Robino & Ors and Townsville District Health Service

(S 119/96, 4 March 1998, Information Commissioner)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1.-5. These paragraphs deleted.

REASONS FOR DECISION

Background

4. By application dated 4 March 1996, the applicants sought access under the FOI Act to: *The investigation report on "the grievance - community medicine services" 11/12/1995*. I will describe the requested document (being the document in issue in this external review) as the "Grievance Report". As a result of concessions made during the course of the review by the applicants, and by the Townsville District Health Service (the TDHS), the issue which remains for my determination in this review is whether the applicants (who were the instigators of the grievance) have a right to obtain access to certain parts of the Grievance Report which are contended by [a 3rd party] (the subject of the grievance) to be exempt from disclosure under the FOI Act.

5. By letter dated 22 May 1996, Mr Ray Green, FOI Decision-Maker of the TDHS, wrote to the applicants confirming the outcome of a meeting with the applicants to the effect that the applicants had refined the scope of their application so as to seek only those parts of the Grievance Report that mention them directly or indirectly, plus the comments, findings and recommendations of the appointed grievance investigators.

6. Mr Green wrote to the applicants on 3 June 1996, communicating his decision to give them access under the FOI Act to parts of the Grievance Report, in accordance with the outcome of the 22 May 1996 meeting. (I note that Mr Green considered at that stage that several folios of the Grievance Report contained matter that fell outside the scope of the applicant's refined FOI access application: as to that issue, see paragraphs 64-66 below.) Mr Green's decision was also communicated to Roberts and Kane, solicitors for [the 3rd party], by a letter dated 25 June 1996.

7. By letter dated 1 July 1996, Roberts and Kane, on behalf of [the 3rd party], applied for internal review of Mr Green's decision, objecting to the disclosure of the Grievance Report (save for recommendations 1-4 on page 7).

8. Pursuant to s.52(2) of the FOI Act, the making of that application for internal review prevented the TDHS from giving the applicants access to the information which Mr Green had decided to release to them. There was a delay in giving an internal review decision, which prompted the applicants to apply to me (by letter dated 16 July 1996) for review under Part 5 of the FOI Act on the basis of a deemed refusal of access to the requested information.

The external review process

9. In letters dated 30 July 1996, the Deputy Information Commissioner wrote to the TDHS, and to the applicants, informing them that the TDHS's deemed refusal of access to the documents requested by the applicants was to be reviewed.

10. The TDHS responded by letter dated 8 August 1996, providing:

1. a copy of the Grievance Report for my examination;
2. a schedule of matter considered by the TDHS to be exempt matter, and
3. a schedule of matter considered by the TDHS to fall outside the terms of the applicants' refined FOI access application.

11. By letter dated 30 July 1996, the Deputy Information Commissioner wrote to Roberts and Kane, inviting [the 3rd party], as a person who might be affected by the review, to apply to be a participant in the review, in accordance with s.78 of the FOI Act. By letter dated 16 August 1996, Roberts and Kane confirmed that [the 3rd party] wished to participate in the review process, and I granted her status as participant in this review, in accordance with s.78 of the FOI Act. Subsequent discussions confirmed that [the 3rd party] was relying on the matters raised in the letters from her solicitors to the TDHS dated 21 May 1996 and 1 July 1996, in support of her contention that the matter in issue was exempt matter under the FOI Act. The grounds of exemption raised in those letters were s.44(1), s.46(1), s.40(c) and s.40(d) of the FOI Act.

12. By letter dated 13 December 1996, Assistant Information Commissioner Sammon wrote to the TDHS in the following terms:

> *From our telephone discussions of 31 October 1996 I understand the Northern Regional Health Authority followed The Public Sector Management Commission (the PSMC) document "Public Sector Management Standard for Grievance Procedures" issued in June 1991, in that it treated the applicants' complaint as a stage 3 grievance. That PSMC standard and associated documents (such as the booklet entitled "The Grievance Procedure - Guidelines for Investigation Officers") appear to contain nothing that would indicate that investigations of stage 3 grievances are ordinarily conducted on the basis that information as to their conduct and outcome is to be kept confidential from the complainant.*

The applicants contend that when they were first interviewed by Ms Lyle and Mr Puglisi, the appointed investigators, they were told that everything they said would be referred to [the 3rd party] *so that she could respond to the specific allegations. The applicants also contend that at this meeting they were told that they would be shown the statements that* [the 3rd party] *provided to the investigators as well.*

So that I can consider this issue more fully, would you please make enquiries of Ms Lyle and Mr Puglisi to establish the nature of the discussions and any undertakings given by them before or during the 13 December 1995 interviews with the applicants. Were such representations made to [the 3rd party] *when she was interviewed? I ask that you provide a response, in writing, from Ms Lyle and Mr Puglisi on these points.*

13. Mr Puglisi responded by letter dated 19 December 1996, relevant passages from which are reproduced below at paragraph 38.

14. In September 1997, I sought clarification from Mr Puglisi in respect of two issues, and he responded by letter dated 29 September 1997. In light of the concession made by the applicants in their letter dated 13 February 1998 (see paragraph 19 below), one of those issues no longer requires a formal decision in this review, although I note that Mr Puglisi confirmed that undertakings of confidence were given by the grievance investigators to third party information providers (i.e., persons other than the applicants and [the 3rd party]). Mr Puglisi also confirmed that the process used from the outset of the grievance procedure was the Public Sector Management Commission's Manual for Grievance Procedure Officers.

15. By letter dated 10 December 1997, I conveyed to the TDHS my preliminary views on the issues which then appeared to require formal determination in this review. In summary, the preliminary views conveyed were that -

(a) the names of TDHS employees referred to in the Grievance Report were not exempt matter under s.44(1) of the FOI Act;

(b) [the 3rd party's] record of interview did not qualify for exemption under either s.46(1)(a) or s.46(1)(b) of the FOI Act;

(c) on the material then before me, all references to the names of the third party information providers, plus the statements they provided to the grievance investigators, would probably qualify for exemption under s.40(c) of the FOI Act;

(d) the document in issue was not exempt under s.40(d) of the FOI Act; and

(e) segments of the Grievance Report said by the TDHS to be outside the scope of the applicants' refined access application, namely:

4. paragraphs 1.3.1 and 1.3.2;
5. the final sub paragraph of paragraph 1.4;
6. paragraphs 2.2.1 and 2.2.2; and
7. paragraph 3.2.1

were not outside the scope of the applicants' refined access application, and furthermore did not comprise exempt matter under the FOI Act.

16. I also expressed the view that recommendations 6, 7, and 8 of the Grievance Report fell within the terms of the refined access application, and asked the TDHS to state its position as to whether it claimed recommendations 6, 7 and 8 to be exempt matter under s.40(c) of the FOI Act. In the event that the TDHS did not accept any of my preliminary views, I invited the TDHS to lodge any additional submission and/or evidence on which it wished to rely to support its case in this review.

17. I forwarded to Roberts and Kane, on behalf of [the 3rd party], a copy of my letter dated 10 December 1997 to the TDHS. I asked Roberts and Kane to advise me whether their client accepted my preliminary views, and if not, I invited the lodgement of any additional submission and/or evidence on which [the 3rd party] might wish to rely to support her case in this review. I directed that any such additional submission and/or evidence be lodged no later than 23 January 1998.

18. By letter dated 22 January 1998, the TDHS informed me that it accepted my preliminary views, and that it had no objection to the disclosure to the applicants of all eight recommendations set out in the Grievance Report.

19. By letter dated 13 February 1998, the applicants wrote to me confirming that they did not wish to pursue access to the names of the third party information providers and their records of interview. Given that concession, it is no longer necessary for me to rule on the issues addressed in my preliminary views letter dated 10 December 1997 concerning the application of s.44(1), and s.40(c) of the FOI Act to the names of the third party information providers and their records of interview.

20. In a letter to me dated 23 January 1998, Roberts and Kane advised that while they did not propose to make any additional submissions regarding my preliminary views, they had been instructed by [the 3rd party] to place on record a number of matters of concern and complaint by [the 3rd party]. Insofar as those matters relate to particular issues which I am required to decide in this review, they are addressed below. However, I consider it appropriate to make the general observation that [the 3rd party] appears to have misunderstood my purpose in conveying to her my preliminary views on the issues for determination in this review, and inviting her to lodge evidence and submissions in response. The purpose of conveying my preliminary views to the participants in a review under Part 5 of the FOI Act is not

only to establish whether any of the participants are prepared to make any concessions on any of the issues for determination in a review, but also to make the participants aware of the issues that I consider may need to be addressed by evidence and/or written submissions lodged in support of their respective cases. An expression of my preliminary views is genuinely preliminary - it conveys my initial assessment of the matter in issue in light of whatever relevant material (e.g., submissions contained in applications for internal or external review; responses from persons consulted under s.51 of the FOI Act; reasons for decision given by agencies; *et cetera*) is then before me. Any preliminary views conveyed to participants are always carefully reconsidered in the light of any additional evidence and/or written submissions lodged by any of the participants in a review.

21. The following passage from the letter to me by Roberts & Kane, dated 23 January 1998, evidences the misunderstanding on the part of [the 3rd party]:

> *... there are two points* [the 3rd party] *respectfully desires to be brought to the attention of the Information Commissioner.*
>
> *First, having examined the excerpt of Mr Puglisi's letter which is contained in page 6 of* [my letter dated 10 December 1997 conveying preliminary views] *she is surprised that the Information Commissioner did not verify the accuracy of Mr Puglisi's memory.* [The 3rd party's] *notes of her interview contradict Mr Puglisi's assertions. It is on the basis of Mr Puglisi's assertions that the Information Commissioner makes his determination of procedural fairness. Thus, it is a matter of regret that the Information Commissioner neglected to verify the memory of Mr Puglisi with, at the very least, the person against whom the very serious allegations were originally made.*
>
> *Second, although* [the 3rd party] *feels that she has not been fairly served by the system of justice, she is not prepared to prolong the process by way of costly court action, her faith in the notion of procedural fairness has been seriously undermined.*

22. One of the major purposes of my letter dated 10 December 1997 to [the 3rd party's] solicitors was to accord [the 3rd party] procedural fairness, so far as my review under Part 5 of the FOI Act was concerned. That letter gave [the 3rd party] the opportunity, if she wished to challenge the correctness of facts relied upon in forming my preliminary views, to do so by lodging a sworn affidavit or statutory declaration stating her account of the correct factual position. That would have in turn been provided to the TDHS for response, and may have elicited formal evidence from Mr Puglisi. In the event of a conflict of sworn evidence on a material fact or facts crucial to the resolution of an issue requiring determination, I have the option of convening an oral hearing with cross-examination, to allow me to decide the issue of fact after hearing the witnesses tested on their evidence.

23. [The 3rd party's] response, however, was not at all helpful for the purposes of this review. She has elected to complain about the process I have adopted (I can only presume that she believes I should have contacted her directly to ask her if Mr Puglisi's statements accorded with her recollection, before I conveyed to the participants my preliminary views on the issues for determination in this review), without taking advantage of the opportunity extended to her to lodge evidence on oath stating any respects in which she believes Mr Puglisi's statements to be incorrect. In the letter dated 23 January 1998, she has simply made a general allegation that Mr Puglisi's memory is inaccurate, without even specifying the precise details in respect of which she claims Mr Puglisi is mistaken, or giving her own account of the correct details. (I note that a number of assertions are made in the last paragraph on page one, and the second paragraph on page two, of the letter dated 23 January 1998 from Roberts and Kane, but none of them actually contradicts the statements made by Mr Puglisi: see paragraphs 39-43 below.)

24. The above-quoted comments by [the 3rd party] also suggest that I have made a determination of procedural fairness, presumably in respect of the manner in which the grievance investigators conducted their process. I have not made any such determination. My comments on page 6 of my letter dated 10 December 1997 conveying preliminary views were directed to the issue I was obliged to consider (the application of s.46(1) of the FOI Act) which involved establishing whether any assurance was given (by the grievance investigators to the parties to the grievance investigation) about keeping information which the parties provided to the grievance investigators confidential from the other parties. I would not have thought it practicable to conduct a satisfactory investigation, that accorded with the requirements of procedural fairness, on the basis of such an assurance, and that is a matter which goes to the understanding which the parties to the grievance ought reasonably to have had in respect of confidential treatment of their statements to the grievance investigators. However, the question of whether procedural fairness was actually accorded in the conduct of the grievance investigation is not a question on which I have jurisdiction to rule.

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

25. In a letter to the TDHS dated 21 May 1996, Roberts and Kane submitted on behalf of [the 3rd party] that the Grievance Report was exempt under s.44(1) of the FOI Act because its disclosure would disclose information concerning the personal affairs of [the 3rd party], and such disclosure could not be said to be in the public interest.

Section 44(1) of the FOI Act provides:

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

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

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

8. family and marital relationships;
9. health or ill health;
10. relationships and emotional ties with other people; and
11. domestic responsibilities or financial obligations.

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

28. In the later case of *Re Pope and Queensland Health* (1994) 1 QAR 616, after reviewing relevant authorities (at pp.658-660), I expressed the following conclusion (at p.660, paragraph 116):

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

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

29. Also in *Re Pope*, I specifically endorsed the observations (concerning the application of s.33(1) (the personal affairs exemption) of the *Freedom of*

Information Act 1992 Vic) made by Eames J of the Supreme Court of Victoria in *University of Melbourne v Robinson* [1993] 2VR 117 at 187:

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

30. In *Re Griffith and Queensland Police Service* (Information Commissioner Qld, Decision No. 97013, 15 August 1997, unreported), I decided that conduct of a public sector employee which occurs in the course of performing his or her employment duties is properly to be characterised as part of the employee's employment affairs rather than his or her personal affairs, even in respect of conduct alleged or proven to involve misconduct or a breach of discipline.

31. I am satisfied that all of the matter in issue concerns the conduct of [the 3rd party] and others in performing their duties of employment, and none of it can be properly characterised as information concerning the personal affairs of [the 3rd party] or others, so as to satisfy the first element of the test for exemption under s.44(1) of the FOI Act. I find that none of the matter in issue qualifies for exemption under s.44(1) of the FOI Act.

Application of s.46(1)(a) and s.46(1)(b) of the FOI Act

32. In their letter to the TDHS dated 21 May 1996, Roberts and Kane submitted on behalf of [the 3rd party] that parts of the Grievance Report were exempt matter under s.46 of the FOI Act. In view of the concession by the applicants referred to in paragraph 19 above, I need only consider the application of s.46(1)(a) and s.46(1)(b) to the record of interview between the grievance investigators and [the 3rd party], and to any segments of the Grievance Report which refer to information from that record of interview.

33. Section 46 of the FOI Act provides:

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

(2) *Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless its disclosure would found an action for breach of confidence owed to a person or body other than -*

(a) a person in the capacity of -

(i) a Minister; or

(ii) a member of the staff of, or a consultant to, a Minister; or

(iii) an officer of an agency; or

(b) the State or an agency.

34. In *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, I considered in detail the elements which must be established in order for matter to qualify for exemption under s.46(1)(a) of the FOI Act. The test for exemption is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency faced with an application, under s.25 of the FOI Act, for access to the information in issue (see *Re "B"* at pp.296-297, paragraph 44). I am satisfied that, in the circumstances of this application, there is an identifiable plaintiff ([the 3rd party]) who would have standing to bring an action for breach of confidence.

35. There is no suggestion in the present case of a contractual obligation of confidence arising in the circumstances of the communication of the information in issue from [the 3rd party] to the grievance investigators appointed to act on behalf of the TDHS. Therefore, the test for exemption under s.46(1)(a) must be evaluated in terms of the requirements for an action in equity for breach of confidence, there being five criteria which must cumulatively be established:

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

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

(c) the information in issue must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the

confidential information in a way that is not authorised by the confider of it (see *Re "B"* at pp.311-322, paragraphs 76-102);

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

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

36. The elements of the test for exemption under s.46(1)(b) of the FOI Act are also considered in detail in *Re "B"* at pp.337-341 (paragraphs 144-162). In order to establish the *prima facie* ground of exemption under s.46(1)(b) of the FOI Act, three cumulative requirements must be satisfied:

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

(b) that was communicated in confidence;

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

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

37. In the circumstances of this review, I consider that I need only address the third criterion to found an action in equity for breach of confidence (as set out above), and the second requirement of the test for exemption under s.46(1)(b) (as set out above), since, in my preliminary view, neither can be established in this instance.

38. By letter dated 19 December 1996, Mr Michael Puglisi, one of the appointed grievance investigators, provided me with information concerning the basis on which the grievance investigation proceeded and the process adopted by the investigators. Mr Puglisi relevantly stated:

> *... The investigation commenced with myself and Ms Anne Billingsley ... . At this initial interview the process to be taken was outlined to the complainants. At the initial interview with the women lodging the complaint general undertakings were given that if it were necessary,* [the 3rd party] *would be given access to details for verification or dispute - and vice versa. Ms Billingsley a day or so after this interview withdrew from the panel after objections by* [the 3rd party] *and the NQU.*

Ms Lyle joined the investigation team and the format followed at the initial interview with the complainants was followed with [the 3rd party]. *From memory the same general undertaking was given in the introduction of the process* [by] *the investigators, that the statements made by her may be given to the complainant for verification or dispute. ...*

39. In addition to the passage reproduced at paragraph 21 above, the letter to me from Roberts & Kane dated 23 January 1998 included the following comments:

... We are instructed that our client disagrees with certain parts of the information extracted from Mr Puglisi's letter dated 19 December 1996 as set forth on page 6 of your preliminary findings. Our client instructs us that at no time was she given an opportunity to view the statements made by the nurses who had taken out a grievance against her, or of the other members of staff who were interviewed by the investigating officers, despite having formally requested such information at the outset of her appearance before the investigating officers. To this day, apart from the four nurses who took out the grievance against her, our client does not know who else was interviewed. Our client does know, however, that two members of staff who each made a formal request to be interviewed by the investigating officers in her support were refused interviews. Our client therefore disagrees with your conclusion (at page 6) that "it is apparent that the clear expectation was communicated to each of the parties to the grievance that they would be provided with statements made, or other material relied on, by the other parties to the grievance so that an opportunity to agree with, or controvert, the other party's account would be afforded".

Our client instructs us that she presented herself for interview at the Townsville General Hospital Social Work interview room No. 2 at 1.30 p.m. on 2 February 1996. Before answering any questions from the investigating officers, she asked them two questions:-

1. Have terms of reference been provided for this investigation, and if so may I see them? *Our client was informed that no terms of reference had been provided.*

2. Have you interviewed the nurses who have lodged the grievance against me, and if so may I have details of their specific allegations against me? *Our client was informed that Mr Puglisi and Ms Billingsley had interviewed the nurses who had taken out the grievance against her. We were instructed that she was further informed that she would not be given the details of the grievance against her nor any supporting evidence.*

We do, however concede, that as an employee of the Townsville District Health Service, [the 3rd party] *would have been under an obligation to provide information to the grievance investigators as pointed out at the top of page 7 of your preliminary findings.*

40. I am prepared to accept [the 3rd party's] statement that at no time was she given the opportunity to view the statements made by the nurses who had taken out a grievance against her. It seems clear that the grievance instigators (the applicants) have similarly never been given the opportunity to view [the 3rd party's] statement to the grievance investigators, or they would not be pursuing access to it under the FOI Act. This means that the part of my preliminary views letter dated 10 December 1997 which is quoted at the end of the first paragraph of the passage reproduced at paragraph 39 above, is inaccurate to the extent that it employs the words "... would be provided with statements made ...". In hindsight, my employment of those words constituted an unwarranted gloss on the words used by Mr Puglisi, as set out at paragraph 38 above. Mr Puglisi stated that he informed the grievance complainants that [the 3rd party] would be given details (presumably of the specific complaints against her) for verification or dispute - and vice versa. Mr Puglisi also stated that he informed [the 3rd party] that the statements made by her may be given to the complainant for verification or dispute. [the 3rd party] has not directly contradicted that statement by Mr Puglisi, which is relevant to the issue of whether [the 3rd party's] statements to the grievance investigators were communicated on the basis that they would be treated in confidence as against the grievance instigators/complainants.

41. It appears that [the 3rd party's] major concern is that she was not given information in writing, before she was interviewed by the grievance investigators, setting out the details of the grievance against her, and any supporting evidence. Whether that constituted conduct by the grievance investigators that was procedurally unfair to [the 3rd party] is not an issue on which I have jurisdiction to make any authoritative ruling. However, I note that the orthodox legal view is that the duty to accord procedural fairness ordinarily requires that a person be given an effective opportunity to know the substance of the case against the person, including in particular the critical issues or factors on which the case is likely to turn, so that the person is given an effective opportunity of dealing with the case against him/her. It may not be strictly necessary that a person be informed of the substance of the case against him/her by the provision in advance of written statements by the complainant. For instance, an investigator may consider that only some of many complaints against a person have sufficient substance to warrant an investigation, and may not wish to disclose written documents containing complaints that are not to be investigated. Or an investigator may prefer to frame the substance of a complaint in a different manner to that in which the complainant has put it. ([the 3rd party] also complains about not having been given the opportunity to view statements obtained by the grievance investigators from other witnesses. Those statements are no longer in issue in this review, but I note, as was indicated in my preliminary views letter dated 10 December 1997, that the grievance investigators

gave specific assurances to the third party information-providers, i.e., those who were not parties to the grievance, that their statements would be treated in confidence as against the parties to the grievance).

42. It is clear, however, from an examination of the Grievance Report and [the 3rd party's] statement to the grievance investigators, that the grievance investigators did directly put to [the 3rd party], for verification or dispute, details of the grievance complaint lodged by the applicants in this review.

43. In the ordinary course of such an investigation, the investigators would be liable to put some of the responses from the subject of the investigation to the complainants, in order to seek clarification of certain matters or test their account of relevant incidents. In my view, Mr Puglisi's statement to the effect that he told [the 3rd party] that information provided by [the 3rd party] to the grievance investigators may be conveyed to the complainants for verification or dispute is entirely credible, being in accordance with the practical exigencies attending such investigations. Moreover, I consider that [the 3rd party] must, or ought reasonably to, have understood that statements she made to the grievance investigators were liable to be put to the complainants, as a consequence ordinarily attending the conduct of such investigations, and that the complainants (and indeed herself) would eventually be entitled to some form of account of the outcome of the grievance investigation which would ordinarily include the key findings of the investigators, and reference to the evidence on which those findings were based.

44. On the material before me, I am not satisfied that [the 3rd party's] statements to the grievance investigators were communicated pursuant to any express or implicit mutual understanding that they would be treated in confidence *vis-à-vis* the grievance complainants (who are the applicants in this review), and I am not satisfied that they were communicated in such circumstances as to import an equitable obligation of confidence binding the TDHS not to disclose them to the applicants in this review. The record of [the 3rd party's] statements to the grievance investigators does not therefore qualify for exemption under s.46(1)(a) or s.46(1)(b) of the FOI Act.

45. Furthermore, in respect of s.46(1)(b), I note that, as an employee of the TDHS, [the 3rd party] would have been under an obligation to provide information to the grievance investigators, and I consider that there would be no prejudice to the future supply of "such information" to the TDHS, if the record of interview with [the 3rd party] were disclosed to the applicants (see *Re McCann and Queensland Police Service* (Information Commissioner Qld, Decision No. 97010, 10 July 1997, unreported) at paragraphs 71 and 72).

46. I find that [the 3rd party's] record of interview, and any segments of the Grievance Report which refer to information from that record of interview, do not qualify for exemption from disclosure to the applicants under either s.46(1)(a) or s.46(1)(b) of the FOI Act.

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

47. Although it is not entirely clear from their latest letter whether they still do so, [the 3rd party's] solicitors specifically contended, in their letter to the TDHS dated 1 July 1996, that paragraphs 4-4.3 of the Grievance Report are exempt under s.40(c) of the FOI Act. Section 40(c) of the FOI Act provides:

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

48. The focus of this exemption provision is on the management or assessment by an agency of the agency's personnel. The exemption will be made out if it is established that disclosure of the matter in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by the respondent of its personnel, unless disclosure of the matter in issue would, on balance, be in the public interest.

49. I analysed the meaning of the phrase "*could reasonably be expected to*", by reference to relevant Federal Court decisions interpreting the identical phrase as used in exemption provisions of the *Freedom of Information Act 1982* Cth, in 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).

50. If I am satisfied that any adverse effects could reasonably be expected to follow from disclosure of the matter in issue, I must then determine whether those adverse effects, either individually or in aggregate, constitute a substantial adverse effect on the management or assessment by the TDHS of its personnel. For reasons explained in *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 (at pp.724-725, paragraphs 148-150), I consider that, where the Queensland Parliament has employed the phrase "substantial adverse effect" in s.40(c) and s.40(d) 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 p.129, paragraph 21) that: "*The onus of establishing a substantial adverse effect is a heavy one ...* ".

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

52. The submission provided to the TDHS by [the 3rd party's] legal advisers, dated 1 July 1996, stated:

> *It is submitted that paragraphs 4 to 4.3 of the grievance report (pages 24 and 23) relating to the performance appraisal process clearly fall within the ambit of subsection 40(c) of the Freedom of Information Act 1992. Such material relates only to the management of and assessment of personnel and its disclosure could reasonably be expected to have a substantial adverse effect on the conduct of future performance appraisals. It is submitted that there is no public interest in releasing the material related to the performance appraisal process. On balance, it seems that the only interests that might be served would be to advance the interests of the applicants in continuing their dispute with our client.*

53. The fact that the TDHS has not sought to rely on s.40(c) of the FOI Act in respect of any part of the document in issue suggests that the TDHS did not consider that disclosure of the document in issue, including paragraphs 4-4.3, could reasonably be expected to have a substantial adverse effect on the management or assessment by the TDHS of its personnel.

54. In my opinion, the information contained in paragraphs 4-4.3 is routine in nature and only mildly contentious. Much of it would already be known to the applicants. The aspect of the grievance dealt with in paragraphs 4-4.3 was upheld, and I cannot see any proper basis for withholding those findings by the grievance investigators from the complainants. I am not satisfied that disclosure to the applicants of the information contained in paragraphs 4-4.3 could reasonably be expected to have a substantial adverse effect on the management or assessment by the TDHS of its

personnel. I find that the matter contained in paragraphs 4-4.3 is not exempt matter under s.40(c) of the FOI Act.

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

55. In their letter to me dated 23 January 1998, [the 3rd party's] solicitors took issue with my preliminary views on the application of s.40(d) of the FOI Act, although they did not make clear whether they still contend, as they did in their letter to the TDHS dated 1 July 1996, that the Grievance Report is exempt in its entirety under s.40(d) of the FOI Act, save for the Report's recommendations 1-4.

56. Section 40(d) of the FOI Act provides:

> ***40.*** *Matter is exempt matter if its disclosure could reasonably be expected to -*
>
> *...*
>
> *(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.*

57. The correct approach to the interpretation and application of s.40(d) of the FOI Act is explained in *Re Murphy and Queensland Treasury & Ors* (1995) 2 QAR 744 at pp.794-798. The focus of this exemption is on the conduct of industrial relations by the relevant 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 the TDHS, unless disclosure would, on balance, be in the public interest.

58. In my letter dated 10 December 1997 conveying preliminary views, I was critical of the basis on which [the 3rd party]' solicitors had contended that all but a small segment of the Grievance Report was exempt matter under s.40(d) of the FOI Act. In their letter dated 23 January 1998, [the 3rd party's] solicitors responded as follows:

> *In relation to your preliminary view that the relevant document is not exempt under s.40(d) of the FOI Act, we concede that our client is not able to present evidence as to the likelihood of the notification of an industrial dispute in relation to the release of the relevant material. This is largely because our client no longer works with the persons who instigated the relevant grievance. We advise, however, that the contention contained in our letter to the Townsville District Health Service dated 1 July 1996 that our client's Union could notify an industrial dispute with the Australian Industrial Relations Commission in relation to the release of such*

investigation report was not merely a hypothetical outcome founded on [the 3rd party's] *perception of the investigation process. Indeed, a copy of our letter was discussed with an industrial officer in the employ of our client's Union, prior to its dispatch. It is submitted that the Australian Industrial Relations Commission, at that time, would have acted upon a notification of dispute by our client's Union in the usual manner, i.e., by convening a compulsory conference between the employer and the Union. The contemplated dispute notification was grounded in Clause 68 of the Nurses' (Queensland Public Health Sector) Award 1992, which is an award of the Australian Industrial Relations Commission. That clause states that the Chief Executive shall ensure that grievances are investigated in a thorough, fair and impartial manner. If it were found that an investigation was not conducted in a thorough, fair and impartial manner, then obviously the resulting report would be flawed, and its publication would be a matter of concern to our client's Union as a party to the award.*

We therefore submit that at the time our letter was sent to the Townsville District Health Service, section 40(d) of the Freedom of Information Act 1992 was raised genuinely, and not as "an attempt by an employee to influence the exercise of a statutory decision - making power which Parliament has conferred for the benefit of citizens".

... it is submitted that the Australian Industrial Relations Commission would not refuse to accept an industrial dispute on the grounds that the dispute related to disclosure of material pursuant to the Freedom of Information Act.

59. This passage suggests to me that [the 3rd party's] legal advisers are still misreading s.40(d) of the FOI Act as though it referred to a substantial adverse effect on industrial relations between an agency and an employee. In fact, s.40(d) refers to a substantial adverse effect on the conduct by an agency of industrial relations: see in this regard *Re Murphy* at pp.795-796, paragraphs 162-166. Even if the disclosure of a particular document under the FOI Act could reasonably be expected to lead to the notification of an industrial dispute with the agency which disclosed the document, that does not mean that disclosure would have a substantial adverse effect on the conduct by the agency of its industrial relations, either in that specific case or generally.

60. On the material set out in the passage quoted at paragraph 58 above, the only ground that [the 3rd party] could in theory have for notifying an industrial dispute would be a failure by the Chief Executive of the TDHS to ensure that the grievance was investigated in a thorough, fair and impartial manner. That is a materially different issue to the disclosure of the Grievance Report, pursuant to the legal right of access to documents held by an agency, such as the TDHS, as conferred by s.21 of the FOI Act. Even assuming that the Grievance Report were flawed, questions

of access to it, under the FOI Act, are governed by the provisions of the FOI Act itself. I would be most surprised if the Australian Industrial Relations Commission would entertain, as valid, an industrial dispute over a decision by an agency to disclose a document pursuant to a legal obligation to do so that is imposed on the agency by the FOI Act.

61. When a person lodges an application for access to documents of an agency, which application complies with the requirements of the FOI Act, the person has a legally enforceable right to be given access under the FOI Act to the requested documents (see s.21 of the FOI Act) other than any of the requested documents to which the agency is entitled to refuse (or defer) access in accordance with exceptions to be found in the FOI Act itself. The most significant exception is s.28(1) of the FOI Act which confers on an agency a discretion to refuse access to exempt matter or exempt documents. An agency has no discretion to refuse access to matter which is not exempt matter, unless it is caught by some other exception in the FOI Act itself (e.g. s.11 or a regulation made under s.11(1)(q), s.22, s.23, s.28(2), s.31). If no provision of the FOI Act permits an agency or Minister to refuse or defer access to a requested document (or part thereof), then the applicant has a legally enforceable right to be given access under the FOI Act to the requested document (or part thereof). (See, generally, *Re Woodyatt and Minister for Corrective Services* (1994) 2 QAR 383 at pp.401-404, paragraphs 45-51.)

62. The application of the FOI Act to any particular document in the possession of an agency, turns on the application of relevant provisions in the FOI Act according to the material facts and circumstances which apply at the time a decision on access is required to be given. An agency must act in good faith in attempting to arrive at the correct decision required by law.
(I note in this regard that an agency's decisions are subject to independent review on the merits by the Information Commissioner.) All that a person consulted under s.51 of the FOI is entitled to do is to seek to persuade the authorised decision-maker within the relevant agency to a particular view as to what is the correct decision required by law. If those attempts are unsuccessful, the person consulted has a right to seek review by the Information Commissioner.

63. The Grievance Report was the product of a dispute between employees, and not between employee and employer *per se*. An employer-provided grievance procedure was invoked to deal with that dispute, but that process has been finalised. The applicants are now seeking to use a statute of general application to documents held by government agencies (the FOI Act) to obtain access to information of interest to them. I am unable to see how disclosure of the document in issue could reasonably be expected to have a substantial adverse effect on the conduct of industrial relations by the TDHS. I find that the Grievance Report contains no matter which qualifies for exemption under s.40(d) of the FOI Act.

Deletion of matter claimed to be outside the scope of the applicants' refined access application

64. The matter initially claimed by the TDHS to be outside the scope of the applicants' refined access application includes:

12. paragraphs 1.3.1 and 1.3.2;
13. the final sub-paragraph of paragraph 1.4;
14. paragraphs 2.2.1 and 2.2.2; and
15. paragraph 3.2.1.

In my view, those segments do not fall outside the scope of the applicants' refined FOI access application.

65. The applicants refined their access application to seek only those parts of the Grievance Report -

16. that mention the applicants directly or indirectly; and
17. the comments, findings and recommendations of the investigators.

I consider that the above-noted paragraphs of the Grievance Report relate directly to the matters raised by the applicants which were the subject of the grievance, and include comments and explanations made by the grievance investigators, and, accordingly, I find that the matter comprised in the abovenoted paragraphs is within the scope of the applicants' refined access application. Consistently with my earlier findings, I consider that the matter comprised in the abovenoted paragraphs is not exempt from disclosure under the FOI Act.

66. The TDHS took the view in its original decision that recommendations 6, 7 and 8 of the Grievance Report fell outside the scope of the refined FOI access application. However, the applicants sought access to the "recommendations of the investigators", without differentiating whether the recommendations mentioned the applicants or not. I find that recommendations 6, 7 and 8 fall within the terms of the refined FOI access application. I note that the TDHS is now prepared to disclose recommendations 6, 7 and 8. I also note the comment in the final paragraph of the letter from [the 3rd party's] solicitors dated 23 January 1998 that [the 3rd party] and the grievance complainants are no longer in a position of having to work together, and I find that disclosure of recommendations 6, 7 and 8 could not reasonably be expected to have a substantial adverse effect on the management or assessment by the TDHS of its personnel, and hence that those recommendations are not exempt matter under s.40(c) of the FOI Act.

DECISION

67. I vary the decision under review by finding that -

(a) the segments of the Grievance Report identified in paragraph 64 of my reasons for decision, plus recommendations 6, 7 and 8 set out in the Grievance Report, fall within the terms of the applicants' refined FOI access application; and

(b) the matter remaining in issue in this review, after the concession by the applicants referred to in paragraph 19 above, is not exempt from disclosure to the applicants under the FOI Act.