

## "D" and Department of Tourism, Small Business and Industry

(S 11/97; 23 June 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.)*

### **REASONS FOR DECISION**

#### **Background**

5. The applicant in this external review was the author of a letter of complaint dated 6 August 1996 to the Liquor Licensing Division (the LLD) of the respondent. I will refer to the author as "the complainant". The complainant is pursuing this 'reverse FOI' application because the complainant objects to the respondent's decision to disclose to the access applicant, Mr R Modin, the bulk of the information contained in the complaint letter.

6. By letter dated 28 August 1996, Mr Modin, the Nominee of the Rainbow Beach Sports, Recreation and Memorial Club (the Club), applied to the respondent for access to:

*any information you can supply me regarding any liquor licensing complaints made against this Club in particular those received recently to Dominic TENNISON from your Sunshine Coast Regional Office.*

...

*Our committee is in the process of taking legal action against any person found defaming any members of this committee.*

7. In accordance with its obligations under s.51 of the FOI Act, the respondent consulted with a number of persons who had made complaints against the Club, including the complainant. By letter dated 14 October 1996, Power & Cartwright, Solicitors, on behalf of the complainant and other persons, objected to the disclosure to Mr Modin of their clients' complaints to the LLD. Power & Cartwright submitted that the documents were exempt under s.42(1)(b), s.42(1)(c), s.42(1)(e), s.44(1), s.45(1)(c), and s.46(1) of the FOI Act. The respondent also sought the views of the Queensland Police Service (the QPS) as to whether the documents, some of which referred to physical assaults at the Club, might be exempt under s.42(1)(a), on the basis that their disclosure could prejudice any police investigations into those matters. The QPS advised that it had no objection to the disclosure of the documents to the access applicant.

8. By letter dated 18 November 1996, Mr M Jones of the respondent informed the complainant of his decision that small parts of the complaint letter dated 6 August 1996

were exempt under s.44(1), but that the balance of the letter was not exempt matter under the FOI Act. The complainant then sought internal review of Mr Jones' decision to give access to parts of the letter (the "matter in issue"). That decision was upheld on internal review by Mr S Chapman in a decision dated 6 January 1997.

9. By letter dated 22 January 1997, the complainant applied to me for review, under Part 5 of the FOI Act, of Mr Chapman's decision.

### **External review process**

10. I obtained from the respondent copies of the complaint letter dated 6 August 1996, and the respondent's internal records of its consultations in accordance with s.51 of the FOI Act. Mr Modin has not sought to challenge the respondent's decision that parts of the complaint letter are exempt matter, and hence the status of those parts of the complaint letter is not in issue in this external review. On the question for determination in this review, i.e., whether the balance of the complaint letter is exempt matter under the FOI Act, Mr Modin applied for, and was granted, status as a participant in this review, in accordance with s.78 of the FOI Act.
11. Members of my staff interviewed Mr Jones of the respondent and Mr John Roscarel, an investigator employed by the LLD. At that conference, Mr Roscarel explained the process by which investigations are conducted by the LLD, and the particulars of his investigation of a series of complaints made about the Club, including those to which the letter in issue relates. Mr Roscarel subsequently provided this office with a statutory declaration dated 3 March 1998, and a draft Report in respect of the investigation of the various complaints against the Club.
12. The Information Commissioner then wrote to the complainant advising of his preliminary view that the matter remaining in issue is not exempt matter under the FOI Act. The complainant was invited to lodge a written submission and/or evidence, if the complainant wished to contend that the matter in issue was exempt under the FOI Act.
13. The complainant responded by letter dated 22 April 1998, rejecting the Information Commissioner's preliminary view and making brief submissions as to why the letter should not be disclosed. The complainant also provided a copy of a letter dated 30 January 1998 from Power & Cartwright, Solicitors, to the Licensing Commission, regarding complaints to the LLD.
14. I will deal with each of the exemption provisions which have been referred to by Power & Cartwright or the complainant. I should note that, because the identity of the complainant is in issue, I am constrained from including in my reasons for decision, information which would enable the complainant's identity to be ascertained. This necessarily means that discussion of certain aspects of my reasons for decision must be limited.

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

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

*46.(1) Matter is exempt if—*

(a) *its disclosure would found an action for breach of confidence; or*

(b) *it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*

16. I discussed the requirements for exemption under s.46(1)(a) and s.46(1)(b) in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279. As to s.46(1)(a), there is no question of any contractual obligation of confidence arising in the circumstances of this case. To establish an equitable duty of confidence owed by the respondent to the complainant, which would be breached by disclosure of the matter in issue (thus founding an action for breach of confidence), each of the following five criteria must be satisfied:

- (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).

17. For s.46(1)(b) of the FOI Act to be made out, each of the following criteria must be satisfied:

- (a) the information in issue is information of a confidential nature;
  - (b) the information was communicated in confidence;
  - (c) disclosure of the information could reasonably be expected to prejudice the future supply of such information to the LLD; and
  - (d) disclosure of the information would not, on balance, be in the public interest.
18. In his statutory declaration dated 3 March 1998, Mr Roscarel explained the circumstances of the investigation he conducted for the LLD:
- 2. *I became involved in the investigation of complaints against the Club when letters were received by the Liquor Licensing Branch from [the complainant] and other persons concerning a number of perceived problems at the Club which the complainants requested this Branch to investigate.*
  - 3. *On 24 September 1996, in the company of Ms Patrice Costello, I had a meeting with some of the complainants concerning their complaints. [The complainant] was among those present. I wrote down a list of their complaints, a number of which were not liquor licensing complaints. I then explained to the complainants which complaints were within my jurisdiction to investigate and which were not.*
  - 4. *I informed the complainants that because of the very specific allegations raised, in the interests of fairness, I would need to put their names and the specific facts to the Club management if I were to investigate the various complaints. None of the complainants, at the meeting raised any objection to my disclosing the allegations they had made or their names to the Club for the purposes of my investigation.*
  - 5. *Following that meeting, I attended the Club and met with Club committee members, including Rick Modin. The committee provided me with its version of the incident involving [the complainant] about which the latter had complained. I do not recall specifically to what extent I disclosed the contents of [the complainant's] letter of complaint in my contact with the Club committee but, in order to be fair, I would have had to have given an outline of [the complainant's] allegations about the incident to see if the committee agreed with [the complainant's] version.*
  - 6. *It is required by the Code of Conduct which applies to investigators under the Liquor Act 1992 that investigators, such as myself, ensure fairness in our official dealings with the public. None of the letters which are sent to complainants from the Liquor Licensing Division indicate that their identities and their complaint will be kept confidential.*

7. *I do not believe that there was anything in my dealings with [the complainant], or other complainants, from which they could have understood that what they told me would be kept confidential from Rick Modin.*

19. The second and third requirements for exemption under s.46(1)(a) involve similar considerations to the first two requirements for exemption under s.46(1)(b).

Necessary quality of confidence/information of a confidential nature

20. In *Re "B"* at pp.337-338 (paragraph 148), I said:

148 *In my opinion, [the first criterion for exemption under s.46(1)(b)] calls for a consideration of the same matters that would be taken into account by a court in determining whether, for the purpose of satisfying the second element of the equitable action for breach of confidence, the information in issue has the requisite degree of relative secrecy or inaccessibility. The matters referred to in paragraphs 71 to 72 above will also therefore be relevant to the question of whether this first criterion for the application of s.46(1)(b) is satisfied. It follows that, although it is not a specific statutory requirement, it will for practical purposes be necessary to specifically identify the information claimed to be of a confidential nature, in order to establish that it is secret, rather than generally available, information. The question of whether the information in issue is of a confidential nature is to be judged as at the time the application of s.46(1)(b) is considered. Thus if information was confidential when first communicated to a government agency, but has since lost the requisite degree of secrecy or inaccessibility, it will not satisfy the test for exemption under s.46(1)(b).*

(See also *Re McMahon and Department of Consumer Affairs* (1994) 1 QAR 377, at p.383, paragraph 21.)

21. In his initial decision, Mr Jones found that because most of the information remaining in issue had been conveyed to the Club management and was common knowledge within the district, it did not have the requisite degree of secrecy or inaccessibility to make it information "of a confidential nature." I agree with that conclusion.

22. It is clear from Mr Roscarel's declaration, and from his draft Report regarding the investigation, that members of the Club committee, including Mr Modin, have been advised by Mr Roscarel that the complainant has made a complaint, and have been advised of the nature of the complaint. The identity of the complainant cannot be said to retain any element of confidentiality as against Mr Modin.

23. The material before me (including one of the annexures to the complaint letter in issue) shows that the detail of the complainant's main complaint, along with other complaints, has been revealed to members of the Club committee, both by Mr Roscarel (in order to allow them to respond, for the purposes of his investigation) and by the complainant.

While the entire text of the complaint letter to the respondent dated 6 August 1996 may not have been made available to Mr Modin, there is no information of substance in that letter of which Mr Modin is not already aware. I find that the matter in issue does not have the necessary quality of confidence to satisfy the second requirement for exemption under s.46(1)(a), or the first requirement for exemption under s.46(1)(b), as set out above.

Equitable obligation of confidence/Communicated in confidence

24. There is no evidence that any express assurances of confidential treatment were given to the complainant, either prior to the forwarding of the letter containing the matter in issue, or at the meeting with Mr Roscarel. However, in *Re "B"* at p.318 (paragraph 90), I said (in respect of the third requirement for exemption under s.46(1)(a) of the FOI Act):

90 *It is not necessary therefore that there be any express consensus between confider and confidant as to preserving the confidentiality of the information imparted. In fact, though one looks to determine whether there must or ought to have been a common implicit understanding, actual consensus is not necessary: a confidant who honestly believes that no confidence was intended may still be fixed with an enforceable obligation of confidence if that is what equity requires following an objective evaluation of all the circumstances relevant to the receipt by the confidant of the confidential information.*

25. In its letter dated 14 October 1996, Power & Cartwright stated:

*When our clients initially made contact with [the respondent] they were advised that, for the matter to be investigated, they would need all complaints in writing. For reasons set out below, our clients were hesitant to do so for fear of their identity being disclosed at a later date. However, they did feel that the matters being complained of were of such a serious nature that they co-operated with the respondent in this regard. They believed that whilst those concerned would discover the nature of the complaints, they did not at any time believe that the actual documents of complaint would be revealed.*

26. In relation to confidentiality of identity, the complainant has submitted:

*...nor did we say [at the meeting, that Mr Roscarel] could give our names as he was going to ask about the incidents then make a decision on investigating them. Instead he meets with the committee gave our names outlined the complaints and naturally they told him they were trying to do the right thing and I was at fault.*

...

*After reading your letter I thought we were a confidential source of information and that disclosure of identity was confidential and that disclosure of the letter could prejudice the future supply of information.*

27. In *Re McEniery and the Medical Board of Queensland* (1994) 1 QAR 349, at pp.359-364 (paragraphs 24-34) and at p.371 (paragraph 50), I considered the factors relevant to determining whether information has been supplied to an agency on the implicit mutual understanding that the identity of the supplier of the information would remain confidential. In particular, I said, at p.361 (paragraph 26) that a relevant issue is whether the supplier and the recipient of the information could reasonably have expected that the supplier's identity would remain confidential given the procedures that must be undertaken if appropriate action is to be taken by the recipient, in respect of the information, for the purposes of the enforcement or administration of the law. Further (at pp.361-362 (paragraph 28)), I said that the legal requirement that government agencies observe the rules of procedural fairness, or the duty to act fairly, will affect the question of whether a supplier of information to a government agency, and the agency itself, could reasonably expect the confidentiality of the supplier's identity to be preserved while taking appropriate action in respect of the information conveyed.
28. The situation in the present case is similar in many ways to that which I dealt with in *Re McMahan*. In *Re McMahan*, a complaint was made by the applicant to a regulatory authority about a specific incident that had transpired between the applicant and the subject of the complaint, and it was impossible for the applicant's identity to be treated in confidence if the complaint were to be investigated. At p.364 (paragraph 23), I said that neither the applicant nor the respondent agency in that case could reasonably have expected that the applicant's identity, and the substance of his complaint, could remain confidential from the subject of the complaint, if appropriate action was to be taken in respect of that complaint.
29. Where a person is the subject of an investigation by a government agency, particularly a regulatory body such as the LLD, the duty of fairness will at least require that a person, against whom specific adverse allegations are made, be given an effective opportunity to know the substance of the case against the person (so that he/she can answer it). Sometimes it is possible for a person to be given an effective opportunity to know the substance of adverse allegations, without revealing the identity of the source of information. *Re McEniery* was a case of that kind, and other examples are given in *Re McEniery* at p.361, paragraph 27. However, as I said in *Re McEniery* at pp.363-364 (paragraph 32):

*Where the substance of the case against a person is dependent on the direct observation and testimony of a source of information, or on the disclosure of the identity of a source of information as the person against whom a wrong is alleged to have been committed, then the source and the government agency could not reasonably expect that the source's identity could remain confidential, if appropriate action is to be taken on the information conveyed by the source ...*

30. It is clear from the letter in issue (in particular the third paragraph and the concluding paragraphs) that the complainant wished the LLD to take action in respect of the complaints raised in the letter. I do not consider that the complainant could reasonably have expected that the complaints could be acted on by the LLD without the substance of the complaints being disclosed to Mr Modin. The nature of those complaints is such that their disclosure would have made obvious the identity of the complainant. In fact the third paragraph of the letter includes what seems to be a call for public vindication of the complainant in relation to the incidents complained of.
31. The complainant must have been aware that procedural fairness would require the complaints to be put to the Club management before any action was taken. Solicitors for the complainant contend that, while it was expected that the nature of the complaints would be made known, the complainant did not believe that the actual documents of complaint would be disclosed. However, I consider that in order to properly investigate the complaints, the LLD would have had to explain the detail of the complaints to the Club.
32. Mr Roscarel has stated (at paragraphs 3-4 of his statutory declaration) that he made it clear that if the complaints were to be pursued, the identities of the complainants and the detail of their complaints would be made known to the Club. Even if the complainant had been under some misapprehension as to confidentiality up to that time, there could have been no doubt thereafter, that there was no understanding, on the part of the respondent, that the complainant's identity, and the detail of the complaints, were to be treated in confidence. The complainant still had the opportunity at that stage, before Mr Roscarel commenced his investigation, to withdraw the complaints, but did not do so.
33. The material before me does not support a finding that there existed any express or implicit mutual understanding that the complainant's identity, or the contents of the complaint letter dated 6 August 1996, would be treated in confidence by the respondent agency. Nor are the circumstances of their communication such as to warrant a finding that there is an equitable obligation of confidence binding the respondent not to disclose to Mr Modin the complainant's identity, or the contents of the complaint letter dated 6 August 1996.

#### Findings on s.46(1)

34. I therefore find that the matter in issue does not qualify for exemption under s.46(1)(a) or s.46(1)(b) of the FOI Act.

#### **Application of s.42(1)(b) of the FOI Act**

35. Section 42(1)(b) of the FOI Act provides:

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



...

*(b) enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained; ...*

36. In *Re McEniery* at pp.356-357 (paragraph 16), I said that matter will be eligible for exemption under s.42(1)(b) if the following three requirements are satisfied:

- (a) there exists a confidential source of information;
- (b) the information which the confidential source has supplied (or is intending to supply) is in relation to the enforcement or administration of the law; and
- (c) disclosure of the matter in issue could reasonably be expected to -
  - (i) enable the existence of a confidential source of information to be ascertained; or
  - (ii) enable the identity of a confidential source of information to be ascertained.

37. At pp.358-359 (paragraphs 20-35) of *Re McEniery*, I considered the concept of a "confidential source of information" for the purposes of s.42(1)(b) of the FOI Act, and found that it referred to a person who supplies information on the express or implied understanding that the person's identity will remain confidential (citing Keely J in *Department of Health v Jephcott* (1985) 62 ALR 421 at p.426).

38. For the reasons stated at paragraphs 27-33 above, I find that the complainant is not a confidential source of information, for the purposes of s.42(1)(b) of the FOI Act. I do not consider that there was ever an understanding, on the part of the respondent (nor could there reasonably have been, in the relevant circumstances), that the complainant's identity would be kept confidential. The identity of the complainant has now been made known to Mr Modin. The matter in issue does not qualify for exemption under s.42(1)(b) of the FOI Act.

#### **Application for s.42(1)(a) of the FOI Act**

39. Section 42(1)(a) of the FOI Act provides:

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

- (a) prejudice the investigation of a contravention or possible contravention of the law (including revenue law) in a particular case; or*

40. In *Re "B"* at pp.339-341, (paragraphs 154-160), 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.

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.*

41. 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).

42. In Power & Cartwright's letter dated 14 October 1996, it was stated:

*...Our clients believe that the investigation into the activities of the club may be prejudiced by the disclosure of the documents at this point. They feel that if the details of the complaint are revealed, then the relevant parties shall have sufficient notice to be able to "cover their tracks".*

43. In his initial decision, Mr Jones said:

*I have discussed this issue with licensing investigators and am satisfied that given the investigations are close to finalisation and the fact the club has been made aware of the allegations, this exemption cannot be relied upon in this particular case.*

44. Mr Roscarel's statutory declaration states that he and another Investigator met with a number of the complainants to discuss their complaints, and to determine what their main concerns were. Mr Roscarel then attended at the Club and met with members of the Club Committee. One of the matters raised with the Club was the circumstances surrounding the main incident raised by the complainant. The Club's version of those events was obtained.

45. Having perused those documents, I wrote to the complainant on 30 March 1998, conveying my preliminary view that it appeared that the investigations into the complaints at the Club had been concluded and that any concerns about prejudice to the LLD's investigations were no longer relevant. In response, the complainant stated:

*In another paragraph on page two you state investigations by [the LLD] have concluded. This isn't true as we have met with Mr Ross Bearkley from [the LLD] in February and he is investigating the matter further.*

*... He was going to take this and other complaints up with the Committee upon return from holidays.*

46. Subsequently, a member of my staff contacted Mr Barkley, the manager of the LLD. Mr Barkley said that he had regarded the investigations of the Club as having been finalised after Mr Roscarel's investigations. However, one of the complainants had written to the responsible Minister who then asked for the matters to be further investigated. The Club was, according to Mr Barkley, "warned and briefed" as to the correct procedure in respect of particular matters and the investigations were finalised, apart from a minor procedural matter that does not require actual investigation.
47. From my examination of Mr Roscarel's statutory declaration, his draft Report, and the record of conversation with Mr Barkley, it is clear that the Club management was made aware of the various complaints made against it. Even if an investigation was still under way, I do not consider that disclosure of the matter in issue could reasonably be expected to prejudice such an investigation. I find that the matter in issue does not qualify for exemption under s.42(1)(a) of the FOI Act.

#### **Application of s.42(1)(c) of the FOI Act**

48. Section 42(1)(c) of the FOI Act provides:

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

*...*

*(c) endanger a person's life or physical safety; ...*

49. In *Re Murphy and Queensland Treasury & Ors* (1995) 2 QAR 744 at p.760 and p.761 (paragraphs 45 and 47), I said that the question of whether disclosure of information could reasonably be expected to endanger a person's life or physical safety 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, 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.
50. In *Re Murphy*, at pp.767-777 (paragraphs 86-91), I expressed the view that evidence of intemperate verbal abuse does not necessarily mean that the person guilty of such conduct would commit acts that would endanger the life or physical safety of another person. I also observed that harassment does not fall within the terms of s.42(1)(c), unless it is harassment which endangers a person's life or physical safety.
51. In the internal review application, the complainant stated that if the information the complainant supplied to the LLD was disclosed it was "*highly likely that ... I will be subject to harassment and possible physical bodily harm*". The complainant stated that

the complainant had already been assaulted inside the Club and that "*the management took no action to either prevent this assault nor did they take any disciplinary action against the offender*". The complainant claimed to have been "*harassed and bashed for asking questions internally*", and that it was "*worrying to me what could happen if written information were released*".

However, in their initial and internal review decisions, the respondent's authorised decision-makers did not consider that the circumstances of this case warranted a finding that endangerment to life or physical safety could reasonably be expected to follow from disclosure of the matter in issue.

52. In its letter dated 14 October 1996, Power & Cartwright asserted that the complainants all feared for their physical safety if the documents in issue were disclosed. Amongst correspondence on the respondent's internal review file is a record of conversation between Mr Jones of the respondent and a solicitor from Power & Cartwright during which the solicitor said that there was a real and serious risk that the complainants would be harmed if the information was released. He told Mr Jones that the clientele of the Club were noted for their aggressive nature and the Club had a history of fights.
53. On the other hand, the draft Report by the Investigation and Complaints Unit of the LLD states that, on making contact with the local police regarding complaints at the Club, Mr Roscarel was informed that the Club had not posed a real problem to the police, but there had been an incident of assault that same year to which the police were called and charges were laid.
54. In my letter to the complainant dated 30 March 1998, I expressed the preliminary view that there was insufficient evidence to make out a claim for exemption under s.42(1)(c) of the FOI Act. The complainant did not offer any further evidence to establish a reasonably based expectation of physical harm.
55. A great deal of the information in the letter has already been investigated by the LLD and, in the course of such investigations, been put to the Club management. There is no evidence of physical violence against any person because of that disclosure. On an objective evaluation of all of the circumstances of the case, including the information remaining in issue, I am not satisfied that disclosure of the matter remaining in issue, or the identity of the complainant could reasonably be expected to endanger any person's life or physical safety.
56. I therefore find that the matter in issue does not qualify for exemption under s.42(1)(c) of the FOI Act.

#### **Application of s.42(1)(e) of the FOI Act**

57. In its letter dated 14 October 1996, Power & Cartwright referred to s.42(1)(e), but in a context which suggested it was discussing s.42(1)(a). For the sake of completeness, I record my finding that the matter in issue is not exempt under s.42(1)(e).

58. Section 42(1)(e) of the FOI Act provides:

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

...

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

59. The correct approach to the interpretation and application of s.42(1)(e) was explained in *Re "T" and Queensland Health* (1994) 1 QAR 386.

60. I discussed the submission by Power & Cartwright in dealing with s.42(1)(a). The matter in issue does not disclose any secret or unusual investigative method or procedure of the LLD. It is merely a letter of complaint. The material before me does not afford a reasonable basis for an expectation that disclosure of the matter in issue could prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law.

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

61. 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.*

62. 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.

63. 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:

1. family and marital relationships;
  2. health or ill health;
  3. relationships and emotional ties with other people; and
  4. domestic responsibilities or financial obligations.
64. 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.
65. In *Re Byrne and Gold Coast City Council* (1994) 1 QAR 477, I held that the fact that a person made a complaint to an elected representative about a matter of concern was information concerning that person's personal affairs, for the purposes of s.44(1) (see, in particular, at p.487, paragraphs 26-27, and pp.488-490, paragraphs 33-38). I consider that the fact that the complainant made complaints to the LLD is information which concerns the complainant's personal affairs. I also consider that much of the information contained in the complaint letter is information which concerns the personal affairs of the complainant.
66. The matter in issue therefore satisfies the test for *prima facie* exemption under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.44(1).
67. I have previously held that there may be a public interest in a person having access to information which involves or concerns the person to such a degree as to give rise to a justifiable 'need to know' which is more compelling than for other members of the public, and that the public interest in fair treatment of an individual may favour an applicant being given the opportunity to see and to answer any allegations that are adverse to him or her (see *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at pp.368-377, (paragraphs 164-193).
68. Although it appears that the investigations of the Club by the LLD are all but complete, the complaints are still retained on the files of the respondent as information adverse to Mr Modin and the Club management in general. I consider that there is a public interest consideration which favours a subject of adverse information held on government records, having access to the information in order to know what has been said about him and enable him to respond to it, if necessary.
69. I do not consider that the public interest in non-disclosure of the identity of the complainant as a complainant can be given any substantial weight, since the applicant is already aware of the complainant's identity.
70. Similarly, it is clear from one of the annexures to the complaint letter that the substance of the information in the complaint letter which concerns the complainant's personal affairs has been made known to the Club committee by the complainant. The complainant's own conduct with respect to disclosure of this personal affairs information

to the Club committee (which includes Mr Modin) indicates that no substantial weight should be accorded, in all the relevant circumstances, to the public interest consideration which tells against disclosure of information concerning the personal affairs of a person other than the applicant for access.

71. I am satisfied that disclosure to Mr Modin of the complaint letter to the respondent dated 6 August 1996 would, on balance, be in the public interest, and I find that the letter is not exempt from disclosure to Mr Modin under s.44(1) of the FOI Act.

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

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

*45.(1) Matter is exempt matter if—*

...

*(c) its disclosure—*

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

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

73. The correct approach to the interpretation and application of s.45(1)(c) is explained in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, at pp.516-523 (paragraphs 66-88). In summary, matter will be exempt under s.45(1)(c) of the FOI Act if I am satisfied that:

- (a) the matter in issue is properly to be characterised as information concerning the business, professional, commercial or financial affairs of an agency or another person (s.45(1)(c)(i)); and
- (b) disclosure of the matter in issue could reasonably be expected to have either of the prejudicial effects contemplated by s.45(1)(c)(ii), namely:
  - (i) an adverse effect on the business, professional, commercial or financial affairs of the agency or other person, which the information in issue concerns; or
  - (ii) prejudice to the future supply of such information to government;

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

74. In *Re Cannon* at p.516 (paragraph 67), I said that the word "concerning", as it is used in the context of s.45(1)(c), means "about, regarding". It is not sufficient for the matter in issue merely to have some connection with the business, commercial or financial affairs of (in this case) the complainant. The matter in issue must itself comprise information about the complainant's business, commercial or financial affairs.
75. The complainant contends that disclosure of the letter may prejudice the complainant's business affairs. However, even if there was sufficient evidence to support a finding that disclosure could reasonably be expected to prejudice the complainant's business affairs (which there is not) the matter in issue does not concern the complainant's business affairs. The information in issue concerns personal aspects of the complainant's life and the management of the Club. It has nothing whatsoever to do with the complainant's business affairs.
76. I find that neither criterion (a) nor criterion (b) above is satisfied, and that the matter in issue does not qualify for exemption under s.45(1)(c) of the FOI Act.

### **DECISION**

77. For the foregoing reasons, I affirm the decision under review (being the decision made by Mr Chapman on behalf of the respondent dated 6 January 1997).