Rynne and Department of Primary Industries

(S 192/98, 11 January 2002, Deputy Commissioner Sorensen)

(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 was employed by the Department of Primary Industries (the DPI). Between August and October 1997, two officers of the DPI conducted a disciplinary investigation into allegations that the applicant had made persistent and vexatious complaints about colleagues. A final report (the Report) by the investigating officers (Ms Noble and Mr Steinkamp), dated 14 October 1997, was provided to the Director-General of the DPI and the applicant was officially reprimanded by the Director-General on the basis of the findings in the Report.

4. A copy of the Report was given to the applicant. It contains a summary of information provided by the applicant's work colleagues who were interviewed by the investigating officers and, in some instances, direct quotes from those interviews. However, the applicant was not given copies of the transcripts of those interviews, or of earlier written statements and complaints about the applicant.

5. By e-mail dated 10 February 1998, the applicant made an FOI access application to the DPI for *"photocopies of all documents, working papers, statements of interviewees, working notes of interviewers, correspondence with other Agencies (eg Criminal Justice Commission) correspondence with other Government Departments (eg Justice Department), etc relating to the investigation and disciplinary action taken by the Director-General against me. In particular, I require the original letter of complaint against me by my work colleague"*.

6. Mr Neil O'Brien, who was then the DPI's Administrative Review Co-ordinator, informed the applicant (by letter dated 13 May 1998) that he had located 328 pages of documents responsive to the terms of the applicant's FOI access application, and had decided to disclose the majority of those documents to the applicant, in full or in part. Mr O'Brien also advised the applicant of his decision that the balance of the documents qualified for exemption under s.40(c), s.41(1), s.42(1)(b), s.43(1) or s.46(1)(b) of the FOI Act.

7. The applicant inspected the documents which Mr O'Brien had decided to disclose to him, and informed Mr O'Brien that he required access to the handwritten notes of the investigating officers, which were not dealt with in Mr O'Brien's decision of 13 May 1998. By letter dated 17 September 1998, Mr O'Brien informed the applicant that Mr Steinkamp had destroyed his notes upon completion of the Report, but that Ms Noble had provided 171 pages of documents which fell within the scope of the applicant's FOI access application. Mr O'Brien decided to disclose the majority of those documents to the applicant, in full or in part, but found that the balance was exempt under s.40(c), s.42(1)(b), s.44(1) and s.46(1)(b) of the FOI Act.

8. By e-mail dated 22 October 1998, the applicant sought internal review of both decisions by Mr O'Brien to refuse him access to documents and parts of documents. The internal review was carried out by Mr J Dulley (Manager, Administration) who informed the applicant, by letter dated 26 October 1998, that he had decided to affirm Mr O'Brien's decisions.

9. By letter dated 23 November 1998, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Mr Dulley's decision.

External review process

10. Copies of the documents in issue were obtained and examined. A member of my staff then telephoned the applicant to discuss the documents. The applicant advised that he did not require access to the private addresses of individuals, or to the identities of officers who were interviewed, and that matter is no longer in issue in this review. The applicant also advised, however, that he required access to the information given in interviews with the investigating officers, and to advice from Crown Law and from DPI legal officers.

11. The applicant had indicated that he was concerned that favourable or supportive information had not been acknowledged or used by the investigating officers in arriving at the findings and conclusions in the Report. A member of my staff met with representatives of the DPI to discuss the possibility of disclosing to the applicant, in an anonymised form, any information from the interviews which was favourable to the applicant, or which supported his complaints against certain officers of the DPI.

12. The DPI was not prepared to agree to the disclosure of any information obtained from third parties, without prior consultation with those third parties. A list of staff interviewed by the investigating officers, and their work addresses, was provided to my office by the DPI. By letters dated 15 February 1999, the Assistant Information Commissioner sought the views of 14 third parties on the disclosure to the applicant of all or part of their records of interview with the investigating officers (and, in some cases, of other documents provided by the third parties).

13. All but one of the third parties responded to the Assistant Information Commissioner's letters (the person who did not respond was overseas). Three of the third parties had no objection to the disclosure of their statements, and one objected only to the disclosure of a brief comment about a person other than the applicant. By letter dated 12 July 1999, the Assistant Information Commissioner authorised the DPI to disclose to the applicant those statements (subject to the deletion from one of the statements of a small amount of matter concerning another officer). That matter is no longer in issue in this review. Nine of the third parties objected to the disclosure to the applicant of any part of their statements, or of any other documents they had provided.

14. While consultation with the third parties was being undertaken, the DPI was requested to clarify its disciplinary investigation procedures, and the status of two officers who had provided advice of a legal character recorded in a number of the documents in issue. The DPI replied, by letter dated 17 June 1999, providing a copy of its Corporate Standard on Discipline and accompanying advice from its Principal Consultant, Workforce Planning and Development. The DPI also stated that the officers who had provided legal advice were admitted as a solicitor and a barrister respectively. Those officers were employed by the DPI as professional legal advisers.

15. By letter dated 22 June 2000, I informed the DPI of my preliminary view that a number of documents and parts of documents did not qualify for exemption from disclosure to the applicant, and that the remainder qualified for exemption under s.43(1) or s.44(1) of the FOI Act. By letter dated 26 June 2000, I informed the applicant of my preliminary view that some documents and parts of documents qualified for exemption from disclosure under s.43(1) or s.44(1) of the FOI Act. Both participants were invited to lodge submissions and/or evidence in support of their respective cases.

16. The applicant lodged a submission and attachments dated 14 July 2000, in which he argued that the timesheets of another officer were not exempt matter under s.44(1) of the FOI Act. The applicant stated that he required access to the timesheets to support a complaint to the Criminal Justice Commission (the CJC) about a senior officer of the DPI. However, the applicant otherwise withdrew his application for review in respect of those documents and parts of documents which, in my preliminary view, qualified for exemption from disclosure under s.43(1) or s.44(1) of the FOI Act. That matter is no longer in issue in this review.

17. The DPI lodged a written submission dated 31 October 2000, in support of its contention that the remaining records of interview with (and other documents provided to the investigators by) DPI staff qualified for exemption under s.40(c), s.42(1)(b), s.44(1) and s.46(1)(b) of the FOI Act.

18. Under cover of a letter from the Assistant Information Commissioner dated 24 November 2000, a copy of the DPI's submission was provided to the applicant, who was invited to lodge comments or a further submission in reply. The applicant lodged a further brief submission dated 6 December 2000.

19. The matter remaining in issue in this review, which the DPI contends is exempt from disclosure under s.40(c), s.42(1)(b), s.44(1) and s.46(1)(b) of the FOI Act, consists of:

1. time sheets for a third party (whose identity is known to the applicant) - folios 061, 062;
2. Ms Noble's handwritten notes of interviews with third parties, the final typed versions of those interviews, and further comments by one third party - folios 001-018, 021-025, 029, 059, 060, 129, 130, 133-139, 141-148, 164, 167, 170, 281, 282 (copies of 059, 060); and
3. a letter and a memo from third parties complaining about the applicant's conduct - folios 047, 057, 058, 278 (copy of 047).

20. In reaching my decision, I have taken into account the following material:

1. the contents of the matter in issue;
2. the Report;
3. Mr O'Brien's reasons for decision dated 13 May 1998;
4. the applicant's external review application and attachments, dated 23 November 1998;
5. the DPI's letter dated 17 June 1999 and attachments;
6. the applicant's submission dated 14 July 2000;
7. the DPI's submission dated 31 October 2000; and
8. the applicant's letter dated 6 December 2000.

21. In his initial decision, Mr O'Brien stated:

> *This agency regards the investigation of complaints very seriously. Complaints are, by their very nature, inherently private and complex in nature. To investigate complaints, this agency relies upon its staff to either prove or disprove the allegations. If staff did not assist the investigation process in this way, then the investigators would not be able to gather independent evidence. Independent evidence obtained from persons other than the complainant or person complained against is crucial to the investigation process, as the absence of independent evidence frequently results in insufficient evidence being available to prove or disprove the allegations. This obviously would not be in the best interests of this agency, the complainant or the person against whom the complaint was made. Therefore, staff assistance in the investigation process is crucial to the success of the investigation process.*

Departmental officers who do assist investigators and become involved in the investigation process must feel confident that this agency will protect their identity and information they provide from unnecessary disclosure. This would have serious consequences to this agency as it could not investigate complaints with any real effect.

The fact that a staff member chooses to participate in the investigation is a matter that concerns that staff member's personal affairs. The staff member could choose not to participate. If this occurred, the investigative process would not be effective. Furthermore, if this agency could not provide undertakings of confidentiality (where possible) to its staff, then it is likely that they would choose not to participate in the investigation.

For these reasons, it is considered that the release of the documents would amount to:

1. *a substantial adverse effect on the ability of this agency to manage or assess it personnel;*
2. *the identification of a confidential source of information;*
3. *a disclosure of the personal affairs of a person;*
4. *a breach of confidence.*

22. I will consider the application of s.46(1)(b), before dealing with each of the other exemptions in turn.

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

23. Section 46(1)(b) and s.46(2) of the FOI Act provide:

> ***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.*
>
> ***(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.

24. Parts of the matter remaining in issue are excluded from eligibility for exemption under s.46(1), by the operation of s.46(2), because they consist of matter of a kind mentioned in s.41(1)(a) of the FOI Act (principally, opinion recorded for the purposes of the DPI's deliberative processes, i.e., deciding what action to take in respect of the complaint against the applicant), and were obtained from persons in their capacities as officers of DPI. (See *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at p.292, paragraphs 35-36, and *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.70-71, paragraphs 27-32.) However, the balance of the matter in issue, which consists of factual matter rather than matter of a kind mentioned in s.41(1)(a), is not excluded from eligibility for exemption under s.46(1). (In view of the conclusions I have reached below, it is unnecessary for me to specifically identify the segments of matter which are excluded from eligibility for exemption under s.46(1), by the operation of s.46(2) of the FOI Act.)

25. In *Re "B"* (at pp.337-341; paragraphs 144-161), the Information Commissioner 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

26. The matter in issue was considered in the course of the investigation on which Ms Noble and Mr Steinkamp based the Report. The applicant has been given access to the Report, which contains not only a summary of the contents of the statements which comprise the bulk of the matter in issue but also a number of direct quotes

from those statements, accompanied by the names of the officers involved. The applicant is therefore aware of the identities of a number of the third parties and of some of the contents of their statements. Most of the information which has not already been disclosed to the applicant concerns incidents in which the applicant was involved, or complaints made by or about the applicant. Certain matters of which the applicant has complained have been discussed at meetings between the applicant and the subjects of those complaints, or investigated by the CJC, and the applicant is aware of the third parties' responses to those complaints. Accordingly, much of the matter in issue does not, in my view, comprise information of a confidential nature *vis-à-vis* the applicant.

27. Some of the matter in issue has not been disclosed to the applicant, either directly or in summary, and there is nothing before me to indicate that that information would have been known to the applicant. I consider that that matter does remain confidential as against the applicant. (In view of the conclusions I have reached below, it is not necessary to specifically identify those segments of the matter in issue which still remain confidential as against the applicant.)

Communicated in confidence

28. In my letter to the DPI dated 22 June 2000, I had conveyed the preliminary view that the matter in issue identified in subparagraph 19(b) and (c) above did not qualify for exemption under s.46(1)(b) or s.42(1)(b) of the FOI Act because:

(a) it was required to be disclosed to the applicant under s.15(1) of the *Public Service Regulation 1997* Qld (the PS Regulation), or (in the case one document) under its predecessor provision, s.99 of the *Public Sector Management and Employment Regulation 1988* Qld (the PSME Regulation); and

(b) the inclusion in the Report of the identities of most of the people interviewed, and substantial segments of their records of interview, must cast significant doubt on the existence of any understanding of confidentiality.

29. With respect to (a) above, the DPI obtained advice from the Crown Solicitor and lodged a written submission dated 31 October 2000, contending that, on its proper construction, s.15(1) of the PS Regulation did not require disclosure to the applicant of the documents in issue, because they concerned the applicant's conduct in the workplace rather than his performance of his duties of employment. The same argument was put in respect of another application for review by another former DPI employee who had been the subject of an investigation for alleged misconduct, and I dealt with the DPI's arguments in detail at paragraphs 50-69 of my reasons for decision in that case (S 72/95) given on 19 December 2001. I explained there why I accepted that there was a valid distinction to be drawn, in the interpretation of the relevant regulations, between an employee's performance of his/her duties of employment and an employee's conduct. However, I also made the point (at paragraphs 61 and 63) that where issues of conduct and performance coincide or

overlap, such that a document could properly be characterised as one about a public service employee's performance, even though it was also about his/her conduct, then the disclosure obligation under s.15(1) of the PS Regulation (or its predecessor provisions) still applied.

30. I consider that it is reasonably arguable that the documents identified in paragraph 19(b) and (c) above are about both the applicant's conduct and his "performance", to the extent that the applicant's vexatious complaints about co-workers and managers were made through proper workplace channels ordained for the making of appropriate complaints, and that properly drawing the attention of supervisors and managers to legitimate concerns about the workplace performance or conduct of others ought properly to be regarded as part of a public service employee's performance of his/her duties. The issue is not free from doubt, however, and, given the other findings I have made below, I do not propose to lengthen unnecessarily these reasons for decision by analysing this issue and making findings in respect of it.

31. The following is a summary of relevant principles with respect to requirement (b) set out in paragraph 25 above, taken from the Information Commissioner's decisions in *Re "B"* at pp.338-339 (paragraphs 149-153) and *Re McCann and Queensland Police Service* (1997) 4 QAR 30 at paragraphs 21-24, 33-34 and 57-58:

1. The phrase "communicated in confidence" is used in the context of s.46(1)(b) to convey a requirement for a mutual understanding between the supplier and the recipient of the relevant information that the relevant information is to be treated in confidence.
2. The first question is whether there is reliable evidence of an express consensus (for example, the seeking and giving of an express assurance, written or oral, that the relevant information would be treated in confidence) between the supplier and the recipient as to confidential treatment of the information supplied.
3. If there is no evidence of an express consensus, the relevant circumstances attending the communication of the information in issue must be examined to ascertain whether they evidence a need, desire or requirement on the part of the supplier of the information for confidential treatment which, in all the relevant circumstances, the supplier could reasonably expect of the recipient, and which was understood and accepted by the recipient, thereby giving rise to an implicit mutual understanding that confidentiality would be observed.
1. If there was an express or implicit mutual understanding that information would be treated in confidence, it may also be necessary to construe the true scope of the confidential treatment required in the circumstances, e.g., whether it was or must have been the intention of the parties that the recipient should be at liberty to disclose the information to a limited class of persons, or to disclose it in particular circumstances; see, for example, the usual implicit exceptions to an

understanding that confidential treatment would be accorded to information conveyed for the purposes of a law enforcement investigation, that are identified in *Re McCann* at paragraph 58.

4. An obligation or understanding of confidence is ordinarily owed by the recipient of the information for the benefit of the supplier of the information. This means that the supplier may waive the benefit of the obligation or understanding of confidence, including waiver by conduct of the supplier that is inconsistent with a continued expectation of confidential treatment on the part of the recipient.

Circumstances surrounding communication

32. The following comments are representative of the views of the third parties who objected to the disclosure of their statements to the applicant:

> *When I made comments to the Investigating Officers, I understood that the comments were to be treated confidentially. If I do not feel that comments I give in relation to the investigation of employees within my work area are confidential I will be hesitant to participate in future investigations. This may hamper the ability of the Department to fairly and independently investigate complaints in future.*
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> …
>
> *I am concerned about the adverse consequences should my comments be released to* [the applicant]. *The investigation was performed by this Department in an effort to effectively manage staff, to answer not only* [the applicant's] *concerns but also the concerns of the rest of the staff.* [The applicant] *has since left the … work area and I feel that release of the record of interviews will only serve to refresh this matter, and its associated ill feelings, in the minds of those staff working in the area.*

33. In letters to my office, one of the third parties indicated that they had been "led to believe" that their statements would be kept confidential if at all possible. Another claimed to have been told that it was possible that some of their statement would be disclosed, but that every effort would be made not to disclose it. A number of others stated, in identical terms, that they understood that their statements would be treated as confidential.

34. However, none of the third parties has stated that any express assurance of confidential treatment was given by the investigators. The DPI, which (pursuant to s.81 of the FOI Act) carries the onus of establishing that its decision was justified, has not provided any evidence from the investigators to the effect that express assurances of confidential treatment were given. In the circumstances, I find that there was no express mutual understanding between the DPI and the third parties

that information communicated to the investigators by the third parties would be treated in confidence as against the applicant.

35. I note that the Information Commissioner has previously indicated that it would not usually be proper for an investigator in these circumstances to give a blanket promise of confidentiality. At p.23 (paragraph 17) of *Re Chambers and Department of Families, Youth and Community Care; Gribaudo* (1999) 5 QAR 16, the Information Commissioner said:

> *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.*

36. In my view, the very nature of the exercise on which the investigators were engaged, and the specifics of the complaints against the applicant, tell against the existence of any implicit mutual understanding (certainly, on the part of the DPI) that the information supplied to the investigators by the third parties would be treated in confidence as against the applicant. The use which the investigating officers subsequently made of information provided by third parties - i.e., the inclusion in the Report of both summaries of, and verbatim comments from, the individual statements obtained from third parties - supports the view that they had no understanding that confidential treatment would be accorded.

37. The investigating officers conducted the interviews on which the Report was based in August 1997. The Report itself is dated 14 October 1997. At that time, the DPI was drafting an internal Corporate Standard for Discipline, which was formally adopted on 23 January 1998. A draft of that document, dated 30 September 1997, has been provided to this Office by the DPI, with the advice that *"the Draft was widely used before it was signed ... in 1998. Prior to the Draft Standard being created .. the PSMC Standard 10 on Discipline was used by the Department during the discipline process"*.

38. The DPI's draft Standard appears to be substantially based on the Public Sector Management Commission (PSMC) Standard for Discipline, which provided (in section 4.2.3):

> *To meet the requirements of natural justice, as identified in Section 4.2.2. the employee who is being investigated should in most situations, be provided with a copy of any documentation at the conclusion of the investigation process. The witnesses/complainants signing statements should be made aware of the employee's right of access. In the majority of disciplinary cases natural justice demands full disclosure but there are some situations where it may be necessary to withhold documentation and provide a written summary. In instances where it is considered there may be a threat to the well-being (both physical and emotional) of the witnesses/claimants, care should be exercised in providing documentation which identifies witnesses/complainants to the employee under investigation. Serious consideration must be given to the facts of the case before withholding such information.* (my underlining)

39. The DPI's draft Standard states, more succinctly:

> *Natural justice is a fundamental principle of administrative law and will apply to this process. It requires that:*
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> 1. *a person be advised of the factors to be taken into account in making a decision which affects them and that they be given an opportunity to respond to relevant information available to the decision maker before any decision is made;…* (my underlining)

40. Regardless of which Standard the investigating officers followed, it is clear that relevant information obtained for the purposes of a disciplinary investigation was ordinarily to be disclosed to the subject of the complaint, i.e., unless there were special circumstances warranting withholding of particular information (in which case, the substance of the crucial information would still have to be disclosed to the subject of investigation in order to accord procedural fairness). The PSMC Standard contemplated that investigators should disclose all information obtained, unless they were satisfied that there was a threat to the physical or emotional wellbeing of third parties. The DPI and its investigators must have been aware of these requirements, even if the third parties were not.

41. The behaviour complained of by the third parties was the number and nature of complaints made by the applicant against various colleagues over a period of several years. The applicant is alleged to have complained of the personal behaviour, moral standards and manner of dress of certain officers; of workplace behaviour by other officers; of the playing of music; and of workplace and management practices and standards. Almost all of the third parties interviewed

expressed varying degrees of annoyance, distress or frustration at the applicant's behaviour in making unfounded or minor complaints about matters which the third parties believed were not properly the applicant's concern, and at what has been described as the applicant's inability to resolve or "get over" his grievances against colleagues. In my view, procedural fairness required the detail of the concerns and issues raised by other employees about the applicant (certainly to the extent that it comprised factual details, *cf.* paragraph 24 above) to be put to the applicant to enable him to have an effective opportunity to respond. I do not consider that the nature of the complaints against the applicant, or the workplace circumstances, gave rise to any need to withhold information in the interests of the wellbeing of witnesses. For the most part, the witnesses wanted action taken to curtail the applicant's vexatious complaints, and I do not think it was reasonable for them to expect that they could ventilate their specific concerns about the applicant's behavior, in the context of a disciplinary investigation, on the basis that the information they supplied would be kept secret from the applicant.

42. I am not satisfied of the existence of an express or implicit mutual understanding between the third parties and the investigators that the information supplied by the third parties would be kept confidential from the applicant. I find that the matter in issue identified in paragraph 19(b) and (c) above was not communicated in confidence, and that it does not qualify for exemption under s.46(1)(b).

Prejudice to the future supply of information

43. 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 by a significant number of sources in relation to the investigation of officers' complaints or grievances.

44. According to the third parties, there was a level of apprehension about providing information adverse to the applicant. However, there was clearly a high level of concern expressed about the applicant's behaviours, and a clear desire for action to be taken to curtail the applicant's vexatious complaints. If any action was to be taken against the applicant, staff must or ought to have appreciated that information they provided would have to be disclosed to the applicant. The option open to staff was to provide information on which the DPI could act, or to say nothing and have the situation persist. I am not satisfied that disclosure of the matter in issue could reasonably be expected to prejudice the future supply of like information.

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

45. 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;

46. The requirements for exemption under s.42(1)(b) of the FOI Act are:

(a) the existence of a confidential source of information;
(b) the information which the confidential source has supplied (or is intended to supply) must relate 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 the confidential source of information to be ascertained.

(See *Re McEniery and Medical Board of Queensland* (1994) 1 QAR 349, at pp.356-357, paragraph 16.)

47. A "confidential source of information", under s.42(1)(b), is a person who supplies information on the understanding, express or implied, that his or her identity will remain confidential: see *Re McEniery* at p.358, paragraphs 20-21. Relevant factors in determining whether there was an implied understanding of confidentiality are discussed at p.371, paragraph 50, of *Re McEniery*.

48. In *Re Croom and Accident Compensation Commission* (1989) 3 VAR 441 at p.459, Jones J (President) of the Victorian Administrative Appeals Tribunal (the Victorian AAT) said of s.31(1)(c) of the Victorian FOI Act (which corresponds, though not precisely, to s.42(1)(b) of the Queensland FOI Act):

It is designed to protect the identity of the informer and has no application where that identity is known or can easily be ascertained independently of the document in question. ...

49. I am not satisfied that the third parties are confidential sources of information. The applicant has been aware, since receiving a copy of the Report in 1998, of the identities of 11 of the 14 third parties, who are named in the Report as persons interviewed by the investigating officers. Another two third parties, who are not named in the Report and who provided only brief comments, have agreed to the disclosure of their statements to the applicant. There is therefore only one third party whose identity has not been disclosed to the applicant.

50. I have examined that third party's statement, and have formed the view that disclosure of the contents of that statement would identify the third party to the

applicant. I am also of the view, however, that the applicant could readily deduce that third party's identity by comparing the names of third parties already disclosed to him with the names of staff at that DPI office at the relevant time. Moreover, for the same reasons explained at paragraphs 34-42 above, I am not satisfied that there was any express or implicit mutual understanding that the identities of any of the third parties would be kept confidential from the applicant.

51. With regard to requirement (b) from paragraph 46 above, there is an issue as to whether the information provided to the investigating officers by the third parties was provided in relation to the enforcement or administration of the law. The investigation and Report deal only with the making of vexatious complaints by the applicant, a matter for which the applicant was subsequently reprimanded for having *"contravened, without reasonable excuse, a provision of the Department of Primary Industries Code of Conduct in that* [the applicant] *failed to show respect for the dignity, rights and views of others, and failed to look for constructive solutions when conflict arose in* [the applicant's] *work group"*. I have reservations as to whether information relating to a breach of a Departmental Code of Conduct is information relating to the enforcement or administration of the law, but there is no necessity to resolve that issue in view of my earlier findings.

52. I find that none of the matter in issue qualifies for exemption under s.42(1)(b) of the FOI Act.

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

53. 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.*

54. The Information Commissioner explained and illustrated the correct approach to the interpretation and 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* (1995) 2 QAR 744, *Re Shaw and The University of Queensland* (1995) 3 QAR 187, and *Re McCann*. In applying s.40(c) of the FOI Act, I must determine:

1. whether any adverse effects on the management or assessment by the DPI of its personnel could reasonably be expected to follow from disclosure of the matter in issue; and

2. if so, whether the adverse effects, either individually or in aggregate, constitute a substantial adverse effect on the management or assessment by the DPI of its personnel. The adjective "substantial" in the phrase "substantial adverse effect" means grave, weighty, significant or serious (see *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663, at pp.724-725, paragraphs 148-150).

If the above requirements are satisfied, I must then consider whether the disclosure of the matter in issue would nevertheless, on balance, be in the public interest.

55. In *Re "B"* at pp.339-341 (paragraphs 154-160), the Information Commissioner 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 particular, the Information Commissioner 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 Concise Dictionary, 3rd Rev. ed 1988); "Regard as ... likely to happen; ... Believe that it will prove to be the case that ..." (The New Shorter Oxford English Dictionary, 1993).

56. I accept that the investigation by an agency of complaints of misconduct about officers of that agency is an aspect of the management or assessment by that agency of its personnel.

57. A number of the third parties who were consulted by this Office objected to the disclosure of information which they had given to the investigation team, and comments representative of the views expressed by those third parties in letters and telephone calls to this Office are quoted at paragraphs 32-33 above.

58. It is clear that there was tension in the office where the applicant worked, and that staff anticipate negative consequences if the matters which were the subject of the investigation and disciplinary proceeding against the applicant are re-opened, or if the matter in issue is disclosed to the applicant. However, it is also clear from the Report itself that the investigating officers considered it necessary to disclose to the

applicant the identities of the majority of third parties and, in some cases, the actual content of the third parties' statements.

59. The applicant has been aware of the identities of most of the third parties, and of the substance of their statements (and of the verbatim contents of those segments of their statements that appear in the Report) since September or October 1998. None of the negative consequences foreshadowed by the third parties has occurred. The applicant is no longer employed by the DPI, and the third parties are no longer required to work with him.
As the applicant has left the area where he was working at the time and is living permanently elsewhere, it is highly unlikely that the third parties will have any contact with the applicant outside the workplace.

60. As I noted at paragraphs 43-44 above, I do not consider that disclosure of the matter in issue could reasonably be expected to inhibit a significant number of staff from coming forward with similar complaints in future, or from co-operating in such investigations in the future. Given that there is no evidence before me of assurances of confidentiality having been given by the investigating officers, I do not see any reasonable basis for expecting that disclosure could result in any significant loss of faith in the DPI's grievance or disciplinary processes, which, in any event (as I have noted above), set disclosure of relevant information to the subject of investigation as the norm.

61. For these reasons, I am not satisfied that disclosure of the matter in issue at this time could reasonably be expected to have a substantial adverse effect on the management or assessment by the DPI of its personnel.

62. I find that the matter in issue does not qualify for exemption from disclosure to the applicant under s.40(c) of the FOI Act.

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

63. 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.*

64. In applying s.44(1) of the FOI Act, the first question to ask is whether disclosure of the matter in issue would disclose information concerning the personal affairs of a person other than the applicant for access. If that is the case a public interest consideration favouring non-disclosure is established, and the matter in issue will be exempt, unless there are public interest considerations favouring disclosure which outweigh all public interest considerations favouring non-disclosure.

65. In *Re Stewart and Department of Transport* (1993) 1 QAR 227, the Information Commissioner 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, the Information Commissioner 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.

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.

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

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

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

67. In reviewing relevant authorities in *Re Pope*, the Information Commissioner had specifically endorsed the following observations, concerning s.33(1) (the personal affairs exemption) of the *Freedom of Information Act 1982* Vic, made by Eames J of the Supreme Court of Victoria in *University of Melbourne v Robinson* [1993] 2 VR 177 at p.187:

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

68. I am satisfied that the information remaining in issue in the folios identified at paragraphs 19(b) and (c) above does not concern the personal affairs of the third parties. For the most part, it comprises comments about the applicant or his interaction with others in a work context. It does not contain information concerning the private aspects of the lives of the third parties.

69. The Department initially contended that the fact that an employee has co-operated in providing information to his or her employer is information concerning the personal affairs of the employee. I do not accept that that is the case in the present circumstances. Employees owe a duty of good faith to their employer, which includes a duty to provide information relevant to the efficient and effective functioning of the workplace. The information was provided in the context of a disciplinary investigation conducted by the employer. In any event, I am satisfied that the applicant is aware of the identities of the third parties (see paragraphs 49-50 above).

70. The only matter in issue which I find does concern the personal affairs of a third party are two time sheets (being data entry sheets for the DPI's wages payroll system) for a member of the staff of the office where the applicant worked. In *Re Stewart* at p.261 (paragraph 92), the Information Commissioner said that there is a relevant distinction to be drawn in respect of matters that relate to an employee as an individual, rather than an employee as agent or representative of the employer, and some matters in the former category may fall within the meaning of the phrase "personal affairs", as it has been explained above. The Information Commissioner also said in *Re Stewart* at p.257 (paragraph 80) that information concerning a person's income and personal financial position is information concerning that person's personal affairs. While attendance at a place of work, and performance of allocated duties, does not concern a person's personal affairs, I find that a record of the variable hours worked by, and the income earned by, a person comprise information concerning the personal affairs of that person, and are therefore *prima facie* exempt from disclosure under s.44(1) of the FOI Act.

71. Because of the way in which s.44(1) of the FOI Act is worded and structured, the mere finding that information concerns the personal affairs of a person other than the applicant for access must always tip the scales against disclosure of that information (to an extent that will vary from case to case according to the relative weight of the privacy interests attaching to the particular information in issue in the particular circumstances of any given case), and must decisively tip the scales if there are no public interest considerations which tell in favour of disclosure of the information in issue.

72. In *Re Stewart* at p.257 (paragraph 80), the Information Commissioner observed that the general public interest in seeing how the taxpayers' money is spent is ordinarily sufficient to justify the disclosure of the gross income payable from the public purse to the holder of a public office. This principle tells in favour of disclosure of the gross annual income of a public service officer, or even the gross hourly rate paid to a casual employee of a government agency, but I do not regard it

as telling in favour of disclosure of the level of detail in a particular employee's fortnightly time sheets.

73. The applicant contends that the time sheets are likely to demonstrate that a senior scientist with the office where the applicant worked directed staff to falsify the hours they worked to avoid claiming overtime. He says their disclosure would assist him to show that his complaint to the CJC had merit. There is nothing on the face of the timesheets that supports the applicant's allegation. The officer involved has signed the sheets, and has made no complaint about unpaid overtime entitlements. I also note that the applicant has complained both to the DPI and to the CJC about the matter, citing the existence of the timesheets, and that either agency had power to call for and examine those documents to assess whether or not they afforded any support for the applicant's complaints.

74. In the circumstances of this case, I am not satisfied that there are public interest considerations favouring disclosure to the applicant of the time sheets of another person, which are sufficiently strong to outweigh the public interest in protecting the privacy of information in those time sheets which concerns the personal affairs of that other person. I therefore find that those documents comprise exempt matter under s.44(1) of the FOI Act.

DECISION

75. I set aside the decision under review. In substitution for it, I decide that the third party's time sheets qualify for exemption from disclosure under s.44(1) of the FOI Act, but that the balance of the matter in issue (identified at paragraph 19(b) and (c) above) is not exempt from disclosure to the applicant under the FOI Act.