East and Environmental Protection Agency

(S 85/98, 15 June 2001, Commissioner Albietz)

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

1.- 2. These paragraphs deleted.

REASONS FOR DECISION

Background

3. The applicant, Mr East, is a former staff member of the Environmental Protection Agency (the EPA). Another staff member of the EPA (the complainant) expressed concerns about the applicant's performance of his employment duties insofar as it related to her. This ultimately led to the institution of a stage 3 grievance investigation, which was conducted by Ms J Stevens of the EPA and Mr G Francis of Francis Consulting Pty Ltd. The investigators ultimately recommended that no action be taken against the applicant in respect of the grievance, and no action was taken. By letter dated 3 December 1997, the applicant applied to the EPA, under the FOI Act, for access to all documents relating to the allegations and investigation.

4. By letter dated 27 February 1998, Ms M Sanderson, the Acting FOI Co-ordinator, informed the applicant that 509 folios and 3 audio tapes had been identified as falling within the terms of his FOI access application. Ms Sanderson decided that 61 folios and 2 audio tapes were fully exempt, and a further 41 folios were partially exempt, under s.40(c), s.44(1) and/or s.46(1)(b) of the FOI Act (meaning that some 407 folios and one audio tape were available for disclosure in full, and 41 folios were available for disclosure in part).

5. By an undated letter received by the EPA on 25 March 1998, the applicant sought internal review of the exemption claims. By letter dated 6 April 1998, Mr Arnott, Director (Business Support Services), informed the applicant of his internal review decision, which slightly varied Ms Sanderson's initial decision by permitting disclosure of some additional information, but confirmed her decision that 60 folios and 2 audio tapes were fully exempt, and a further 38 folios were partially exempt, under s.40(c), s.44(1) and s.46(1)(b) of the FOI Act.

6. By an undated letter received in my office on 4 June 1998, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Arnott's decision.

External review process

7. By letter dated 5 June 1998, the Deputy Information Commissioner referred the EPA to s.15 and s.16 of the *Public Service Regulation 1997* Qld (the Regulation), as then in force (those provisions have recently been amended, with effect from 6 April 2001) and to my comments in *Re Holt and Education Queensland* (1998) 4 QAR 310 at paragraphs 51-53. The Deputy Information Commissioner indicated that the reasoning disclosed in both the initial access decision and the internal review decision appeared to be flawed, given that neither decision took into account the legal effect of s.15 and s.16 of the Regulation. He continued:

> *Both the initial decision and the internal review decision placed much reliance on the Information Commissioner's decision in* Re McCann and Queensland Police Service [(1998) 4 QAR 30]. *However, uniformed police officers are not subject to the application of the* Public Service Regulation*, while the Department of Environment is. It seems to me to be difficult to argue that disclosure of documents to the applicant would have a substantial adverse effect on the management of the Department's personnel, if the Department is obliged to show those documents to the applicant under the terms of legislative provisions that form part of the specific legislative framework pursuant to which the Department must manage its personnel.*
>
> *It may be that the question of Mr East obtaining access to most of the documents he seeks does not need to be considered under the FOI Act. I have written to him suggesting that he make a formal request to inspect the documents he seeks under s.16 of the* Public Service Regulation*. I have indicated that this office will deal with the question of whether Mr East is entitled to obtain access, under the FOI Act, to any documents which Mr East is unable to obtain by exercising the right conferred on him by s.16 of the* Public Service Regulation*. Section 44(1) of the FOI Act would still be capable of applying to any matter in issue which solely concerns the personal affairs of persons other than Mr East.*

8. Mr East did make an application, under s.16(2) of the Regulation, to inspect the records relating to the grievance. That application was refused by the Acting Director, Corporate Development, who, in a letter to Mr East dated 24 December 1998, said:

> *The information you request is not held on your personal file. The documents you seek are broader and relate to all material gathered in the course of the investigation of the ... grievance. Consequently, on a literal interpretation of this subsection, I do not believe it is possible to release the documents you have requested.*

9. With respect, these comments were insupportable. At that time, s.16(2) of the Regulation provided:

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

10. This provision imposed no requirement that the departmental records that an employee sought to inspect must be held on that employee's personal file: *cf.* my comments in *Re Chambers and Department of Families, Youth and Community Care; Gribaudo* (1999) 5 QAR 16 at paragraph 9. On a literal interpretation (or any other lawful approach to statutory construction) of s.16(2) of the Regulation, departmental records concerning a grievance in which Mr East was the subject of complaint must have answered the statutory description of being departmental records about the employee (i.e., Mr East). Mr East therefore had a statutory entitlement to inspect them at a time and place convenient to the department.

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11. Mr East requested a reconsideration of this decision. After some delay, he received a letter dated 19 March 1999 from the Director-General of the EPA, refusing Mr East's request.
The Director-General's stated reason for doing so was that he was not prepared to disclose information gathered in relation to grievances where that information was given and received in confidence and release could cause detriment to others. I merely observe that the Regulation provided for no such exception to the statutory entitlement conferred on public service employees by s.16(2) of the Regulation.

12. Faced with the stance adopted by the EPA, Mr East decided to pursue his application for review under Part 5 of the FOI Act. Copies of the documents to which the EPA had refused Mr East access, under the FOI Act, were obtained and examined.

13. In several telephone discussions with staff of my office during the course of this review, and by letter dated 7 February 2000, the applicant indicated, for the purposes of this review, that he was no longer pursuing access to information which would identify a third party, or which concerned the personal affairs of any other individual. The applicant accepted that substantial portions of the transcript of an audio tape of an interview with a third party information provider, contained matter which concerned the personal affairs of, or would identify, the third party information provider. These concessions by the applicant have meant that a small number of documents which the EPA had previously agreed to disclose subject to the deletion of matter of the type described above, are no longer in issue. I have attached to these reasons for decision a schedule of the documents which contain the matter remaining in issue. Matter in those documents which is no longer in issue in this external review has been identified in letters to the EPA dated 16 February 2000 and 15 June 2001.

14. Following an examination of the matter remaining in issue, I wrote to the EPA on 23 September 1999 conveying my preliminary views on the issues raised in this review. Enclosed with that letter was a copy of my decision in *Re Chambers*.

15. By letter dated 28 October 1999, Mr B Carbon, the Director-General of the EPA, informed me that he did not accept my preliminary views, and lodged a submission in support of the EPA's case for exemption. A copy of that submission was provided to the applicant. By letter dated 16 November 1999, the applicant lodged a short response.

16. I have taken into account the following material in making my determination in this review:

- the contents of the documents containing the matter in issue;
- applicant's initial access application dated 3 December 1997;
- initial access decision dated 27 February 1998;
- applicant's undated internal review application (received 25 March 1998);
- internal review decision dated 6 April 1998;
- applicant's undated application for external review (received 4 June 1998);
- EPA's submission dated 28 October 1999; and
- applicant's letter in response dated 16 November 1999.

17. The small amount of matter which Mr Arnott decided was exempt under s.44(1) of the FOI Act is no longer in issue in this review, so I will not deal further with that exemption provision in my reasons for decision. Mr Arnott also decided that handwritten notes made by the complainant in September 1996, and the letter initiating the stage 3 grievance process (including attachments), were wholly exempt under s.46(1)(b) of the FOI Act.

I will consider the application of s.46(1)(b) before proceeding to consider the application of s.40(c), which Mr Arnott decided applied to all of the matter remaining in issue.

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

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

> ***46.(1)*** *Matter is exempt if —*
>
> ...
>
> *(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.*

19. In *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (at pp.337-341; paragraphs 144-161), I considered in detail the elements which must be established in order for matter to qualify for exemption under s.46(1)(b) of the FOI Act. In order to satisfy the test for *prima facie* exemption under s.46(1)(b), three cumulative requirements must be established:

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

(b) that was communicated in confidence; and

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

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

Information of a confidential nature

20. The bulk of the matter in issue relates to, or was considered in the course of, the stage 3 grievance process. The applicant has been given access to material concerning the earlier stages, and to parts of the stage 3 grievance report. He has therefore been made aware of the general nature of the grievances raised by the complainant, and the investigations that took place in the course of the stage 3 process. The attachments to the complainant's letter initiating the stage 3 grievance process include a considerable history of events leading up to that time. The applicant would clearly be aware of many of the events in which he was involved, and of the complaints raised by the complainant on earlier occasions. It is therefore difficult to see how such matter could be said to be information of a confidential nature, as against the applicant. Nevertheless, for the purposes of my analysis, I will consider the question of communication in confidence as it relates to all of the matter.

Communicated in confidence

21. At pp.338-339 (paragraph 152) of *Re "B"*, I made the following comments with respect to requirement (b) above:

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> *152. I consider that the phrase "communicated in confidence" is used in this context to convey a requirement that there be mutual expectations that the information is to be treated in confidence. One is looking then for evidence of any express consensus between the confider and confidant as to preserving the confidentiality of the information imparted; or alternatively for evidence to be found in an analysis of all the relevant circumstances that would justify a finding that there was a common implicit understanding as to preserving the confidentiality of the information imparted.*

22. In his letter dated 28 October 1999, Mr Carbon stated that "*assurances of confidence were given or implied*". There is no evidence before me that any express assurance as to confidentiality was sought by or given to any person who gave information in the course of the investigation. Given the onus that lies on the EPA under s.81 of the FOI Act, I find that there was no express assurance of confidentiality. Indeed, I consider that a blanket promise of confidentiality ought not properly to have been given, for the reasons I stated at paragraph 17 of *Re Chambers*:

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

23. An examination of the relevant circumstances attending the communication of information may support a finding that there existed an implicit mutual understanding between the supplier and the recipient that the information supplied would be treated in confidence. However, a fundamental obstacle to such a finding in this case was the existence of statutory provisions, binding on the EPA, which required the disclosure to the applicant of the documents in issue.

24. The text of s.16(2) of the Regulation is set out in paragraph 9 above. Section 15(1) of the Regulation relevantly provided:

> ***Particular documents to be noted by employee before being placed on departmental records.***
>
> ***15.(1)*** *The employing authority must ensure that a report, correspondence item or any other document about a public service employee's performance*

that could reasonably be considered to be detrimental to the employee's interests, is not placed on a departmental record unless—

(a) the employee has initialled the document or, if the employee refuses to initial it, the refusal is noted on the record; and

(b) the employee has been given—

(i) a copy of the document; and
(ii) the opportunity to respond in writing to its contents within 14 days after receiving the copy.

...

25. The precursors to s.15 and s.16 of the Regulation were s.99(1) and s.103 of the *Public Service Management and Employment Regulation 1988* Qld (the PSME Regulation), which provided:

Reports to be noted by officers

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

(a) a copy of the document; and

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

Access to officer's file

103.(1) *At a time and place convenient to the department, an officer shall be permitted to peruse any departmental file or record held on the officer.*

(2) *The officer shall not be entitled to remove from that file or record any papers contained in it but shall be entitled to obtain a copy of it.*

26. In *Re Holt*, I said, at paragraphs 49-50:

49. It is well established that an obligation of confidence, whether equitable or contractual, can be overridden by compulsion of law, in particular by a statutory provision compelling disclosure of information: see, for example, Smorgon v ANZ, FCT v Smorgon *(1976) 134 CLR 475 at pp.486-490. The existence of a provision like s.99 of the PSME Regulation could arguably forestall the recognition and enforcement of an equitable obligation of confidence in respect of information that would be (or would inevitably become) subject to disclosure pursuant to an obligation imposed by statute or delegated legislation. ...*

50. Section 99 and s.103 of the PSME Regulation required the interpretation and application of some rather vague terms such as

> *"official files or records relating to the officer" and "departmental file or record held on the officer". Moreover, under s.99 of the PSME Regulation, the obligation to disclose adverse information to an officer arose only at the point prior to placement of the adverse information on any official files or records relating to the officer. Disclosure under s.103 of the PSME Regulation was required only when an officer elected to exercise the entitlement conferred by s.103. An equitable obligation of confidence binding the Department not to disclose certain information may subsist until such time as it is overridden by the application of a provision in a statute or delegated legislation obliging disclosure. Unless and until the equitable obligation has been overridden in that way, it must still be given effect to in the application of s.46(1)(a) of the FOI Act.*

27. The applicant formally sought access to all of the documents in issue under s.16 of the Regulation while he was a public service employee. That application was refused by the EPA and, as I have indicated above, I consider that the EPA had no proper legal basis for doing so. (I should point out that s.16 of the Regulation confers legal rights that are distinct from the legal rights conferred by the FOI Act. The fact that an FOI access application is being processed affords no legal basis for refusing to comply with a valid application under s.16 of the Regulation. In a review under Part 5 of the FOI Act, I do not have jurisdiction to make an order or decision in aid of enforcement of the statutory entitlement which Mr East had as a public service employee, pursuant to s.16 of the Regulation. Nevertheless, it is appropriate for me to consider the application of s.16 of the Regulation, and the other provisions set out above, insofar as their application is relevant to the application of exemption provisions under the FOI Act.)

28. For the reasons stated in paragraphs 9-11 above, I am satisfied that, when the applicant sought access under s.16 of the Regulation, the EPA was bound, at a time and place convenient to it, to allow the applicant to inspect the matter in issue.

29. I am also satisfied that the documents fulfilled the criteria under s.99(1) of the PSME Regulation, or s.15 of the Regulation (depending on the time they were placed on the files of the EPA), to cast a statutory obligation on the EPA which required it (prior to placing the documents on files of the EPA) to give the applicant copies of the documents in issue.

30. Common elements of both provisions were that a document must be about or concern the officer's performance, and that the document could reasonably be considered to be detrimental to the officer's interests. I am satisfied that each of the documents containing matter in issue concerns, or is about, the applicant's work performance. They concern the grievance lodged by the complainant about the applicant's working relationship with her. The applicant's performance of his employment duties was the focus of the grievance. I am also satisfied that, given the negative comments contained in them, they each, at the time they were placed on EPA files, must reasonably have been considered to be detrimental to the applicant's interests as an employee.

31. Section 15(1) of the Regulation required disclosure before a document was placed on a "departmental record". However, s.99 of the PSME Regulation was more restrictive, referring to "any official files or records relating to" the officer . In *Re Chambers*, at paragraph 20, I stated that, while there could be some difficulties in delineating the precise scope of that phrase, I had no doubt that a file or record relating to the investigation of a formal grievance against a named officer falls squarely within the natural and ordinary meaning of that phrase. At paragraphs 20 and 21, I continued:

> *20. ...I do not consider that a reasonable construction of that phrase involves limiting its sphere of application to the main personnel file on a particular officer. I do not consider it appropriate to construe a provision that was obviously intended to confer a substantial entitlement on public service officers (i.e., to be informed of information concerning their performance which could reasonably be considered to be detrimental to their interests) in such a way that the entitlement could be negated simply by strategic placement of a document on a particular file.*
>
> *21. Nor can I see any justification for construing the relevant phrase as if it read "any official files or records relating exclusively to that officer". It would be highly artificial, and subversive of the obvious intent of the provision, to construe it as though information detrimental to the interests of two officers was not to be disclosed to either because it was not placed on an official file or record relating exclusively to either one of them, or that it was not to be disclosed to one of them because it was placed on an official file or record relating to the other. In this case, the applicant was one of three subjects of a grievance lodged by the complainant. A separate file was created in relation to that grievance, and I consider that it was an official file relating to the applicant. Likewise, the record of interview with Ms Gribaudo was an official record relating to the applicant.*

32. I am satisfied that any implicit mutual understanding of confidentiality that could be established as between the EPA and individuals who supplied information for the purposes of the grievance investigation was over-ridden by these statutory disclosure provisions, which required disclosure of the matter in issue to the applicant.

33. This must have been the case with respect to any of the information in issue supplied for the purposes of the grievance process. This will be a relevant consideration in dealing with the contention by the EPA that all of the matter in issue is exempt under s.40(c) of the FOI Act. However, with respect to s.46(1)(b), the EPA has only contended that handwritten notes of the complainant made in September 1996, and the letter initiating the stage 3 grievance process (with attachments), are exempt under s.46(1)(b). Even if the legislative provisions discussed above had not mandated disclosure, there is insufficient material before me to satisfy me that a mutual understanding of confidential treatment, as against the applicant, could be inferred from the circumstances surrounding the supply of information for the purpose of pursuing a grievance against the applicant. The complainant must have anticipated that, in order to progress the grievance, it would be necessary to put her complaints to the applicant, in order to allow him to respond. There was clearly a long history of dispute between the applicant and the complainant, and issues arising between the applicant and the complainant had been aired in the previous grievance stages. I find that the complainant, and the employees of the EPA who received information from the complainant on behalf of the EPA, must reasonably have anticipated that the matters she raised would be put to the applicant.

34. The bulk of the handwritten notes made in September 1996 record a conversation between the complainant and a member of the public (the third party). While the third party was obviously concerned at the possibility of becoming involved in the dispute, I consider that the third party must reasonably have expected that any comments made to the complainant

concerning the applicant might well be raised, either directly with the applicant, or with EPA management (and passed on by EPA management to the applicant). The information that the third party provided was obviously of such a nature that it would require some action by the complainant or by EPA management. I am not satisfied that, even if the legislative provisions discussed above had not been in force, the circumstances attending the communication of the information in question could support a finding that there existed implicit mutual understandings that information supplied by the third party to the complainant, and by the complainant to the EPA, would be treated in confidence as against the applicant.

35. I find that none of the matter in issue was communicated in confidence, for the purposes of s.46(1)(b) of the FOI Act.

Prejudice to future supply of information

36. Although it is not strictly necessary for me to do so, given my finding above, I should also note that I do not consider that disclosure of the matter in issue could reasonably be expected to prejudice the future supply of information to initiate a grievance process and support the complaint. I do not consider that a significant number of people in the position of the complainant would be less likely to initiate grievance processes if the grounds for grievance were disclosed to the subject of the grievance complaint. It is surely only logical that a part of the grievance process is to put the grievances to the subject of complaint in order to allow them to be addressed, either by way of correcting behaviour or rebutting the concerns raised. Nor is the limited information provided by other staff members of such sensitivity that its disclosure could reasonably be expected to prejudice the future supply of information.

37. I find that none of the matter in issue qualifies for exemption from disclosure to the applicant under s.46(1) of the FOI Act.

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

38. The EPA claims that all of the matter remaining in issue is exempt under s.40(c) the FOI Act, which 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; or*
>
> *unless disclosure would, on balance, be in the public interest.*

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

assessment by an agency of its personnel, unless disclosure of the matter in issue would, on balance, be in the public interest.

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

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

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

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

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

43. I am satisfied that the grievance proceeding comprised an aspect of the management by the EPA of its personnel.

Substantial adverse effect

44. In his submission dated 28 October 1999, Mr Carbon said:

> *There are sometimes circumstances where, despite the best of intentions, a learned interpretation of the rules produces an answer which is wrong. In the circumstances where the rules and what is right are in conflict, we should choose what is right.*
>
> *...*
>
> *The case we have is one of a series of exchanges between people who did not like each other, but were obliged to work in close proximity. ...*
>
> *...*

> *... I see no reason to place any of the material on file, nor to distribute it. I see no public nor private good can come from releasing any of it to anyone. ...*
>
> *There was a complaint, the parties had their say, the grievance was decided, and it should be over. The release of presently confidential information can only lead to further bad feelings with whatever consequences. ...*
>
> *...*
>
> *It is clear that some parties were justifiably frightened, to the point that they did not wish to be involved in the grievance matter at all, and others were particularly uneasy about being caught in the middle of workplace conflict. It is also clear that there would be detriment to those parties if information which they had given in confidence and we had agreed to treat confidentially were released. I believe that there needs to be sensible interpretation to material given in confidence.*
>
> *...*
>
> *I have been advised that throughout a four year period serious management problems existed because of this matter. There was extreme concern, animosity and anxiety between individuals and workgroups. Many of the officers involved do the same or related work within small work units and need to rely on the assistance of others and trust each other. It has taken many months to try to restore the efficiency of the work unit which had years of diminished efficiency. Wounds are now starting to heal. This agency cannot afford a repeat of the previous situation which I believe would be likely to occur if the documents were even partially released. This is so of all the documents .... Management staff have informed me that it would not be possible to release anything meaningful from those documents without disclosing personal details and the identities of those mentioned.*
>
> *It is definitely not in the public interest to continually pursue an issue which should have been ended long ago.*

45. I have some sympathy for the views expressed by Mr Carbon on two counts. Firstly, the regulations I have discussed above were, in my view, too broad and unqualified in their terms, and liable to produce unsatisfactory and anomalous results in certain circumstances. At paragraph 26 of *Re Chambers*, I said: *It is possible to think of examples where the application of the natural and ordinary meaning of the language of s.99 of the PSME Regulation (and its successor provision) could lead to inappropriate consequences ... .there seems to me to be a case for careful consideration of whether amendments are necessary to introduce qualifications/exceptions to the rights and obligations that have been provided for in broad and unqualified terms in the current provisions."* (Sections 15 and 16 of the Regulation have since been amended in a manner that removes most of the concerns I had with the provisions, but not in a manner that would prevent Mr East, if he were still a public service employee, from exercising an entitlement to inspect the matter in issue. The new provisions would permit the employing agency to delay access to an employee record for up to 6 months after the record comes into the employing agency's possession, but not to refuse inspection.)

46. Secondly, I appreciate that it sometimes happens that compliance with a binding legal obligation does not appear to afford the most just and/or expedient way of managing a

seemingly intractable personnel management problem. However, it is a fundamental obligation of government agencies and officials to comply with the law. Failure to do so tends to erode the moral authority of government agencies and officials to perform one of the primary functions of the executive branch of government, i.e., enforcing compliance by citizens with laws enacted by Parliament according to Parliament's view of what will best serve the wider public interest. Moreover, when a citizen brings a dispute before a court or tribunal (as Mr East has done in this case), the citizen is entitled to expect that the court or tribunal will administer justice according to law, not according to subjective notions of what justice requires in a particular case, in disregard of the law.

47. In this case, the applicant has (pursuant to s.21 of the FOI Act) a right to obtain access to the documents he requested from the EPA, except to the extent that they comprise exempt matter, and the EPA has the legal onus of establishing that matter in issue is exempt matter.

48. The EPA has expressed concern that disclosure could result in:

    (a) prejudice to the future supply of information in grievance cases;
    (b) damage to the relationship of trust between managers and staff; and
    (c) disharmony in the workplace.

49. I noted above that I do not consider that disclosure could reasonably be expected to inhibit aggrieved staff from coming forward or, given the nature of the information supplied by other staff, from providing like information in the future. Given that there is no evidence of assurances of confidentiality having been given by the investigators or EPA management, I do not see a basis on which disclosure would result in any loss of faith with management. The potential for disharmony in the workplace would also appear to have largely dissipated, given that the applicant is no longer a staff member. For these reasons, I am not satisfied that disclosure, at this time, of the matter remaining in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by the EPA of its personnel.

50. In any event, a fundamental obstacle to the application of s.40(c) in this case is that the legislative provisions discussed above formed part of the legislative framework for personnel management and assessment under which the EPA was obliged to operate. I cannot accept that disclosure to the applicant, under the FOI Act, of information that the EPA was required to disclose to the applicant under regulations which governed the performance of its personnel management functions, could reasonably be expected to have a substantial adverse effect on the management or assessment by the EPA of its personnel.

51. I find that the matter in issue is not exempt from disclosure to the applicant under s.40(c) of the FOI Act.

DECISION

52. For the reasons given above, I set aside the decision under review (being the decision of Mr Arnott on behalf of the EPA dated 6 April 1999). In substitution for it, I decide that the matter remaining in issue does not qualify for exemption from disclosure to the applicant under the FOI Act.