no suggestion in this case that disclosure of any of the documents would, or could reasonably be expected to lead to Mr Toren's, Mr Dan Toren's or Mr Wachtel's harming himself in this way.

Turning to direct harm, there is no evidence that there has been any physical harm done by any one of them to either of the others or to Mr Wachtel's family in the past. As to the future, I have the affidavit evidence of Mr Toren and his brother that they have no intention of harming Mr Wachtel in the future and this is indirectly supported by Mr Penfold who speaks of their good reputation. ... The chances of such harm occurring are remote given the contents of the documents and the history of the relationships between Mr Dan Toren and Mr Wachtel who are the centre of this case. The relationship between them has been very poor for many years and no physical harm has come to any of them. On the evidence, I cannot find that there has been any threat of physical harm by any of them to either of the others. In the absence of any other evidence, I am not satisfied that the Department has established that the documents are exempt under paragraph 37(1)(c).

58. In the case presented by the respondent, the only source of danger that is contemplated is Mr Murphy himself. The only persons whose lives or physical safety are claimed to be at risk of endangerment by disclosure of the matter in issue are the officers (and retired officers) of the OSR whose names are in issue. What then is the evidence on which the respondent relies to base the application of s.42(1)(c) of the FOI Act to the matter in issue?

59. Ms Jane Macdonnell, Assistant Commissioner of Land Tax and Executive Director of the OSR, has sworn an affidavit dated 21 October 1994, which, so far as relevant to the present issue, says:

> *2. On 2 May 1991, I had a conversation with the applicant, Mr Murphy, regarding a land tax assessment. During the course of that conversation in*

which I refused to withdraw the relevant land tax assessment, the applicant told me that I'd be on the list for reprisal action. I could hear a computer keyboard being used as we spoke. The applicant in response to my questioning disavowed having an illegal purpose in compiling a list, but made statements rejecting the power of Parliament to impose taxation rather than a fee for service, rejecting the ballot box as a means of change and threatening reprisals which were inconsistent in my assessment with belief in the rule of law. Now produced and shown to me and marked with the letter "A" is a true but brief summary made by me contemporaneously of our conversation. I found the applicant to be menacing and that fact caused me to make a record.

3. I have been informed by other Treasury officers of telephone conversations that they have had with Mr Murphy, both prior to and since his conversation with me, in relation to land tax and to his FOI application. Those officers have given me consistent oral accounts of abuse including use of language generally described as obscene, and/or menacing statements by the applicant. In each instance, the recipient of the call told me that he/she understood that Mr Murphy was seeking the making of a decision in his favour.

60. Ms Macdonnell's contemporaneous note of her telephone conversation with Mr Murphy on 2 May 1991 reads as follows:

Mr Murphy rang around 9.45 am.

He complained that he had received a demand for money with menaces.

- I confirmed that the document in question was a land tax assessment.

- His objection was that the tax was unrelated to services.

- He clearly believed that the user pays principle could apply to all services strictly.

I confirmed that he wasn't complaining about the calculation of the tax.

- He said his complaint was that it wasn't zero.

His comments challenged government's power to tax people (again where case was not fee for service).

He complained about 52% of population being public servants, the unemployed and people at Woodridge got a mention.

I invited him to put forward his views on land tax or any other state tax to the government for use in its tax review.

- He saw no use in that action.

- References to changes in 25 years see Eastern Europe = seizing property from those who'd stolen it.

He told me that I'd be on the list.

- clarified purpose of list and was told "nothing illegal" (not making any illegal threat)

- list relates to list of people to have pensions etc seized in 25 years time. (I could hear him keying)

...

61. The contemporaneous note does not refer to the list being for "reprisal action" (the words used in paragraph 2 of Ms Macdonnell's affidavit) or to any threats of reprisal other than the seizure of public servants' pensions in 25 years time (in this respect, it is consistent with evidence given by Mr Murphy - see paragraphs 80-82 below). The contemporaneous note does record Mr Murphy disavowing any illegal purpose or the making of any illegal threat, with respect to the list. Mr Murphy obtained a copy of Ms Macdonnell's file note of their telephone discussion on 2 May 1991 through his FOI access application. He annexed a copy of it to his affidavit sworn 4 December 1994. Mr Murphy commented on it (at paragraph 9 of his affidavit) as follows:

> *... It contains a statement that I had complained to her that "52% of the population were public servants". Shortly before that conversation, I had read in the Courier Mail of a study by the Australian Bureau of Statistics which showed that 24% of the working population were government employees and a further 28% obtained all, or the major part, of their income from government benefits. The statement I actually made was in accordance with that report. It was made in a context when I was putting to Macdonnell that the tax system she helped administer was an unconscionable burden on the remaining 48% who were the net tax producers.*
>
> *...*

62. I assume that, in other respects, Mr Murphy accepts that Ms Macdonnell's contemporaneous file note is a reasonably accurate record of their conversation on 2 May 1991. Mr Murphy went on at paragraphs 10-12 of his affidavit to explain his references to "the list": see paragraphs 80-82 below.

63. Mr Michael Sarquis has provided a statutory declaration, executed on 20 October 1994, concerning his contact with Mr Murphy in respect of the processing of Mr Murphy's FOI access application. Mr Sarquis has had telephone contact with Mr Murphy, and is the only witness for the respondent who has had contact with Mr Murphy in a face-to-face conference. Mr Sarquis' evidence is as follows:

> *... I believe Mr Murphy can be an unreasonable man with a very aggressive manner.*
>
> *During a telephone conversation I had with Mr Murphy I found him to be an irate man who was extremely difficult to deal with. Mr Murphy indicated, among other things, that I had acted illegally (in my decision to exempt the names of officers at Office of State Revenue from disclosure), my decision was libellous, I was corrupt and that I had not heard the last of this matter.*
>
> *During a conference I had with Mr Murphy he was asked whether he felt that some officers of the Office of State Revenue were justified in feeling threatened by his behaviour. Mr Murphy did not feel this to be the case but he admitted to being angry with officers over the telephone and to giving them a hard time and he felt that this was within his rights.*
>
> *I also raised the issue of Mr Murphy keeping a list of names and the reason for*

> *keeping such a list. Mr Murphy stated that he was keeping a list of names of people in case at some stage in the future there might be a change in the political system leading to an opportunity to enact retrospective legislation and prosecute those who he considered to be stealing his money at the present time.*
>
> *From my contact with Mr Murphy, I was not comfortable with dealing with him and I believe a person could feel threatened when he is in one of his aggressive moods.*
>
> *Mr Murphy displayed rudeness and a terrible temper and often was not interested in listening to reason. Mr Murphy seems to be of the view that there is a vendetta against him by certain areas of the government.*
>
> *In view of the above circumstances and the possible consequences, I believe that the names of the officers involved should not be revealed to Mr Murphy.*

64. Nine officers, or retired officers, of the OSR have provided statutory declarations attesting to their fears if their names are disclosed to Mr Murphy. Four of those officers have had telephone contact with Mr Murphy, but no face-to-face contact. The other five have had no contact with Mr Murphy of any kind, and the fears to which they attest are based only on material contained on the relevant land tax file (i.e. the file to which Mr Murphy has obtained access, subject to deletion of the names in issue) and what they have been told by other officers of the OSR who have had contact with Mr Murphy.

65. This evidence is in a slight state of confusion. Two officers who have attested to their fears of harassment and retribution if their names are disclosed to Mr Murphy, did in fact have their names disclosed to Mr Murphy when Mr Murphy obtained access to the relevant file late in 1993. Mr Murphy has annexed to his affidavit sworn 4 December 1994 copies of the documents in issue, as he obtained them from the respondent, and it is quite clear on the face of those copies that the names of those two officers were not deleted from the documents in issue, whereas the names of some eight other officers of the OSR were deleted. Taking at face value the fears expressed by the officers of the OSR who lodged statutory declarations, it was considered appropriate to provide copies of the statutory declarations to Mr Murphy with the names of the declarants deleted.

66. However, having carefully checked all of the evidence for the purposes of preparing my reasons for decision, it is clear, as I have indicated above, that the names of two of the declarants are not, in fact, in issue in this review: their names have not been deleted from any place where they appear in the copies of the documents in issue given by the respondent to Mr Murphy. In his evidence and submissions, Mr Murphy correctly identified the names of those two declarants from the correlation between the evidence given in their statutory declarations as to their telephone contacts with Mr Murphy (in which they had identified themselves by name in any event) and their contemporaneous notes of their telephone contacts with Mr Murphy, to which Mr Murphy obtained access, without deletion of the names of the two officers in question. (Presumably, the FOI administrators considered it inappropriate to delete the names of the two officers because Mr Murphy knew their names from his prior telephone discussions with them. Indeed, one of them was specifically named in Mr Murphy's FOI access application: see paragraph 2 above.) Since the names of those two officers, Mr Don Abberton and Mr Wallace Telford, are not in fact in issue in this review, it is not appropriate that I continue to refer to their evidence anonymously.

67. The evidence given in Mr Abberton's statutory declaration executed on 25 October 1994 is as follows:

> *I believe that should my name be released I may be subjected to harassment and I would be quite concerned if I were to come in personal contact with Mr Murphy.*

During telephone conversations I have had with Mr Murphy he has been very abusive and constantly attacking me personally. Mr Murphy told me to "get a decent job" and likened my job to the train drivers who drove the Jews to the gas chambers. Mr Murphy informed me that when he gets to power my name will be "on the list".

At the time of these conversations I was placed in a highly stressful situation and I have never before encountered such threatening and abusive behaviour. His aggressive manner was such that I would not like to have been physically around him at the time of these conversations.

Recently, in my absence, a fellow officer took a telephone call from Mr Murphy wishing to speak to me after he had been issued with correspondence from this Office. When informed that I was absent Mr Murphy demanded to speak to Jane Macdonnell, the Assistant Commissioner of Land Tax. When this officer informed Mr Murphy she was unavailable he said "she's my fucking servant" and generally became abusive about not being able to speak to her personally.

I am concerned that Mr Murphy has behaved as outlined above and that he appears to have an intense dislike for public servants. His manner was very intimidatory and threatening and Mr Murphy spoke using obscene language throughout the entire conversation.

On the above occasions Mr Murphy appeared to be acting unreasonably and was unable to communicate with public servants without the use of expletives and personal abuse. Mr Murphy also told me that I should resign.

I believe that myself and other officers concerned may be subjected to continual abuse and harassment if our names are disclosed. I am quite concerned about the repercussions if these names are released. Mr Murphy has in the past placed me in stressful situations and I believe that same may happen in the future if my name is revealed.

I further believe there is a genuine concern for my safety if there is a possibility I may come in contact with him personally.

In view of the above circumstances and the possibility of retribution, I do not wish my name to be revealed to Mr Murphy.

68. Although Mr Abberton refers to telephone conversations with Mr Murphy, the relevant land tax file contains a record of only one telephone conversation between them, on 20 April 1993. Thereafter, Mr Abberton appears to have dealt directly with Mr Murphy's accountant concerning the land tax investigation. In his affidavit sworn 4 December 1994 (at paragraph 27), Mr Murphy deposes that his conversation with Mr Abberton on 20 April 1993 was his only contact with Mr Abberton, to the date of swearing his affidavit. Certainly, if Mr Abberton did have any other telephone contacts with Mr Murphy to that time, he does not appear to have seen fit to make a record of them for file purposes. Mr Murphy's account of the conversation with Mr Abberton on 20 April 1993 is set out at paragraphs 14-27 of Mr Murphy's affidavit:

> *14. The residence of myself and my family is owned by the Trustee of our family Trust and rented by us from it. In about 1989 (I do not remember precisely when), I was informed by an employee of the OSR that such a property was exempt from Land Tax provided all the Trustee beneficiaries resided in it.*

> *15. Having no reason to believe otherwise, Directors caused the Trustee to claim the exemption on the next Land Tax return and on subsequent returns up to the return based upon the Trustee's real estate holdings at 30 June 1992.*
>
> *16. In April 1993, I received a telephone call from ROBERT VICTOR HARRIS, who was, and is, the accountant to the Trustee. He informed me that the OSR had requested the income tax returns of the Trustee. He gave me the name and telephone number of the person in the OSR who had contacted him. That name was DON ABBERTON.*
>
> *17. I contacted ABBERTON to discover the basis of the enquiry. In the subsequent conversation, I discovered that the residence was not, in fact exempt, despite what I had been led to believe by the OSR earlier and that the arrears of taxes and penalties would amount to about THREE THOUSAND DOLLARS, so far as I recollect the amount.*
>
> *18. ABBERTON was totally unconcerned at the effect such a situation might have on the beneficiaries of the Trust. He expressed the view that the money was the property of the Government and that was that. He offered no apology whatsoever for the fact that negligent advice on the part of the OSR had created the situation. I regarded his attitude as exhibiting a callous, arrogant, untouchable contempt for us. He expressed the view that he was not interested in the rights or wrongs of the matter as what he was doing was legal.*
>
> *19. I regarded this attitude as all the more reprehensible since we are forced by law to deal with ABBERTON and to contribute to his salary and perquisites. I became angry with his attitude and abused him roundly. I say that my anger was justified and I say that I have no regrets about it and I say that I would probably react in the same way if the circumstance recurred.*
>
> *...*
>
> *27. ... I have never approached ABBERTON personally; I have not spoken to him apart from the one occasion in April 1993, nor have I attempted to contact or approach him other than on that occasion.*

69. While I do not think it justifies the abusive and intemperate language and aggressive telephone manner, which I accept that Mr Murphy used in that telephone conversation with Mr Abberton, Mr Murphy's account at least explains the cause of his anger. The evidence before me also supports Mr Murphy's assertion, in paragraph 27 of his affidavit, that although Mr Murphy has known Mr Abberton's name since April 1993, Mr Murphy had no further contact with Mr Abberton, whether in person or by telephone, between April 1993 and December 1994. (Since then, Mr Murphy has contacted Mr Abberton by telephone with respect to an action for defamation which Mr Murphy says he intends to bring against Mr Abberton: see paragraphs 89, 145-146 below.) In my opinion, this indicates that the fears expressed in Mr Abberton's statutory declaration about continual abuse and harassment, and danger to physical safety, are not soundly based.

70. The evidence given by Mr Wallace Telford in his statutory declaration executed on 20 October 1994 is as follows:

> *I believe that, as the contents of file notes have already been released, should my name be released, Mr Murphy could well go out of his way to cause problems and*

that I may be subjected to harassment. This belief is reinforced by, as later stated, Mr Murphy's verbal admission that he had a list of people to "be done" when he "comes to power".

During a telephone conversation I had with Mr Murphy I was subjected to abusive tirades especially as to my "robbing" him, ... Mr Murphy continually talked about guns, death and the Jews, topics which Mr Murphy apparently thought had a bearing on the levying of land tax. Mr Murphy also mentioned taking my superannuation and stated that I should make a moral judgment and resign. Mr Murphy also stated that in two or three years when he "comes to power", the superannuation that has been paid to already retired public servants will be taken back off them. Mr Murphy denied the right of the Government to levy land tax and accused the Government of illegally trying to take his property.

Mr Murphy was repetitious, rambling, abusive and rude. His tirade was interspaced with expletives of, to my mind the coarsest nature, and on several occasions he advised me that I was "on the list" which he advised was a list of people who would "be done" when he had the power.

From my contact with Mr Murphy I believe him to be an extremely vindictive person. I believe Mr Murphy is a very angry individual who has a lot of trouble controlling himself. Mr Murphy would not listen to logical argument and was abusive and rude throughout the entire conversation.

I believe that Mr Murphy has a real control problem which gives me considerable concern and I further believe that I may be subject to future harassment.

In view of the above circumstances and the possible consequences, I do not wish my name to be disclosed to Mr Murphy.

71. At paragraphs 107-111 of his affidavit sworn 4 December 1994, Mr Murphy disputes the accuracy of Mr Telford's account of what Mr Murphy said in this conversation in several respects -

> that Mr Murphy did not say that the "list" is for the purpose of physical or illegal acts.
>
> that Mr Telford has misrepresented comments by Mr Murphy about public servants hiding behind the "Nuremburg defence", an analogy commonly used in discussions of the legality-morality dichotomy.
>
> that Mr Telford has misrepresented Mr Murphy's only reference to a gun, which was Mr Murphy's assertion that tax collection is coercive (it appears from Mr Telford's file note of this telephone conversation that Mr Murphy equated the levying of land tax to a person entering his home with a gun and demanding to take his property without his consent).

72. Mr Murphy asserts that his only contact with Mr Telford has been the one telephone conversation, of which Mr Telford has given evidence, which occurred on 25 September 1990. The evidence before me supports the correctness of Mr Murphy's assertion in this regard. Mr Murphy has known Mr Telford's name since 25 September 1990, and late in 1993 Mr Murphy obtained access to a copy of Mr Telford's record of their prior telephone conversation, with Mr Telford's name appearing clearly at the end of it. In my opinion, the fears expressed by Mr Telford in his statutory declaration, about being subjected to harassment by Mr Murphy,do not appear to be soundly based.

73. The evidence of the other seven officers, or retired officers, of the OSR is very similar in nature to the evidence given by Mr Abberton and Mr Telford. Those who have had telephone contact with Mr Murphy have attested to his verbal abuse, swearing, and aggressive manner. Those who have had no contact with Mr Murphy attest to their belief, from discussions with staff who have spoken to Mr Murphy, and from their examination of the relevant land tax file, that Mr Murphy has been abusive, aggressive and irrational in dealings with officers of the OSR, and that there is a record on Mr Murphy's land tax file of Mr Murphy having been involved in an attempt to assault a Brisbane City Council officer. In summary, the evidence given by the officers of the OSR is generally to the effect that they are fearful that if their names are released to Mr Murphy the following effects are likely:

> they may be subject to verbal abuse, threats and harassment
>
> as the result of the applicant's "unstable and highly irrational" behaviour, certain officers fear for their safety
>
> the applicant is capable of being physically abusive and has the hallmarks of being physically violent
>
> disclosure would cause distress to them and their families
>
> their names have been placed on a list, the purpose of which is to threaten persecution.

74. It is recorded in at least two places (folios 45 and 48) of the land tax file to which Mr Murphy has obtained access, that an officer of the Brisbane City Council had advised that: "John Murphy had 'thrown some punches' at a parking meter attendant and action was being instigated on 20 May 1991". Mr Murphy has sworn that this statement is completely false (at paragraph 44 of his affidavit) and that he has never been prosecuted for any offence in his life (at paragraph 46 of his affidavit). Mr Murphy gives his account of the incident at paragraphs 29-40 of his affidavit, to which he annexes relevant documents obtained from the Brisbane City Council under the FOI Act. Mr Murphy addressed this issue in his written submission at pages 6-9:

> *The allegation by the respondent that the applicant assaulted* [a parking meter attendant employed by the Brisbane City Council] *is denied under oath by the applicant and is in any event mere hearsay derived from material which is itself hearsay. The documents obtained from the BCC and which are tendered in evidence in this matter are particularly instructive in a number of ways. ...*
>
> *The document marked "BCC/6" is a copy of the parking ticket issued to the applicant. It is submitted that it is reasonable to infer that the account of the incident recorded on it was made within a few minutes of that incident. The document marked "BCC/4" is a hand-written statement by the* [parking meter attendant] *concerned. It is undated, but must have been produced within a day or two of the incident which it alleges to have occurred at 2.45 pm on 28 February 1991. The applicant agrees with that time. The document marked "BCC/3" contains some conclusions of a senior employee of the BCC as to the truthfulness of the* [parking meter attendant]. [The senior officer of the Council was critical of the behaviour of the parking meter attendant and recommended that he provide a brief written apology to Mr Murphy.] *It should be inferred that these conclusions were reached after examination of the written material and, probably, an interview.*
>
> ...

> *None of these documents mentions an assault or any actual situation remotely resembling an assault. It is submitted that the* [Information Commissioner] *should find they show there was no assault in fact. It is inherently unlikely that persons who are demonstrably hostile (or least unfriendly) towards the applicant would not mention an assault if it had indeed occurred. The four documents concerned here represent four separate occasions on which they had the opportunity to do so. Indeed, it is submitted that the absence of a complaint in these circumstances is proof beyond reasonable doubt that what was later alleged to have occurred did not, in fact, occur.*

75. When given the opportunity to reply to Mr Murphy's evidence and submissions, the respondent did not seek to challenge or contradict Mr Murphy's evidence in respect of this incident. The evidence before me does not support the correctness of the allegation that Mr Murphy threw some punches at a parking meter attendant employed by the Brisbane City Council in an incident which occurred on 28 February 1991. I do not accept that the information recorded on folios 45 and 48 of the land tax file, to which Mr Murphy has obtained access, is correct in that respect. This is the only material before me which connects Mr Murphy to the commission of an act of physical violence towards another person, and I am not satisfied that it is correct.

76. Although it was expressly relied upon by the respondent when addressing s.42(1)(c) in its first submission, the respondent did not make any reference, in its submission in reply, to the incident between Mr Murphy and the Brisbane City Council parking officer, to support its case under s.42(1)(c). The respondent nevertheless submitted that the evidence establishes a risk of violence on the part of the applicant, because it establishes that the applicant has a demonstrated propensity to act in a threatening, intimidatory and menacing manner towards public servants generally, and officers of the OSR in particular. All of the evidence to which the respondent referred comprised instances of verbal abuse of public servants by the applicant.

77. The instances of contact between Mr Murphy and officers of the respondent in which, according to the evidence before me, Mr Murphy is said to have resorted to verbal abuse, are as follows:

> one telephone conversation between Mr Murphy and Mr Telford on 25 September 1990
>
> one telephone conversation between Mr Murphy and Ms Macdonnell on 2 May 1991 (there is no evidence of subsequent contact by Mr Murphy with Ms Macdonnell, though Mr Murphy has probably contacted her by telephone to discuss his alleged cause of action for defamation against officers of the OSR)
>
> one telephone conversation between Mr Murphy and Mr Abberton on 20 April 1993 (plus evidence of a further telephone contact on 1 March 1995 in which Mr Murphy raised his alleged cause of action for defamation against Mr Abberton: see paragraphs 89, 145-146 below)
>
> two telephone conversations between Mr Murphy and Mr Geoff Jones of the OSR on 12 July 1994 (Mr Murphy explains his reasons, such as they are, for becoming angry in these conversations at paragraphs 84-88 of his affidavit sworn 4 December 1994).
>
> one telephone conversation with an officer of the OSR whose name is in issue - no date given
>
> one telephone conversation (date not specified, but probably 21 September 1993),

and one face-to-face conference on 15 October 1993, between Mr Murphy and Mr Sarquis, relating to the processing of Mr Murphy's FOI access application. At the conference, Mr Murphy admits (at paragraph 65 of his affidavit) to having used obscene/abusive language to Ms Natalie Barber, an FOI administrator, who was also present.

78. With the exception of Mr Murphy's recent attempts to raise his proposed action for damages for defamation, and one or two immaterial exceptions, each of Mr Murphy's contacts with officers of the respondent appears to have been made in response to the receipt of correspondence from the respondent (or in Mr Abberton's case, a verbal request for access to information) concerning liability to land tax, or the processing of Mr Murphy's FOI access application. The contacts were sporadic over the space of four years. All of the contacts with officers have been at their place of employment, during office hours. This is hardly indicative of a campaign of intentional harassment of individual officers.

79. More disturbing is the evidence of Mr Murphy's propensity to lapse into intemperate, abusive and occasionally obscene language. Mr Murphy does appear, as asserted by Mr Telford, to have a problem in controlling himself, but on the evidence before me, it extends only to his self-control with respect to the language he uses when angered: there is no evidence of a lack of self-control extending to actions which could endanger a person's life or physical safety.

80. Comments by Mr Murphy to which officers of the OSR have taken objection (and the significance of which I think they have misunderstood or exaggerated to a large extent) appear to spring from Mr Murphy's philosophical objection to paying taxes, and his apparent need, when legally obliged to do so, to sate his anger with some retributive baiting of revenue officers. The evidence discloses a pattern of consistent behaviour in this regard. Documents on the relevant land tax file record Mr Murphy in 1988 addressing cheques for payment of land tax to "the Chief Thief", endorsed with the comment "Why don't you get an honest job and stop stealing??". Mr Murphy has given evidence in this regard at paragraphs 5-12 of his affidavit sworn 4 December 1994:

> *5. I believe I am entitled to express my opinions to public servants involved in revenue collection and to criticise both the methods of collection and the use to which the revenue is put. I assert my right to tell any public servant that I believe he or she is acting unethically.*
>
> *6. I hold the opinion that coercive expropriation of property is never moral simply because it is legal.*
>
> *7. The most frequent responses I have obtained when I expressed this opinion to employees of the OSR are "I am only doing my job" and "What I am doing is legal, so it's alright". WALLACE TELFORD, DONALD ABBERTON and JANE MACDONNELL have all responded in that way. ...*
>
> *8. The counter-example I used on each occasion is based on what is commonly termed the "Nuremburg defence" - the defence of obedience to orders or conformance with legal authority which was rejected at the War Crimes tribunals at the end of World War II. In using that term on each of these three occasions, I gave an example of what I meant by putting the rhetorical question, "Well, if that argument holds up, it must have been quite alright for the German train driver to take cattle trucks of Jews to the gas-chamber - after all, he was only doing his job according to law?".*
>
> ...

> *10. I have told bureaucrats in the OSR that I remember a list of names of people who, in my opinion, have violated my rights to my property. This is quite true. I have a good memory and in this connection remember names and incidents since 1983.*
>
> *11. I regard the utility of remembering these names as little more than a pious hope. The idea arose in the late 1980s when profound political changes began to occur in Eastern Europe. Many countries introduced legislation to return to the original owners property which had been legally taken from them by the State. Under these laws there is no compensation for the expropriators who are mainly, so far as I am aware, bureaucrats and other sycophants of the previous regimes. The basis of the legislation, so far as I understand it, is reasoning roughly consistent with the opinion deposed to above - the legality of a coercive seizure of property does not excuse it.*
>
> *12. If the opportunity ever arose under similar domestic legislation (and I do not think I will live to see it) I would certainly take back every cent from any person who took my property without my consent; I would do so, if authorised by law, without compunction, pity or compassion. On the slight chance that the opportunity might arise, I remember the relevant persons.*

81. Each of the witnesses for the respondent has deposed to fears concerning Mr Murphy's assertions that he maintains a list of the names of revenue officers with whom he has dealt. Mr Murphy's explanations in respect of the list have, however, been consistent dating back to 1990. Mr Telford's statutory declaration refers to Mr Murphy speaking on 25 September 1990 of a list of public servants to "be done" when he (Murphy) came to power, by taking back the superannuation that had been paid to them. Within a week of that conversation, Mr Murphy submitted payment of a land tax assessment with this note attached:

> *These funds are taken by you without the consent of their owner. They will be used by you for the benefit of people who have had no place in the labour and risk involved in their generation. All those "employees" of the Land Tax Office who are involved in this process of legal theft should take notice that there is a growing number of citizens who intend, at an opportune time in the future, to take action to recover the funds involved in this plunder. If necessary, we will even garnishee your pension and leave you in poverty in your old age.*
>
> *We have an inalienable right to the product of our labour. Dressing up an act of theft by clothing it in the dignity of an Act of Parliament makes it no less an act of theft.*

Ms Macdonnell's contemporaneous note of her telephone conversation with Mr Murphy on 2 May 1991 records Mr Murphy disavowing any illegal purpose or illegal threat in respect of the list, saying it is a list of people to have pensions etc seized in 25 years time. Mr Sarquis's statutory declaration refers to Mr Sarquis asking Mr Murphy at a conference (on 15 October 1993) the reason for keeping a list. According to Mr Sarquis's evidence: "*Mr Murphy stated that he was keeping a list of names of people in case at some stage in the future there might be a change in the political system leading to an opportunity to enact retrospective legislation and prosecute those who he considered to be stealing his money at the present time*".

82. I accept Mr Murphy's evidence that the list (if it exists at all, and is not just a device for baiting and attempting to discomfort revenue officers when he is required to pay land tax) is not a list of persons to be subjected to any form of "reprisal action" that would involve endangering a person's life or physical safety. At least three of the witnesses for the respondent, Mr Telford, Ms Macdonnell and

Mr Abberton, have had their names on "the list" for several years now, and there is no evidence that they have been subjected to any action by Mr Murphy that could even be properly described as harassment (which, according to the Collins English Dictionary, Third Australian Edition, means "to trouble, torment or confuse by continual, persistent attacks ... from the French, *harasser*, variant of old French, *harer* - to set a dog on"), let alone any action endangering their lives or physical safety. Once the nature of the "threat" which Mr Murphy has directed towards officers on "the list" is understood, I do not think it is reasonable to expect that any officers of the OSR would be intimidated by it: the prospect of seizure of their superannuation or other property at some time in the future, for the purpose of compensating citizens previously obliged by law to pay state taxes, is so remote that it would rightly be dismissed as fanciful.

83. At page 18 of his written submission, Mr Murphy says:

> *The applicant does not submit that the* [Information Commissioner] *should agree with his political or ethical views. He does, however, submit that those views are not unreasonable, are not uncommon, and that most importantly he is entitled to hold them and attempt to put them by lawful means to whomever he pleases.*

84. I have no sympathy for Mr Murphy's supposedly philosophical/ethical viewpoint on the right of the State to tax its citizens. Like all citizens, Mr Murphy should have the right to question and challenge the actions of the OSR with a view to ensuring that he pays no more tax than he is obliged by law to pay, but his occasional outbursts at officers of the OSR on the right of the state to tax its citizens are, frankly, a waste of the time of the officers concerned. Mr Murphy is well aware that, provided they conduct themselves within the limits of the authority conferred on them by statute, the officers of the OSR have a legal duty, as well as the legal authority, to collect the taxes levied by Act of Parliament. It is no function of the officers of the OSR to question the policies adopted by the legislature. Mr Murphy's baiting of revenue officers with references to the "Nuremburg defence" is quite inappropriate - there is no correlation between enforcement of lawful revenue statutes and war crimes.

85. Nor do I condone Mr Murphy's apparent inability to put his philosophical/ethical views to public servants without lapsing into abusive and intemperate language. Mr Murphy ought to curb this behaviour. He ought to appreciate that from the subjective viewpoint of persons on the receiving end of his occasional bursts of verbal abuse, he is likely to be seen as a threatening or menacing person due to what would appear to be a lack of self-control.

86. Nevertheless, the question which I have to determine is whether disclosure to Mr Murphy of the names of officers, and retired officers, of the OSR that are in issue, could reasonably be expected to endanger a person's life or physical safety. The fact that a person who feels aggrieved at the behaviour of government officials, whether the grievance is reasonable or not, is prone to lapsing into intemperate verbal abuse does not necessarily mean that the person would commit, or would even consider committing, acts that would endanger the life or physical safety of government officials. In my view, a significant segment of the population is quite capable of becoming ill-tempered or abusive towards public servants, indeed towards suppliers of goods and services in the private sector, through anger or frustration experienced in the pursuit of a grievance. Only a very small segment of the community is liable to extend such anger or frustration into retributive action which could endanger the life or physical safety of any person.

87. I am not satisfied, on the totality of the evidence, that Mr Murphy falls into the latter category. Despite the behaviour to which I have referred, I am satisfied that Mr Murphy is an intelligent man, who conducts himself within the law. I accept his evidence that he has never been prosecuted for any offence. I note that he has always ultimately, though grudgingly, complied with his legal obligations in respect of the payment of state taxes. I accept the character evidence given by Mr Peter John Byrnes in his affidavit sworn 2 December 1994. Mr Byrnes, who is a senior officer in

the Department of Justice and Attorney-General, deposes to having been a close friend of Mr Murphy's for most of the past 22 years, and that while Mr Murphy is forceful and forthright in putting his views, he confines himself to the verbal arena: Mr Byrnes has never perceived even a hint that Mr Murphy was likely to become physically aggressive. This is consistent with the evidence that Mr Murphy has not taken any action against officers of the OSR, whose identities have been known to him for several years, that involved endangering a person's life or physical safety.

88. I am satisfied that Mr Murphy would not, and does not intend to, use any names of officers which he obtains through his FOI access application in any way which would be contrary to the law, let alone which would endanger the lives or physical safety of any of the officers. Any action which Mr Murphy proposes to take to redress alleged wrongs will, I believe, be undertaken through proper legal avenues. Mr Murphy has given evidence as to his intentions in pursuing access to the names of officers which are in issue, in paragraphs 1-4 of his affidavit sworn on 4 December 1994:

> *1. Consequent upon an FOI request to the Treasury as deposed to below, I received certain documents. Some of these documents contain matter which accuses me of having committed a criminal assault. Certain remarks made to my accountant (also deposed to below) carried an implication of the same nature.*
>
> *2. Following an FOI request to the Brisbane City Council ("BCC") as deposed to below, I obtained* inter alia *an incomplete copy of one of the documents mentioned in the previous paragraph. This document contained the same defamatory matter. It became evident to me that this material had been disseminated outside the Office of State Revenue ("OSR").*
>
> *3. My purpose in requiring names of OSR employees is to enable me to determine the identity of those responsible for defaming me in relation to the documents already disclosed and to determine whether there have been other publications of defamatory matter concerning me. It is my present intention, having acquired the necessary information, to commence appropriate proceedings in the Supreme Court.*
>
> *4. I have no other purpose for obtaining the names.*

89. Finally, the respondent submits that the threat of legal action may amount to harassment or pressure. Referring to the supplementary affidavit of Mr Abberton executed on 13 March 1995 (the terms of which are referred to at paragraph 145 below), the respondent submits that, in telephone contact on 1 March 1995, Mr Murphy threatened Mr Abberton with legal action and financial ruin, and also "14 or 15 others involved". The respondent submits that this telephone contact constitutes nothing more than "unabridged harassment" of Mr Abberton, and there is every indication that such harassment will continue against not only Mr Abberton, but other officers of Queensland Treasury if the names, the subject of the review, are released to the applicant.

90. This submission is not sufficient to establish a case for exemption under s.42(1)(c) of the FOI Act. Firstly, one telephone contact threatening legal action does not answer the description of harassment. Secondly, the disclosure of Mr Abberton's name is not in issue. The instance of defamation alleged by Mr Murphy (according to Mr Abberton's statutory declaration dated 13 March 1994, and confirmed by paragraph 24 of Mr Murphy's affidavit sworn 4 December 1994) turns on remarks made by Mr Abberton to Mr Murphy's accountant in April 1993. Any cause of action which exists is not liable to be affected by disclosure of the names in issue. There is no reasonable basis which I can see for expecting that disclosure of the names in issue (of which there are eight) will result in threats of defamation action against each of those eight officers, let alone 14

or 15 officers. The names of officers that are in issue appear in contexts which generally record them going about their duties of office in an unexceptionable manner. The name of one officer, however, appears in a context where the officer has recorded the information conveyed by an officer of the Brisbane City Council about Mr Murphy having thrown some punches at a Council parking attendant. Another name appears in a context where the officer has conveyed a brief warning to other staff, based on the information obtained from the Brisbane City Council officer. At most, only two of the names in issue appear in a context which could conceivably, by virtue of their disclosure, expose the persons named to a possible action for defamation (and I say nothing about the merits of any such action).

91. Finally, and most importantly, harassment does not satisfy s.42(1)(c) unless it is harassment which endangers a person's life or physical safety: see paragraph 51 above. I am not prepared to accept that a threat, or the commencement, of litigation against a person is harassment which endangers a person's life or physical safety. There are sound reasons of public policy which reinforce my view. The role of the courts as arbiter of disputes is an essential feature of the rule of law, and the pre-eminent means sanctioned by liberal democratic societies for the peaceful settlement of disputes and grievances concerning the assertion of legal rights. The availability of resort to litigation is intended to be a prime disincentive to any tendency by a citizen, who seeks redress of grievances, to "take the law into their own hands" by resorting to actions which endanger a person's life or physical safety.

92. I am not satisfied that disclosure of the matter in issue could reasonably be expected to endanger a person's life or physical safety. I find that the matter in issue is not exempt matter under s.42(1)(c) of the FOI Act.

Application of s.40 of the FOI Act

93. The respondent also argues that the matter in issue is exempt under s.40(a), (c) and (d) of the FOI Act which provide as follows:

> ***40.*** *Matter is exempt matter if its disclosure could reasonably be expected to -*
>
> *(a) prejudice the effectiveness of a method or procedure for the conduct of tests, examinations or audits by an agency; or*
>
> ...
>
> *(c) have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; or*
>
> *(d) have a substantial adverse effect on the conduct of industrial relations by an agency;*
>
> *unless its disclosure would, on balance, be in the public interest.*

94. The words "*if its disclosure could reasonably be expected to*" govern the three paragraphs of s.40 on which the respondent relies. The meaning of that phrase has already been explained at paragraph 44 above.

95. Both s.40(c) and s.40(d) employ the phrase "substantial adverse effect". I have previously considered the meaning of the adjective "substantial" in the phrase "substantial adverse effect", where it appears in s.49 of the FOI Act. I adhere to the view which I expressed at paragraphs 147 to 150 of my reasons for decision in *Re Cairns Port Authority and Department of Lands* (Information Commissioner Qld, Decision No. 94017, 11 August 1994, unreported), that where the Queensland Parliament has employed the phrase "substantial adverse effect" in s.49, s.40(c), s.40(d) and s.47(1)(a) of the FOI Act, it must have intended the adjective "substantial" to be used in the sense of grave, weighty, significant or serious. In *Re Dyki and Federal Commissioner of Taxation* (1990) 22 ALD 124, Deputy President Gerber of the Commonwealth AAT remarked (at page 129, paragraph 21) that: "*The onus of establishing a 'substantial adverse effect' is a heavy one* ...".

The application of s.40(a) of the FOI Act

96. The terms of s.40(a) are set out above. The focus of this exemption provision (so far as relevant to the present case) is on prejudice to the effectiveness of a method or procedure for the conduct of audits by an agency. The OSR would, from time to time, have cause to conduct audits for the purpose of establishing whether certain persons or corporations have complied with statutory obligations to pay land tax or stamp duty under relevant State revenue legislation.

97. The problem with the respondent's attempt to invoke s.40(a) is that nowhere in its evidence or submissions has the respondent identified a method or procedure for the conduct of audits by the OSR, the effectiveness of which could reasonably be expected to be prejudiced by disclosure of the matter in issue (*cf.* my observations on the similar phrase "prejudice the effectiveness of a lawful method or procedure" in s.42(1)(e) of the FOI Act, in *Re "T" and Queensland Health* (1994) 1 QAR 386 at pp.393-396, paragraphs 24-35).

98. The relevant part of the respondent's first written submission (at p.27 thereof) is as follows:

> *5.2.3 The persons who have their affairs (especially financial) audited and investigated may not take kindly to this. In some cases such as the present (see statutory declarations) they may well be aggressive and engage in conduct which comes close to or amounts to intimidation.*
>
> *5.2.4 It is reasonable to expect that such auditors and investigators may not go about their duty with maximum efficiency and diligence if they are concerned about possible personal future repercussions should details of their names be readily available to the persons who are being or have been investigated.*

99. In terms, this is a claim that names of auditors and investigators should not be available to persons investigated, because that could reasonably be expected to inhibit maximum efficiency and diligence on the part of auditors and investigators. It is difficult to give this submission any credence. First, it has nothing to do with methods or procedures for the conduct of audits by an agency. It is axiomatic that an agency must conduct audits through its relevant employees. But the focus of s.40(a) is on prejudice to the effectiveness of methods or procedures for the conduct of audits. I do not accept that the focus of s.40(a) was intended to be so broad as to permit an argument that the effectiveness of any method or procedure for the conduct of audits would be prejudiced if staff are inhibited from performing their duties with maximum efficiency and diligence.

100. Secondly, the submission is contrary to the OSR's internal management policies requiring officers to identify themselves when dealing with members of the public: see paragraph 5 of Ms Macdonnell's affidavit quoted at paragraph 137 below, and paragraph 115 below.

101. Ms Macdonnell has, in paragraphs 5, 6 and 7 of her affidavit sworn on 21 October 1994, given evidence which is apparently intended to support the application of each of s.40(a), s.40(c) and s.40(d) of the FOI Act. It is reproduced at paragraph 137 below. In addition, most of the officers, or former officers, of the OSR whose names are in issue have submitted evidence to the effect that they fear harassment from Mr Murphy if their names are disclosed. In my opinion, the only paragraph of s.40 to which this evidence, and the respondent's submission noted at paragraph 98 above, is arguably relevant is s.40(c), and I have dealt with it on that basis at paragraphs 136-154 below.

102. Most importantly, for present purposes, there is no evidence to suggest that a method or procedure for the conduct of audits could reasonably be expected to be prejudiced by disclosure of the matter in issue. The only attempt by the respondent to identify a relevant method or procedure within the terms of s.40(a) is contained in one paragraph on p.6 of the respondent's submission in reply:

> *Furthermore, part of the investigation process involves information gathering. Should the names in question be disclosed to the applicant informal sources of information will be less inclined to co-operate with officers of the Office of State Revenue, the effectiveness of such a method or procedure having been prejudiced. More formal and costly mechanisms for information gathering would have to be used (see s.45 of the Land Tax Act 1915)*

103. I cannot accept the relevance or correctness of this submission. I cannot see any reasonable basis for an expectation that the disclosure of the names of officers of the OSR, on documents which relate to the performance of their duties of office, will make informal sources of information used by officers of the OSR less inclined to co-operate with those officers. The disclosure of the names of informal sources of information is not in issue in this case (unless the officer of the ATO whose

name has been deleted from folio 48 is regarded as an informal source: but that officer has informed me that he has no objection to the disclosure of his name to the applicant).

104. While it is not the test posed by s.40(a), there is not even any particularly convincing evidence that the OSR's ability to conduct effective audits of the land tax liability of Mr Murphy (or more precisely, the company which is trustee of his family trust) would be prejudiced by Mr Murphy's having knowledge of the names of officers involved in such audits. In paragraph 7 of her affidavit, Ms Macdonnell says: "*As I recall, the relevant land tax file indicated that a previous audit of the land tax affairs of a company controlled by Mr Murphy had been abandoned as a result of concerns that Mr Murphy may be violent*". Mr Murphy addressed this at p.41 of his written submission: "*It is submitted that Macdonnell is uniquely placed to determine the truth of that statement. She has obviously not read the Trustee's file during the preparation of her deposition. If she had done so, it is submitted, she would have read the material which is before the* [Information Commissioner] *and which shows conclusively that nothing the applicant has done, or is alleged to have done, has hindered any investigation in any way*". In the course of this review, I called for and examined a copy of the OSR file which was released to Mr Murphy, subject to deletion of the names of officers now in issue. I could not see any indication, on the copy provided to me, of a previous audit having been abandoned because of concerns that Mr Murphy may be violent.

105. Indeed, the most recent investigation evident on the file appears to have been successfully undertaken, with payment of additional land tax obtained, notwithstanding that officers appear to have approached the investigation on the basis that personal contact with Mr Murphy should be avoided, and notwithstanding Mr Murphy's abusive telephone contact with Mr Abberton, one of the officers involved in the investigation. Mr Murphy drew attention to this at pp.36-37 of his written submissions:

> *It is submitted that it is plain on the evidence that the Applicant has never sought to interfere in the operations of the OSR. The evidence is that the Applicant has accepted the legality of its operations (while challenging their ethical basis) and caused the Trustee* [of the applicant's family trust] *to comply with the Land Tax Act in accordance with his understanding of it.*
>
> *It is submitted that the documents '8', '9', '10', '13', '15' and '21'* [i.e. the annexures to Murphy's affidavit sworn 4 December 1994, which bear those numbers] *demonstrate that the Applicant complied (and instructed the Trustee's accountant to comply) with requests for information from the OSR. The material shows that the Applicant did not do so with good grace. However, is it seriously to be contended that a taxpayer's unhappiness with being obliged to pay taxes constitutes a cause of prejudice to the collection process? It is submitted that if that were the case, the system would be so prejudiced (by the combined effect of 10,000,000 unhappy taxpayers) that it would have ground to a halt years ago.*

106. The last three sentences of this passage make light of the concern which has been caused to officers of the OSR by the abusive and intemperate language which, it appears from the evidence, Mr Murphy has employed on more than one occasion to express his unhappiness with being obliged to pay land tax.

107. Nevertheless, the respondent has not satisfied me that disclosure of the matter in issue could reasonably be expected to prejudice the effectiveness of a method or procedure for the conduct of audits by an agency, and I find that the matter in issue is not exempt under s.40(a) of the FOI Act.

The application of s.40(c) of the FOI Act

108. The terms of s.40(c) are set out at paragraph 93 above. The focus of this exemption provision is on

the management or assessment by an agency of the agency's personnel. (I note that no suggestion has been raised by the respondent that assessment, as distinct from management, of its personnel is relevant in the context of the present case.) 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 by the respondent of its personnel, unless disclosure of the matter in issue would, on balance, be in the public interest.

109. In its first submission, the respondent stated its reliance on three decisions of the Commonwealth AAT, *Re Z and Australian Taxation Office* (1984) 6 ALD 673, *Re Mann and Australian Taxation Office* (1985) 7 ALD 698, and *Re Lander and Australian Taxation Office* (1985) 17 ATR 173, all of which held that the names of officers of the Australian Taxation Office (the ATO) were exempt from disclosure under the Commonwealth FOI Act. The respondent relies on these cases for a proposition that names of revenue officers are always exempt from disclosure under freedom of information legislation. I will deal first with this proposition, which I find to be untenable for a number of reasons explained below.

110. The only attempt by the respondent in its written submissions to formulate adverse effects on the management by the respondent of its personnel (which could reasonably be expected to follow from disclosure of the matter in issue) appears at pp.6-7 of its submission in reply: see paragraph 135 below. In addition, other expected adverse effects of disclosure identified in the respondent's submissions on s.40(a) and s.40(d) are, in my opinion, more correctly arguable in the context of s.40(c). I have dealt with these issues at paragraphs 136-154 below.

111. There are several problems with the respondent's reliance on *Re Z*, *Re Mann* and *Re Lander*: firstly, in my opinion, those cases appear (with the benefit of hindsight afforded by later decisions of the Federal Court of Australia) to have been wrongly decided; secondly, it is doubtful that those decisions could have been based on the exemption provision in the Commonwealth FOI Act which corresponds to s.40(c) of the Queensland FOI Act; but (thirdly) if they were, they were decided in the context of a management policy of the ATO which was virtually the opposite of the OSR's relevant management policy.

112. It is indicated at p.676 of the decision of the Commonwealth AAT in *Re Z* that the ATO argued that the names of officers of the ATO were exempt from disclosure under s.40(1)(c) or s.40(1)(d) of the Commonwealth FOI Act. Section 40(1)(c) of the Commonwealth FOI Act corresponds fairly closely to s.40(c) of the Queensland FOI Act. Section 40(1)(d) of the Commonwealth FOI Act (which focuses on disclosure having "a substantial adverse effect on the proper and efficient conduct of the operations of an agency") does not, however, have a counterpart in the Queensland FOI Act. It is clear from the terms of its decision on this issue (at p.677) that, although both s.40(1)(c) and s.40(1)(d) of the Commonwealth FOI Act were argued, the Tribunal in *Re Z* based its findings only on s.40(1)(d):

> *The submission concerning the officers' names ... also succeeds because we agree that there is a public expectation that taxpayers' affairs will be the subject of the highest confidentiality. <u>The proper and efficient conduct of the operations</u> of the Australian Taxation Office is a subject of real public importance. There is a <u>strong possibility</u> that the revelation of names of individuals who have dealt even in a routine way with any taxpayers' affairs would undermine public confidence in the strict confidentiality which quite properly surrounds the operations of the agency. That is a confidentiality which both the public and the officers employed by the agency have grown to respect. It would not be in the public interest in our view to breach that confidence.* (my underlining)

113. The stated reasons have nothing to do with the management by the ATO of its personnel, so it appears that s.40(1)(c) of the Commonwealth FOI Act cannot have been the basis for the Tribunal's

decision. The Tribunal was apparently satisfied that the disclosure of the names of officers of the ATO would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the ATO because there was a strong possibility of undermining public confidence in the strict confidentiality of its operations. Whether a strong possibility is sufficient to discharge the test imposed by the words "could reasonably be expected to", as clarified by later decisions of Full Courts of the Federal Court of Australia in *Attorney-General's Department v Cockroft* (1986) 10 FCR 180 and *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163 at pp.175-178, is doubtful.

114. Moreover, I have difficulty in accepting that a strong possibility of undermining public confidence in the confidentiality of the operations of the ATO could logically have been raised by the prospect of disclosure of the bare names of officers of the ATO, or the disclosure of those names in the context of documents concerning the tax affairs of the applicant for access. Absent extraordinary circumstances, there is no prospect of an applicant obtaining access under either the Commonwealth FOI Act or the Queensland FOI Act to documents concerning the tax affairs of another person (unless perhaps that other person consents to disclosure to the applicant, or is involved in some relationship with the applicant such that their tax affairs are in effect, joint tax affairs, either generally or in particular instances). I am unable to accept that disclosure to an applicant for access of the names of officers on documents concerning that applicant's tax affairs can logically be expected to have a substantial adverse effect on the protection of the confidentiality of taxpayers' affairs generally (see also my remarks at paragraph 121 below).

115. It may, however, have an effect on the accountability of individual officers for their service delivery to taxpayers, which is presumably a major reason why the OSR has adopted a policy of requiring its officers to identify themselves in their dealing with taxpayers. The OSR has published "Client Service Standards", the detail of which need not be set out in full, but the following parts of which are relevant for present purposes:

> *All taxpayers have a right to courteous, competent and timely service and will be informed of avenues for complaint, review or appeal.*
>
> ...
> [Under standards for dealing with correspondence -]
> *Respond to correspondence promptly - our letters will explain our decisions and give the author's name and contact phone*
>
> ...
>
> [Under standards for dealing with phones -]
> *People are to identify themselves by their full name to callers.*

116. The OSR's policy in this regard is entirely opposite to the policy of the ATO which was current when evidence was given in 1985 to the Commonwealth AAT hearing the ATO's case in *Re Mann*. It is recorded at p.709 of the decision in *Re Mann* that a Senior Assistant Commissioner of the ATO, Mr J J Daly, gave evidence that the ATO had adopted the policy of not disclosing the names of its officers for reasons of security, industrial harmony and staff morale, and there had been threats of work bans by the Federated Clerks Union if names were disclosed.

117. It was against this background that the Tribunal in *Re Mann* stated (at p.711) that it agreed with the finding in *Re Z* (that is set out above at paragraph 112), and that it considered it clear that disclosure of the officers' names would have the substantial adverse effects mentioned in s.40(1)(c) and s.40(1)(d) of the Commonwealth FOI Act. The Tribunal found it unnecessary to make any finding in relation to s.40(1)(e) of the Commonwealth FOI Act, which corresponds fairly closely to s.40(d) of the Queensland FOI Act. The only reasoning set out in the decision to support the finding that

disclosure of the names of officers of the ATO would have the substantial adverse effects mentioned in s.40(1)(c) and s.40(1)(d) of the Commonwealth FOI Act is at p.708 of the decision:

> *We are of the opinion that there would be very real dangers of misuse of the names of officers of an agency, at least and in particular the names of officers of the Australian Taxation Office, if disclosure were made. It would be one thing for the names of officers holding delegations from the Commissioner of Taxation to be released, but at lower levels we see a distinct danger of mischievous use of officers' names, with no countervailing advantage to the public. While we do not suggest for a moment the presence of any such danger of misuse in the present case, the principle is a general one.*

118. At pp.36-37 of its first submission, the respondent submitted that from *Re Mann* the following four points were made clear:

> *(1) Disclosure of names of officers at lower levels has a distinct danger of mischievous use. As in* Re Mann, *no direct evidence of this is necessary. Common sense and inference is sufficient.*
>
> *(2) In* Re Mann *it was found as a matter of fact there was no actual evidence of danger of misuse of the information in that case but it did not matter as the principle was a general one.*
>
> *(3) The ATO did not disclose names of officers for reasons of security, industrial harmony and staff morale.*
>
> *(4) Disclosure of names of junior officers was not in the public interest nor would such disclosure affect accountability.*

119. I am unable to accept the correctness of the first two propositions, for reasons explained below. The third proposition is a statement of fact about the ATO's policy in 1985. The more relevant fact for present purposes is the current policy of the OSR. The fourth proposition does not even arise unless one reaches the stage of having to apply the public interest balancing test which qualifies s.40(c) of the FOI Act.

120. The reasons given by the Tribunal in *Re Mann* (and in *Re Z*) as to why substantial adverse effects could reasonably be expected to follow from disclosure of the names of officers of the ATO are extremely brief, vague, unsubstantiated and, frankly, unconvincing. Moreover, the connection between the unexplained potential for misuse or mischievous use of officers' names and adverse effects on the management by the ATO of its personnel, is not explained in the reasons for decision in *Re Mann*. While the Tribunal said it was satisfied that both s.40(1)(c) and s.40(1)(d) of the Commonwealth FOI Act were established, I consider that its findings are more explicable by reference to s.40(1)(d) of the Commonwealth FOI Act, which, as I have explained at paragraph 112 above, has no counterpart in the Queensland FOI Act.

121. In the passage from *Re Mann* quoted at paragraph 117 above, no details of the potential misuse or mischievous use were given, nor any substantial grounds identified as to why that misuse or mischievous use could reasonably be expected to follow from disclosure of the documents in issue. The suggestion given in evidence in *Re Mann* (at pp.708-709) that *"if individual assessors had their names readily available to members of the public, it is possible that taxpayers could feel that other taxpayers might be able to obtain information concerning their affairs simply by approaching one of the named officers"* is so implausible, having regard to the legal constraints on tax officers imposed by statutory secrecy provisions and other disciplinary measures, that it could not, in my opinion, found a reasonable expectation of adverse effect according to the proper test.

122. In my opinion, the conclusion is inescapable that the Tribunal was dealing in merely speculative possibilities, of a kind which would not satisfy the test imposed by the words "could reasonably be expected to", as it is now properly understood in the light of the subsequent decisions of Full Courts of the Federal Court of Australia (see paragraph 113 above) and of the principles I have referred to in paragraph 44 of this decision.

123. It is not sufficient for the respondent in the present case to claim, as it has, that no evidence is necessary of the dangers of mischievous use of officers' names, that common sense and inference are sufficient. Common sense and inference suggest to me that the OSR's conscious choice of the policy referred to in paragraph 115 above, warrants the opposite conclusion to the one the respondent invites me to reach. If a respondent agency seeking to invoke s.40(c) of the FOI Act cannot identify a substantial adverse effect on the management or assessment by an agency of the agency's personnel, and point to the existence of a reasonable basis, i.e. real and substantial grounds, to support an expectation that the substantial adverse effect will follow from disclosure of the matter in issue, it will run the risk of failing to discharge its onus under s.81 of the FOI Act.

124. The proposition in the final sentence of the passage quoted from *Re Mann*, at paragraph 117 above, is also dubious. Ordinarily, the application of exemption provisions in FOI legislation calls for an evaluation of the prejudicial effects of disclosure of the particular information in issue. For the Tribunal to say that it saw no danger of misuse of officers' names if disclosed in the case before it, but that the principle on which it relied was a general one, must mean that the Tribunal in effect made a policy decision to support the ATO's policy on non-disclosure of officers' names, thereby favouring the interests of security of ATO staff over considerations of accountability of individual ATO officers, irrespective of whether disclosure of officers' names to a particular applicant posed any real threat to the security of the officers.

125. I do not see how the OSR can legitimately claim reliance on the decision in *Re Mann* when it has consciously chosen to adopt a different policy: a choice which indicates either that it does not seriously accept the potential dangers of mischievous use of officers' names (absent exceptional circumstances) or that any potential dangers are so slight as to be outweighed by the overall benefits of enhanced standards of client service, and enhanced accountability of individual officers for their service delivery.

126. The decisions in *Re Z, Re Mann* and *Re Lander* on disclosure of officers' names appear to me to be the product of an outdated approach to the application of FOI legislation which paid insufficient regard to the appropriate emphasis, evident in recent cases, on the accountability objects of FOI legislation, which include accountability of individual public servants (see my comments at paragraphs 34-37 of this decision).

127. In my opinion, the general policy on disclosure of officers' names which the OSR has chosen to adopt is an entirely appropriate one, that accords with evolving trends in public sector management, and legitimate community expectations of service delivery by public sector agencies. In my view, there is little justification for insulating a government revenue collecting agency from general developments of this kind.

128. Moreover, it will be increasingly difficult for notions of the traditional anonymity of public servants to survive the rise of consumerism in modern society. In my view, it is simply unacceptable to most people in our community at the present time, that they should have to deal with anonymous public servants, or that individual service providers are not accountable for their treatment of the people with whom they deal.

129. The impact of the consumer movement on the provision of government services is exemplified by "The Citizen's Charter" published by the United Kingdom government in July 1991. I will quote

some parts of "The Principles of Public Service" set out at p.5 of that document which are apposite for present purposes:

> *Every citizen is entitled to expect:*
>
> ***Standards***
>
> *... These standards should invariably include courtesy and helpfulness from staff ...*
>
> ***Openness***
>
> *There should be no secrecy about how public services are run, how much they cost, who is in charge, and whether or not they are meeting their standards. Public servants should not be anonymous. Save only where there is a real threat to their safety, all those who deal directly with the public should wear name badges and give their name on the telephone and in letters.*
>
> ***Information***
>
> *...*
>
> ***Choice***
>
> *...*
>
> ***Non-discrimination***
>
> *...*
>
> ***Accessibility***
>
> *...*
>
> ***And if things go wrong?***
>
> *At the very least, the citizen is entitled to a good explanation, or an apology. ... There should be a well-publicised and readily available complaint procedure.*

It is clear from p.24 of the Charter that the above principles are intended to apply to U.K. Revenue Departments.

130. At least one prominent Australian commentator on administrative law principles has commented that, to compensate for deficiencies in Australia's formal administrative law systems, it is both inevitable and desirable that many of the principles behind the U.K. Citizens Charter be adopted in Australia. Mr Alan Rose, a former Secretary of the Commonwealth Attorney-General's Department, now President of the Australian Law Reform Commission, and a long-time member of the Commonwealth Administrative Review Council, made the following remarks in a paper titled "Future Directions in Australian Administrative Law: the Administrative Law System" published in J McMillan (ed), Administrative Law: Does the Public Benefit? (Proceedings of the Australian Institute of Administrative Law Forum, April 1992), pp.213-219, at pp.217-218:

> *... Put very simply, the community is more comfortable with a model of service provision and authority which needs to treat them as clients/customers, not as subjects. ...*
>
> *There is a belief, and one that I share personally, that the best way to raise the quality of individual decisions and policy generally and to get government under control is to let consumers get at it. We have now to open the doors a little wider. ...*
>
> *I consider that it is both inevitable and desirable that many of the principles behind the UK Citizen's Charter be adopted in Australia. ...*
>
> *The Charter provides a direct framework for ensuring that agencies respond to the needs of their clients.*
>
> *...*
>
> *... The initiatives we need to take now are ones that bring centrally into focus requirements for individual decision makers to be accountable personally for what they do.*

131. The principles and approach evident in the UK Citizen's Charter have been endorsed by the New South Wales Government in its "Guarantee of Service" (published in the booklet New South Wales - Facing the World, March 1992, see especially at p.53). They have also been endorsed in the Queensland Government's Financial Management Strategy (the Public Sector Reform Directorate within the respondent, Queensland Treasury, has responsibility for monitoring the strategy): see Queensland Government, Financial Management Strategy - Progress Report, June 1995, at p.7, and also p.7 of the "Queensland Government Policy (and Guidelines) for Client Service Standards", which is published as Attachment A to that booklet.

132. Some of the principles referred to in the preceding paragraphs have been quite properly embraced in the OSR's Client Service Standards. In my opinion, that factor makes the respondent's reliance on *Re Mann*, for a general principle that names of its officer should not be disclosed in documents released under the FOI Act, quite untenable.

133. The same applies to an argument repeated in several places in the respondent's first submission, but captured in the following extract (from pp.29-30):

> *5.3.6 The report of the Electoral and Administrative Review Commission ("EARC") on Freedom of Information is a document to which consideration may be given for the purposes of s.14B(3)(B) of the* Acts Interpretation Act 1954 (Qld): *see the decision of the Information Commissioner in* Re Stewart and Department of Transport ... *paragraph 59.*
>
> *5.3.7 Parliament has chosen to enact s.40(c) of the Act in exactly the same terms as Clause 32(c) of the draft Bill attached to EARC's report. At paragraph 7.100 of EARC's report the following statement is made:-*
>
> > "The scope of these provisions is reasonably apparent on their face. Under the Commonwealth FOI legislation, names of public servants are often excluded under the equivalent to Clause 32(c) (see *Re Mann and Australian Taxation Office* (1985) 3 AAR 261). Clause 32(c) might also be invoked where one agency officer seeks personnel records about

another (often in promotion contexts)."

5.3.8 It is submitted that EARC's commentary on Clause 32(c) indicates that it was clearly intended that its recommended Clause 32(c) should be interpreted in accordance with the decision in Re Mann and Australian Taxation Office.

134. The relevant sentence from paragraph 7.100 of the EARC Report (i.e., "Under the Commonwealth FOI legislation, names of public servants are often excluded under the equivalent to Clause 32(c) ... see *Re Mann* ...") is merely an observation. It is certainly open to infer that in 1990 the Commissioners of EARC contemplated that *Re Mann* might be followed in Queensland. But the purpose of recourse to legislative history materials is not to permit the authors of such materials to prescribe that a particular previous case (here, not even an authoritative decision of a superior court of record) is to govern the future interpretation of a legislative provision, irrespective of whether a particular subsequent case exhibits materially different circumstances to those of the case which is claimed to govern the situation, or the subsequent emergence of different interpretative approaches adopted by superior courts. The purposes of recourse to legislative history materials are those set out in s.14B(1) of the *Acts Interpretation Act 1954* Qld. None of them supports the respondent's proposition. I do not accept that the parts of the EARC Report to which the respondent has drawn attention are capable of saving that part of the respondent's case which is based on *Re Mann*, *Re Z* and *Re Lander*. (I note that *Re Lander* merely follows *Re Z* and *Re Mann* without further explanation).

135. Where the respondent does raise an arguable case for the application of s.40(c) is in its brief contention at p.37 of its first submission that (in contrast to the general risk of mischievous use of names found in *Re Mann*) there is evidence in the present case of an actual risk. This is briefly related back to the focus of s.40(c) on the management by an agency of its personnel, at pp.6-7 of the respondent's submission in reply, which summarises the respondent's case on s.40(c) as follows:

(i) Paragraph 6 of the statutory declaration of Macdonnell [set out at paragraph 137 below] *deposes to the belief that disclosure of the names in question to the applicant will jeopardise the general office policy of having officers disclose their names to taxpayers;*

(ii) Officers will, it is submitted, be more inclined not to follow the office policy and refuse to reveal their names to taxpayers. This will in turn, it is submitted, cause broad management problems within the Office of State Revenue;

(iii) It is submitted that disclosure of the names in question will have a substantial adverse effect on the management by the Office of State Revenue of its personnel.

136. In addition, other expected adverse effects of disclosure of the matter in issue have been identified in the respondent's submissions on s.40(a) and s.40(d), when, in my opinion, they more correctly relate to the management by the respondent of its personnel. They are -

> Auditors and investigators may not go about their duty with maximum efficiency and diligence if they are concerned about possible personal future repercussions should details of their names be available (first submission paragraph 5.2.4). Officers of the OSR will be less inclined to refer matters to the Compliance Branch for audit. In turn, investigation officers (particularly the more junior ones) will be less likely to persist with audits where there are indications of harassment or intimidation (submission in reply, paragraph 2.5(i)).

The OSR has assured staff that it would seek to protect staff from reprisals or harassment by taxpayers. The staff of the OSR tend not to distinguish between matters for management decision and those in which management has no say. The staff will perceive the release of the names in question as an act of breach of faith on the part of management (submission in reply, paragraph 2.7(a)). Disclosure would affect morale and productivity (first submission, paragraph 5.4.6).

137. Evidence in support of these contentions has been given by Ms Jane Macdonnell, Assistant Commissioner of Land Tax and Executive Director of the OSR, in paragraphs 5, 6 and 7 of her affidavit sworn 21 October 1994:

> *5. In the interests of accountability and good client service, I have directed employees of the Office of State Revenue to identify themselves by full names (given and family name) to telephone callers and to addressees of correspondence from the Office. I have also more recently directed them to include their names on stamp duty assessments and to make signed file notes of advice/interactions with taxpayers (apart from general enquiries). These directions, or aspects of them, have met with vigorous protests from some staff and representations from the State Public Services Federation Queensland. While there is still not full compliance with the policy, the fears of many staff appear to have been partly allayed by my assurance that the Office would seek to protect staff from reprisals or harassment by taxpayers. I recall that members of the Welfare Committee (workplace union delegates) and one of the then Joint General Secretaries of the State Public Services Federation Queensland made strong representations to me that officers' names not be disclosed to Mr Murphy.*
>
> *6. While this review under the Freedom of Information Act arises out of an application for access to land tax documents, the decision will have a wider impact on Office personnel. The Office has a generic structure under which staff are employed as Senior Revenue Officers, Revenue Officers, Senior Investigations Officers etc without reference to a particular tax type and most are proficient in more than one tax. Officers are freely moved across tax types and across sections and branches. It is therefore my honest belief that the Office policy of employees generally disclosing their names to taxpayers would be jeopardised by the disclosure of the officers' names to the applicant. In this way, disclosure to the applicant is reasonably expected by me to have a substantial adverse effect on the management of the Office's personnel, and on the conduct of industrial relations by the Office, and to that extent by Queensland Treasury. To further illustrate the bases of my expectation, I have found that many staff do not distinguish between matters for management decision and those in which management has no say. As one example of this failure to so distinguish, I cite the salary broadbanding arrangements introduced by the Public Sector Management Commission which resulted in work disruption, union representations to me and formal grievances concerning the salary point transfers of certain officers which were effected by the Queensland Treasury in accordance with mandatory instructions from the Public Sector Management Commission. I reasonably expect that any decision by the Information Commissioner to release officers' names will be perceived by staff generally as a failure by management to keep faith with them.*
>
> *7. Further, if the names of more junior officers are disclosed in circumstances where the applicant's motives for seeking such disclosure appear to be*

> *mischievous, I reasonably expect that revenue officers will be less inclined to refer matters to the compliance branch for audit. In turn, investigation officers (particularly the more junior ones doing the more routine audits) will be less likely to persist with audits where there are indications that they will be harassed or intimidated as a result. As I recall, the relevant land tax file indicated that a previous audit of the land tax affairs of a company controlled by Mr Murphy had been abandoned as a result of concerns that Mr Murphy may be violent. If matters are not referred to compliance or not thoroughly investigated after referral, the effectiveness of the Office's audits to protect state taxation revenue would be prejudiced.*

In addition, most of the officers, or former officers, whose names are in issue have submitted evidence to the effect that they fear harassment from Mr Murphy if their names are disclosed.

138. It is necessary for me to determine whether the stated expectations of adverse effects, following from disclosure of the matter in issue, are reasonably based. If I am satisfied that any of the claimed adverse effects could reasonably be expected to follow from disclosure of the matter in issue, it is also for me to determine whether they constitute a substantial adverse effect on the management by the respondent of its personnel.

139. One of the downsides of the rise of the consumer movement is the encouragement given to, and the corresponding rise in the number of, complainants who are not prepared to accept the fact that government agencies are frequently under legal, policy or resource constraints which do not permit them to give the complainant some kind of service or benefit to which the complainant insists he or she is entitled, or to accept that government agencies may have the legal authority to deal with them, or their property, or their business interests etc, in a way they find objectionable. Sometimes people develop profound resentments or become obsessive about their grievances. In my capacity as Queensland Ombudsman, I have had more experience than most public servants of dealing with complainants of the kind described. Most often, expression of the resentment is confined to abusive language. Sometimes, explicit threats of retribution against individual public servants are made, but in my experience, are rarely followed through. Nevertheless, while instances of assaults or harassment of public servants are rare, they have occurred.

140. Mr Murphy's expressions of resentment have, on the evidence before me, been confined to occasional outbursts of abusive and intemperate language. As I have said, I do not condone Mr Murphy's use of abusive and intemperate language. In a perfect world, public servants should not have to be subjected to it; people would raise only legitimate complaints, and in temperate and reasoned language. However, it is a fact of life, and of human nature, that many people with grievances, legitimate or not, have difficulty in raising and pursuing them in a controlled and reasonable manner. No doubt many officers in the OSR must have to handle heated exchanges with irate taxpayers on a fairly regular basis; it is a hazard that goes with the territory. Government agencies and employees have to devise methods of managing this phenomenon.

141. As is recognised in the extract quoted from the UK Citizen's Charter (at paragraph 129 above), exceptional circumstances, such as where there is a real threat to the safety of public servants, may justify and require that exceptions be made to systems for dealing with members of the public which are ordinarily appropriate. All employers owe a duty of care to provide for the safety of their employees, which includes an obligation to take all reasonable and practicable steps to safeguard against a foreseeable risk of harm to an employee.

142. The evidence before me, however, does not support a proposition that names of auditors and investigators should not ordinarily be available to persons investigated. Rather, it is directed to the proposition that the names of officers who have dealt with a land tax file concerning Mr Murphy should not be disclosed to Mr Murphy because of fears held by officers about Mr Murphy's future

behaviour towards them based on Mr Murphy's past contacts with officers. I am not satisfied that it is reasonable to expect that disclosure of the matter in issue would cause officers of the OSR to refuse to follow the office policy of revealing their names to taxpayers with whom they have to deal, in the general run of cases. The policy is a sound one which accords with Queensland government policy (see paragraph 131 above), and I do not think it is reasonable to expect that officers of the OSR are likely to insist on abandoning it, to the detriment of the vast majority of taxpayers, and the reputation of the OSR generally, because of their concerns over Mr Murphy. There is not sufficient evidence before me to afford a reasonable basis for an expectation that disclosure of the matter in issue would result in officers of the OSR objecting to disclosure of their names to other taxpayers or persons subject to audit, who were not perceived to have behaved in such a manner as to cause officers to fear harassment.

143. There is evidence from Ms Macdonnell (in paragraph 6 of her affidavit) that she has given assurances to staff that the OSR would seek to protect staff from reprisals or harassment by taxpayers. No evidence has been given of any formal policy dealing with exceptions to the general management policy referred to in paragraph 115 above, or what constitutes sufficient grounds to warrant an exception from the usual policy. It is clear, however, that Ms Macdonnell and several officers of the OSR regard Mr Murphy as warranting exception from the usual policy, and there appears to be concern that making exceptions to the usual policy is rendered meaningless if there is nothing to prevent a taxpayer circumventing the OSR's attempts to protect its staff, by obtaining the names of staff under the FOI Act. This appears to be the basic concern underlying the two adverse effects identified in paragraph 136 above, adverse effects which may have substance in circumstances where there is a reasonable basis for expecting that disclosure of information under the FOI Act would expose staff to a real risk of danger or harassment.

144. As is apparent from my consideration of s.42(1)(c) of the FOI Act, I consider that the management and staff of the OSR, despite understandable concerns at Mr Murphy's intemperate and abusive language, have substantially exaggerated the threat to staff of the OSR posed by Mr Murphy. It is legitimate to test the respondent's case in respect of s.40(c) by questioning the extent to which the evidence supports the respondent's assertion that in the present case there is an actual risk of mischievous use of the names in issue if they are disclosed to Mr Murphy. I have reached a finding that I am not satisfied, on the totality of the evidence before me, that disclosure of the names in issue could reasonably be expected to endanger a person's life or physical safety. Moreover, the evidence discloses no behaviour on the part of Mr Murphy which amounts to harassment of individual officers whose names are known to him (see paragraphs 78 and 82 above). I am satisfied that there is no reasonable basis for expecting harassment of the officers whose names are in issue, if their names are disclosed to Mr Murphy. I am satisfied that Mr Murphy seeks access to the names in issue only for the purpose of assisting him to pursue litigation in respect of his grievance with the alleged spreading of defamatory remarks about him. I consider it unlikely that Mr Murphy would attempt to make any contact at all with most of the eight persons whose names are in issue However, it does appear likely that Mr Murphy may attempt to contact one or two of the named officers, in respect of his grievances at alleged defamation of his character.

145. In a statutory declaration executed on 13 March 1995, Mr Abberton states than on 1 March 1995 he received a telephone call from Mr Murphy. He annexes a copy of his contemporaneous record of the exchange with Mr Murphy. It records that Mr Murphy stated he was going to sue Mr Abberton for defamation of character in respect of comments made by Mr Abberton to Mr Murphy's accountant in April 1993. Mr Abberton records Mr Murphy as requesting Abberton to meet with Murphy to discuss ways to resolve the matter, as if the matter got to court Abberton would be in financial ruin. Mr Murphy is recorded as having spoken of a real estate agent who ended up with medical problems as a result of the ordeal of being taken to court by Mr Murphy.

146. In a supplementary submission dated 6 April 1995, Mr Murphy does not dispute Mr Abberton's account of this telephone contact. Mr Murphy does object to Mr Abberton's characterisation of it as

a tirade by Mr Murphy. Mr Murphy says that Mr Abberton's record of the conversation discloses a quite measured attempt by Mr Murphy to persuade Mr Abberton that his interests would be best served by a pre-litigation settlement. (I note that the matter in issue in this case has no connection with, and its disclosure could not affect, any cause of action for defamation which Mr Murphy may have against Mr Abberton, arising out of the latter's alleged remarks to Mr Murphy's accountant in April 1993.)

147. Mr Murphy also deposes (at paragraphs 56-59 of his affidavit sworn 4 December 1994) to having contacted two officers of the Brisbane City Council to raise allegations that they had defamed him, and to having been subsequently contacted by the Town Clerk of the Brisbane City Council who requested Mr Murphy not to contact the two officers again, but to communicate directly with the Town Clerk.

148. On the evidence before me, it is not possible to say that Mr Murphy does not have a legitimate cause, or causes, of action for defamation in respect of the incidents of alleged defamation referred to in Mr Murphy's evidence. Because it is not possible for me to say that Mr Murphy has no legitimate cause, or causes, of action for defamation, I am not prepared to accept that a legitimate attempt by Mr Murphy to contact a putative defendant to discuss the possibility of pre-litigation settlement can properly be characterised as harassment or the mischievous use of an officer's name. I caution Mr Murphy, however, that it is not appropriate to threaten a putative defendant with financial ruin, or the prospect of medical problems, through involvement in litigation. And if a putative defendant does not respond positively to an initial invitation to discuss pre-litigation settlement of a claim, the appropriate course is to commence legal proceedings, not to press the matter through further telephone contact. It is my understanding that it is the policy of the Queensland government to indemnify its officers for damages or costs awarded against an officer in a civil suit arising out of acts done in good faith in performance of the officer's duties. The merits of Mr Murphy's cause of action for alleged defamation can be tested in court if the putative defendants are not interested in his invitations to discuss settlement.

149. Resort to the courts to pursue grievances of this kind and seek to vindicate personal reputation is an accepted feature of our legal system. While any person could be expected to be concerned at the prospect of being exposed to litigation, (and I can well understand that any officer of the OSR who is sued by Mr Murphy may feel a sense of injustice, in light of the verbal abuse which has been directed by Mr Murphy to some officers of the OSR), the fact is that public servants performing their duties of office are subject to the laws of the land, just as other citizens are. If a person suffered physical injury through the alleged negligence of a public servant, there would not ordinarily be any justification for refusing access to the public servant's name, if the injured person was seeking it for the purposes of bringing an action for damages for personal injury. In principle, there should be no material difference where the "injury" complained of is defamation of character. There are sound reasons of public policy why it would not be appropriate to regard the exposure of an officer to possible litigation as involving harassment, or otherwise affording sufficient justification for the withholding of names of officers: *cf.* paragraph 91 above.

150. Thus, I do not accept that the respondent's expectations of the adverse effects stated in paragraphs 135-136 above, to the extent that they are underpinned by the respondent's expectation of reprisals, or harassment, or other mischievous use by Mr Murphy of the names in issue, are reasonably based.

151. If there is any reluctance by the staff or management of the OSR to accept my judgment in this regard, based on the evidence before me, then what I think may reasonably be expected to follow from disclosure of the matter in issue is attention by management and staff of the OSR (if it has not already been prompted by the occurrence of this review) to the formulation of exceptions to the general policy laid down in the OSR's Client Service Standards, which are to apply when staff have a reasonable basis to apprehend that they may be subject to harassment or physical danger. In such

situations, staff would be justified, presumably with management support, in refusing to put their names on correspondence (which presumably would have to be issued in the name of the Commissioner of Land Tax, or the equivalent office under other revenue statutes) or refusing to provide their full name in telephone contacts.

152. Of course, the OSR still has to deal with any such "problem persons" if they have a continuing liability to pay tax. Such persons must still have the right to raise legitimate concerns about whether liability to pay tax has been properly assessed and levied within the limits of the statutory authority conferred by Parliament. (It may well be the case that Mr Murphy continues in the future to protest his liability to pay state taxes, and resorts again to the use of abusive language, but that would not be a consequence of the disclosure of the names now in issue). The OSR may be justified, however, in insisting that it is only prepared to deal with such persons through an agent, such as a solicitor or accountant, or is only prepared to deal with them by correspondence, or that any telephone contact is only to be made with a designated senior officer. In such exceptional cases, it may be appropriate in the interests of staff safety to adopt a policy that officers not record their full names on file notes, but instead use some appropriate coding system. Steps of this kind would represent a responsible exercise of the duties of an agency to take reasonable steps to protect the safety of its employees, and a legitimate exception to the policy laid down in the OSR's Client Service Standards. Also, public servants should not, in my opinion, be obliged to endure unacceptable language and abuse in telephone conversations, and it would be appropriate for management to instruct staff that, should that occur, they are entitled to warn the other party that they will terminate the telephone conversation if the unacceptable language and abuse does not cease, and to terminate the telephone conversation if the other party then persists with unacceptable language and abuse.

153. There is no evidence that problems of the nature which have prompted the concerns expressed by the OSR in this case are widespread - they are confined to cases where legitimate concerns exist for the protection of officers from danger or harassment. With remedial measures of the kind suggested in the preceding paragraphs able to be implemented in problem cases of that kind, I am not satisfied that adverse effects on the management by the respondent of its personnel (of the kind identified in paragraphs 135-136 above) could reasonably be expected to follow from disclosure of the matter in issue, or that, if any adverse effects of that kind did follow, they would be substantial. In respect of the concern that disclosure of the matter in issue would be perceived by staff as a breach of faith on the part of the management of the OSR, I also rely upon the reasons given below at paragraph 169.

154. The respondent has not satisfied me 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, and I find that the matter in issue is not exempt matter under s.40(c) of the FOI Act.

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

155. The terms of s.40(d) are set out at paragraph 93 above. The focus of this exemption provision is on the conduct of industrial relations by an agency. 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 conduct of industrial relations by an agency (in this case, the only relevant agency which has been suggested is the respondent agency, in particular the OSR), unless disclosure of the matter in issue would, on balance, be in the public interest.

156. In *Re McCarthy and Australian Telecommunications Commission* (1987) 13 ALD 1, when applying s.40(1)(e) of the Commonwealth FOI Act (which corresponds fairly closely to s.40(d) of the Queensland FOI Act) the Commonwealth AAT accepted and applied a definition of the term "industrial relations" set out in the supplement to the Oxford English Dictionary, as follows - "*relationships between employers and employees*". The respondent submits that I should accept and apply that definition. If one is to read the focus of s.40(d) as being on the conduct by an agency of relationships between the agency and its employees, it is difficult to see any respects in which the

area of operation of s.40(d) is not entirely subsumed within the area of operation of s.40(c), i.e. the management by an agency of the agency's personnel. Indeed, the respondent's written submissions seem in places to treat s.40(c) and s.40(d) as if their spheres of operation were virtually identical, at least for the purposes of this case.

157. Even allowing that there may be overlap between exemption provisions, it is difficult to accept that the legislature could have intended such an extensive degree of overlap between the intended spheres of operation of s.40(c) and s.40(d). I have not been able to find any commentary on the legislative history of the Queensland FOI Act, or of s.40 of the Commonwealth FOI Act (on which the Queensland exemption provisions are fairly closely modelled) which offers any explanation as to the intended demarcation between the respective spheres of operation of these two provisions.

158. It is possible to make some inferences from the original form of s.40(c) of the Commonwealth FOI Act, when it was first enacted. It then provided:

> ***40***. *A document is an exempt document if its disclosure under this Act would be contrary to the public interest by reason that -*
>
> ...
>
> *(c) the document contains information the disclosure of which would, or could reasonably be expected to, have a substantial adverse effect on the staff management interests of the Commonwealth or of an agency, including the development and carrying out of the personnel management policy and the industrial relations policy of the Commonwealth or of an agency, or the conduct by or on behalf of the Commonwealth or an agency of industrial relations negotiations.*

159. Following amendments made in 1983, the former s.40(c) of the Commonwealth FOI Act was divided into the present s.40(1)(c) which focuses on "the management or assessment of personnel by the Commonwealth or by an agency", and the present s.40(1)(e) which focuses on "the conduct by or on behalf of the Commonwealth or an agency of industrial relations". One can reasonably infer that the new s.40(1)(e) was at least intended to include the development and carrying out of the industrial relations policy of the Commonwealth or an agency, and the conduct by or on behalf of the Commonwealth or an agency of industrial relations negotiations.

160. As I have said, I can find no commentary in the legislative history of the Commonwealth FOI Act on the intended purpose, or precise sphere of operation, of the exemption which focuses on the conduct of industrial relations. It is difficult to resist the suspicion that at least one of the major concerns which prompted its enactment was that unions, or other employee representatives, with whom the Commonwealth or its agencies would have to deal in the conduct of industrial relations, would have the opportunity to use freedom of information legislation to attempt to obtain documents (of perceived interest or advantage) from a Commonwealth agency involved in negotiations over industrial issues or involved in industrial disputes, while unions and employee representatives would be under no similar obligation to disclose their information.

161. The differentiation by the legislature of the conduct of industrial relations in s.40(d) of the Queensland FOI Act from the management of personnel in s.40(c) (which in the ordinary use of language might be thought to completely encompass the conduct of industrial relations), together with the other matters referred to above, leads me to a preference for the meaning of the term "industrial relations", in the context of s.40(d) of the FOI Act, which accords with the first meaning given by the Collins English Dictionary (Third Australian Edition): "those aspects of collective relations between management and workers' representatives which are normally covered by collective bargaining". From the same source, the appropriate meaning of "conduct", in the context of s.40(d) of the FOI Act, is "the way of managing [a business, affair, etc], handling".

162. Thus, I consider the focus of s.40(d) is on the conduct by an agency of those aspects of the relations between an agency and its employees which may appropriately be, or have become, the subject of dealings between an agency and the representatives of its employees, or an individual employee, under the system of industrial law which governs those relations. (However, when one has regard to the breadth of the matters thus encompassed, which can be gauged by reference to the meaning of the term "industrial matter" given in s.6 of the *Industrial Relations Act 1990* Qld, there may be little practical difference between the meaning of "industrial relations" which I prefer, and the meaning adopted by the Commonwealth AAT in *Re McCarthy*.)

163. The decision of the Commonwealth AAT in *Re Heaney and Public Service Board* (1984) 1 AAR 336 affords a good illustration of circumstances in which I consider an exemption provision such as s.40(1)(e) of the Commonwealth FOI Act, or s.40(d) of the Queensland FOI Act, was intended to be able to be invoked. In that case the documents in issue comprised communications between the Snowy Mountains Hydro-Electric Authority and the Commonwealth Public Service Board concerning the approach which should be adopted by the employer in an industrial dispute over salary levels. The applicant for access was the Branch Secretary of the union which had been involved in the dispute. The Tribunal found that exemption under s.40(1)(e) of the Commonwealth FOI Act was established in respect of documents which would disclose the extent to which either the Authority or the Board was or may have been prepared to go in meeting the union demands for increased salaries (at p.348):

> *Knowledge of precise disagreements on the management side may well be of use in any future salaries dispute and may facilitate identification of potential weak points in what may otherwise be quite properly presented as a united front.*

164. The respondent referred me (at p.39 of its first submission) to the following passage from the decision of the Commonwealth AAT in *Re Thies and Department of Aviation* (1986) 9 ALD 454 (at 463):

> [Counsel for the applicant] *pointed out that by its terms,* [s.40(1)(e) of the Commonwealth FOI Act] *was concerned not with adverse effects on industrial relations but with adverse effects on the conduct of industrial relations, so that the mere fact that industrial action resulted from the disclosure of a document did not necessarily mean that the disclosure was having an adverse effect on the conduct of industrial relations. We accept that that is correct ...*

165. The respondent's first submission went on to say (at p.39):

> *5.4.6 There is sufficient evidence of substantial adverse effect on the conduct of industrial relations. This does not require that a strike or industrial action occur. It is enough if it makes implementation of current processes difficult. Further, if it effects morale and productivity there is both a management and industrial relations problem. Industrial relations is about "relations" not just confrontation. If employer/employee "relations" are affected that is sufficient.*

166. However, it is not sufficient, as here asserted, if employer/employee relations are affected by disclosure of the matter in issue. The expected substantial adverse effect must be on the conduct by an agency (i.e. the employer) of industrial relations. What is really being claimed here is an adverse effect on the management by an agency of its personnel. I have dealt with that argument in considering s.40(c), and to the extent that the argument may appropriately be raised under s.40(d) as well, I would reject it for the same reasons given above at paragraphs 135-154.

167. The argument which I identified (at point (b) of paragraph 136 above) and dealt with as an issue

going to the management by the OSR of its personnel for the purposes of s.40(c), was put by the respondent (at pp.7-8 of its submission in reply) as an argument for the application of s.40(d), in these terms:

> *3.* [the OSR] *policy of having officers disclose their names to taxpayers has met with vigorous staff protests and union representations;*

> *4. The office has assured staff that it would seek to protect staff from reprisals or harassment by taxpayers;*
>
> *5. Disclosure of the names in question will have a substantial adverse effect on the conduct of industrial relations by the Office of State Revenue. Of significance in this regard is the tendency of staff not to distinguish between matters from management decision and those in which management has no say;*
>
> *6. The staff will perceive the release of the names in question as an act of breach of faith on the part of management.*

168. There is really no more than the fact that union representatives have made representations to OSR managers opposing the disclosure of officers' names to Mr Murphy, and about the general policy of the OSR on disclosure of officers' names, which connects this argument to s.40(d), as well as to s.40(c) where I think it more properly belongs. The applicant commented on the evidence on which this submission was based as follows (at p.41 of his submission):

> *The Executive Director of the OSR has sworn an affidavit containing material apposite to this exemption. Some of the propositions she puts are, it is submitted, nothing less than astounding. In particular, it is seriously suggested that the documents should be suppressed because some of her staff lack the ability to distinguish between the law and management policy.*
>
> *These are people who are paid to apply the provisions of statutes such as the Stamps Act, which is, it is submitted, one of the most tortuous pieces of legislation in the State. On their interpretation of the Act, decisions are made which deprive persons of their property. Yet Macdonnell is apparently content to employ them when she herself states under oath that they cannot even recognise a law when they see one.*

169. I am not satisfied that there is a reasonable basis for an expectation that disclosure of the matter in issue would have a substantial adverse effect on the conduct of industrial relations by the respondent, for the reasons advanced by the respondent in the extract from its submission quoted at paragraph 167 above. The respondent has gone to some lengths to find arguments in the exemption provisions of the FOI Act (including some of dubious substance) to attempt to prevent the disclosure of the matter in issue. If the matter in issue is to be disclosed to Mr Murphy under the FOI Act, it will be because I have determined (on the basis of my objective assessment of the evidence before me, including evidence from the applicant, as well as simply the information which was available to officers of the OSR and which gave rise to the concerns which prompted the opposition to disclosure to Mr Murphy of officers' names) that there is no exemption provision available, which, properly construed, entitles the respondent to refuse Mr Murphy access to the matter in issue. I do not think it is reasonable to expect that officers of the OSR, or some of them, will not recognise that if disclosure of the matter in issue is required, it is not because of a breach of faith on the part of management, but because the law requires it. Even if some officers of the OSR are not capable of that recognition, I am not satisfied that any resulting adverse effect (whether on the conduct by the respondent of industrial relations, or on the management by the respondent of its personnel) would be substantial.

170. The respondent has failed to satisfy me that disclosure of the matter in issue could reasonably be expected to have a substantial adverse effect on the conduct of industrial relations by the respondent, and I find that the matter in issue is not exempt matter under s.40(d) of the FOI Act.

171. In the written submission lodged by the SPSFQ, the following statement appears:

> *The State Public Services Federation, Queensland, makes it clear to the Information Commissioner that once his decision is made its members at Queensland Treasury will consider that decision and formulate a response. Such a response could very well be one of strike action as a protest at a decision to release the name of the officers appended to the documents which will be released to Mr John P Murphy. This is not meant to be a threat to the Information Commissioner but a statement of fact that the members will consider their position and a response could very well be one to undertake strike action as a protest. No decision has been made on that at present and will be one for the members to decide upon.*

172. From the context in which it appears, this passage does not appear to be put as a submission going to the application of s.40(d) or any other exemption provision. I merely observe that I am quite sure that s.40(d) of the FOI Act was not intended by Parliament to be an exemption able to be claimed whenever union representatives or employees, opposed to the disclosure of particular matter under the FOI Act, were prepared to threaten, or indeed to take, strike action, with a view to enabling suppression of the matter under s.40(d). Such an approach could enable exemption to be claimed for information, which, for example, related to improper or unlawful conduct by employees, or union officials, if such persons were determined to take any measure available to attempt to suppress it.

173. The union has a legitimate concern with issues such as the protection of the safety of its members in the workplace. Issues of that nature which relate to the disclosure of officers' names have apparently been raised with the OSR. But I am not satisfied that disclosure of the matter in issue could reasonably be expected to have a substantial adverse effect on the conduct by the respondent of industrial relations with respect to that issue, or other industrial relations issues.

Conclusion

174. I set aside the decision under review, and in substitution for it, I find that the matter in issue is not exempt matter under the FOI Act. Hence the applicant has a right to be given access under the FOI Act to the matter which has been withheld from him pursuant to the decision under review.

.....
F N ALBIETZ
INFORMATION COMMISSIONER