OFFICE OF THE INFORMATION	**)**	S 17 of 1993
COMMISSIONER (QLD)	**)**	(Decision No. 94032)

Participants:

DR J M PEMBERTON
Applicant

- and -

THE UNIVERSITY OF QUEENSLAND
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - matter in issue comprising (a) referee reports obtained by the respondent in connection with applications for promotion made by the applicant and (b) parts of referee reports which would disclose the identities of their respective authors in circumstances where the referees have consented to disclosure to the applicant of the contents of their reports, but have refused to consent to disclosure of their respective identities as authors of the reports - whether matter in issue is exempt matter under s.46(1)(a) of the *Freedom of Information Act 1992 Qld* - whether disclosure of the matter in issue would found an action in equity for breach of confidence - whether referee reports written by officers of the respondent are excluded from consideration under s.46(1)(a) by the terms of s.46(2) - words and phrases: "a person in the capacity of ... an officer of an agency".

FREEDOM OF INFORMATION - whether matter in issue is exempt under s.40(c) of the *Freedom of Information Act 1992 Qld* - whether disclosure of reports on a candidate for promotion written by Heads of Department, Deans of Faculty and Pro-Vice-Chancellors in their capacity as officers of the respondent could reasonably be expected to have a substantial adverse effect on the management or assessment of the University's personnel - whether disclosure would, on balance, be in the public interest - consideration of circumstances in which there is a public interest in a particular applicant having access to matter in issue.

FREEDOM OF INFORMATION - whether matter in issue is matter of a kind mentioned in s.41(1)(a) of the *Freedom of Information Act 1992 Qld* - whether disclosure to the applicant would, on balance, be contrary to the public interest.

Freedom of Information Act 1992 Qld s.6, s.8, s.21, s.25, s.40(c), s.41, s.42(1)(b), s.44(1), s.44(2), s.45(1), s.45(2), s.45(4), s.46(1)(a), s.46(2), s.47(1)(a), s.49, s.52,
Criminal Code 1899 Qld s.377, s.378
Freedom of Information Act 1982 Cth s.11, s.38, s.40, s.41, s.43(1)(b), s.45(1)
Freedom of Information Act 1982 Vic s.30, s.35
Motor Car Act 1958 Vic s.50(3)

DECISION

1. I affirm that part of the decision under review by which it was determined that the matter withheld from the applicant, as contained in documents 2, 3, 5, 6, 7, 8, 10, 11, 12, 13, 14, 16(a), 16(b), 21, 22 and 24 (which are identified in paragraphs 11 to 28 of my reasons for decision) is exempt matter under s.46(1)(a) of the *Freedom of Information Act 1992 Qld*

2. I affirm that part of the decision under review by which it was determined that document 1 (as identified in paragraphs 11 and 13 of my reasons for decision) is exempt matter under s.40(c) and s.41(1) of the *Freedom of Information Act 1992 Qld.*

3. I vary the decision under review to the extent that I find that documents 18, 19 and 20 (as identified in paragraphs 11 and 28 of my reasons for decision) -

   (a) are not exempt documents under s.46(1)(a) of the *Freedom of Information Act 1992 Qld*; and

   (b) are not exempt from disclosure to Dr Pemberton under s.40(c), s.41(1) or s.44(1) of the *Freedom of Information Act 1992 Qld* (except for the last three sentences in the final paragraph of documents 18 and 19, which are exempt matter under s.40(c) and s.41(1)).

Date of Decision: 5 December 1994

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F N ALBIETZ
INFORMATION COMMISSIONER

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OFFICE OF THE INFORMATION COMMISSIONER (QLD) **)**

S 17 of 1993
(Decision No. 94032)

Participants:

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REASONS FOR DECISION

Background

1. The applicant is an Associate Professor in the Department of Microbiology at the University of Queensland (the University). He seeks review of the respondent's decision under the *Freedom of Information Act 1992 Qld* (hereinafter referred to as the FOI Act or the Queensland FOI Act) to:

   (a) refuse access in full to a number of referee reports obtained by the respondent in connection with applications for promotion made by the applicant; and

   (b) refuse access to parts of other referee reports which would disclose the identities of their respective authors in circumstances where the referees have consented to disclosure to the applicant of the contents of their reports, but have refused to consent to disclosure of their respective identities as authors of the reports.

2. By letter dated 20 November 1992, the applicant lodged with the respondent an FOI access application seeking "copies of all the files pertaining directly or indirectly to me and in the possession or control of the University". The University's response, given on 4 January 1993, identified some ten files containing more than 700 folios, to the vast majority of which the applicant was allowed access. With one or two minor exceptions (which the applicant is not concerned to pursue in these proceedings in any event) the folios which the University determined to withhold from access comprised referee reports given in respect of various applications for promotion within the University that had been made by the applicant since 1979.

3. On 20 January 1993, the applicant lodged five separate requests for internal review (in accordance with s.52 of the FOI Act) of various aspects of the University's decision of 4 January 1993. While the grounds of some of those internal review applications varied slightly, the grounds of objection were generally consistent. I will not reproduce them here, since they are repeated and enlarged upon in the applicant's written submission to me for the purposes of this review, the relevant extract from which appears at paragraph 119 below.

4. The requested internal reviews were undertaken by the University's Secretary and Registrar, Mr D Porter. Mr Porter's internal review decision was given in two stages. Mr Porter first wrote to the applicant on 4 February 1993 dividing the documents then in issue into three categories. The two folios in the third category have since been released to the applicant following concessions made during the course of the review process and need not be dealt with further.

5. The second category of documents was described as "*minutes of meetings of the promotion sub-committees which considered your* [i.e. the applicant's] *applications for promotions*". Mr Porter's decision in respect of this category of documents was as follows:

> *These committees make recommendations to the University's central Promotions and Re-appointments Committee and should be in a position to make objective assessment as part of the deliberative processes of the University. It is not necessarily in the public interest that such advice, which may or may not be acted upon, should be disclosed. However, it is in the public interest that all applicants for promotion have confidence in the University procedures and are in a position to address and answer any adverse comments. I am also mindful that the procedures to which these minutes refer took place some time ago and that you would have had an opportunity for feedback from the President of the Academic Board where the decision was not to grant a promotion. On balance I can see little point in refusing you access to these documents. I am, therefore, releasing folio 6 to you in full.*
>
> *Folios 43-44 and folio 120, however, contain direct reference to information which was provided to the University in confidence. I am, therefore, releasing these documents to you with some sections deleted. I propose deferring a final decision on whether to give full access to these documents until after the process of consultation above is completed.*

Only one deletion from folio 44 (which is document 6 described in paragraphs 14 and 17 below), being the name of a referee, still remains in issue at this stage, the applicant having had access to complete versions of folios 43 and 120.

6. The documents in the first category comprised "*references obtained either from external assessors or internally from University staff in the course of assessing* [the applicant's] *applications for promotion*". Mr Porter sought time to consult with the author of each report in order to establish whether the author:

   (a) wished to maintain confidentiality in respect of both the contents of the referee report and the identity of the author; or

   (b) was prepared to release the contents of the referee report, but wished to preserve anonymity of authorship; or

   (c) was prepared to have both the contents of the report and the identity of its author disclosed to the applicant.

7. The respondent has supplied me with copies of the correspondence to and from each of the authors in question. Some referees consented to options (b) or (c), as a result of which further material was able to be released to the applicant. A number of referees insisted on strict confidentiality. Mr Porter's internal review decision in respect of the third category, given by letter dated 18 February 1993, basically reflects the choices made by the referees who responded to his consultation letters. Where a response could not be obtained from particular referees, however, Mr Porter determined that reports provided by those referees were exempt in their entirety. I do not propose to set out Mr Porter's reasons for decision since they are repeated and refined in the respondent's written submissions made during the course of this review, which are set out at length below. The grounds of exemption relied upon by Mr Porter for withholding access to referee reports, or to matter which would identify the author of a referee report (in circumstances where the balance of the referee report had been released to the applicant), included s.40(c), s.41(1), s.44(1) and s.46(1) of the FOI Act.

8. By letter dated 24 February 1993, the applicant applied for review of Mr Porter's decision under Part 5 of the FOI Act.

The Review Process

9. A preliminary conference was held with the applicant on 10 March 1993 to clarify certain matters relating to the documents, and the nature of the issues, still in dispute. The documents in issue were then obtained and examined. A further conference was held on 21 April 1993, attended by the applicant and two representatives of the respondent, including Mr Porter. Although attempts were made to mediate the dispute, it quickly became clear that the University regards the confidentiality of referee reports in the freedom of information era as a major issue of principle which it wishes to test. During the course of the review process, further concessions have been made resulting in further material being released to the applicant, but this has invariably been on the basis that the author of the referee report in question consented to its release.

10. Agreement was reached with the participants on a timetable for filing any evidence or written submission in support of their respective cases. The evidence ultimately filed on behalf of the University ran to many hundreds of pages. It is described in greater detail below. The University also filed a written submission of some 34 pages which covered relevant case law and dealt with relevant public interest considerations. Dr Pemberton did not file any formal evidence, but supported his case with a written submission of some 15 pages which addressed the evidence filed by the University.

Documents in Issue

11. For the purposes of the conference with participants on 21 April 1993, a schedule of the documents then remaining in issue was drawn up and the documents were numbered from 1-24. That numbering scheme has been adopted by the participants for the purposes of the written submissions which each participant has lodged, and it will also be adopted in these reasons for decision to refer to the documents remaining in issue. Documents 4, 9, 15, 17 and 23 from that schedule no longer remain in issue, the applicant having been given access to them with the consent of the respective referees who authored them.

Applicant's Promotion Applications 1979-1986

12. The relevant promotion procedures for academic staff followed within the University during this period are described in Mr Porter's evidence which is set out at paragraph 30 below.

13. Document 1 was prepared in connection with the applicant's 1979 application for promotion from Lecturer to Senior Lecturer. The document is titled "Recommendation and Comments of Head of Department", it having been the standard practice to obtain an assessment by the Head of Department on the suitability of a candidate for promotion. Mr Porter has given evidence (at paragraph 31 of his statutory declaration) that he did not authorise contact with the referee who produced document 1 because "[the referee] *is in a poor state of health and I am concerned that any contact with him will deleteriously affect his health*". Document 1 has been withheld from the applicant in its entirety. The document is a *pro forma* requiring certain boxes to be ticked, but also leaving space for comments. The document is headed "Confidential".

14. Documents 2, 3, 5 and 6 were prepared in connection with the applicant's 1982 application for promotion from Senior Lecturer to Reader. The applicant has been refused access to document 2 in its entirety. Document 2 is again a *pro forma* having the title "Assessment of Teaching Ability - Guide to Assessment Form". The applicant would have been aware of the standard practice of having this *pro forma* completed by another academic able to make an assessment of the teaching ability of a candidate for promotion, but would not ordinarily have been aware of the identity of the person, or persons, who undertook that task in the applicant's case. The *pro forma* describes seven categories in which the referee is asked to rate the performance of the candidate for promotion on a

scale from 1-6. It also leaves abundant space for comments. Again, the *pro forma* is headed "Confidential".

15. Document 3 is a referee report, the contents of which have been released to the applicant, except for the author's name, signature and work address, these being details which would identify the author, who has communicated to the University a wish to preserve anonymity.

16. Document 5 is the *pro forma* "Recommendation and Comments of Head of Department" prepared in connection with the applicant's 1982 application for promotion from Senior Lecturer to Reader. That document has been released to the applicant subject only to the deletion of the name of the author of document 2.

17. Document 6 is the report of the Committee which assessed the applicant's 1982 promotion application. Document 6 has been released to the applicant subject only to the deletion of the name of the author of document 3.

18. Having been unsuccessful in his 1982 application for promotion from Senior Lecturer to Reader, the applicant made a further application for promotion in 1985. Documents 7, 8, 10, 11, 12, 13 and 24 were prepared in connection with the applicant's 1985 application for promotion.

19. Document 7 is the final page of the *pro forma* "Recommendation and Comments of Head of Department" for the applicant's 1985 promotion application. The applicant has been given full access to the other pages of that completed *pro forma*. The only matter which has been deleted from the final page comprises the names and addresses of three referees who have communicated their desire to preserve their anonymity.

20. Document 8 is the final page of the *pro forma* "Assessment of Teaching Ability" prepared in respect of the applicant's 1985 promotion application. The applicant has been given access to the other pages of that completed *pro forma*. The matter which has been deleted from the final page is matter which would identify the referee who provided that assessment, and who has expressed a desire to preserve anonymity.

21. Document 10 has been withheld from the applicant in its entirety. It is a referee report assessing the applicant's reputation for scholarship and research, and it bears the marking "In Confidence".

22. Document 11 is another referee report on the applicant's reputation for scholarship and research. The applicant has been given access to the contents of that referee report except for the author's name, signature and work address, the author having expressed a desire to preserve anonymity.

23. Document 12 comprises two *pro forma* letters addressed respectively to the authors of documents 10 and 11 informing them of the outcome of the applicant's promotion application and thanking them for their willingness to provide a referee report. The applicant has been given access to copies of those letters from which the name and address of each referee have been deleted.

24. Document 13 is a memorandum from the President of the Academic Board of the University to the Vice-Chancellor which reports on an interview which the applicant sought following his unsuccessful 1985 promotion application. The applicant has been given access to the contents of this memorandum subject to the deletion of the names of the authors of documents 10 and 11, and the identity of the Universities at which they were then employed.

25. Document 24 is a list of possible referees as to the applicant's scholarship and original achievement. The list was submitted by the applicant himself in connection with his 1985 application for promotion. The only material which has been deleted from document 24 are two annotations made

by the applicant's then Head of Department, the disclosure of which would have the effect of disclosing the author of document 11, who as noted above, has expressed a desire to preserve anonymity.

26. Documents 14, 16(a) and 16(b) were prepared in connection with the applicant's 1986 application for promotion from Senior Lecturer to Reader. Document 14 is the *pro forma* "Assessment of Teaching Ability". Document 14 has been withheld from the applicant in its entirety, its author having insisted that it was given in confidence and that its confidentiality should be preserved.

27. Documents 16(a) and 16(b) are respectively the final page and the first page of the *pro forma* "Recommendation and Comments of Head of Department" prepared in connection with the applicant's 1986 application for promotion. The only matter deleted from document 16(a) comprises the names and addresses of two of the persons nominated by the Head of Department as assessors of scholarship and original achievement. The only matter deleted from document 16(b) is the identity of the author of document 14.

Applicant's 1992 Application for Promotion from Reader to Professor

28. The relevant promotion procedures in this regard are described in Mr Porter's evidence which is set out at paragraphs 31-32 below. Documents 18, 19, 20, 21 and 22 were all prepared in connection with the applicant's 1992 application for promotion from Reader to Professor. Documents 18, 19, 20 and 22 have been withheld from the applicant in their entirety. Each of them comprises a report or assessment of the applicant's suitability for promotion to Professor. Document 21 is a letter from the Vice-Chancellor to one of the referees involved. The applicant has been given access to the contents of the letter subject to the deletion of the name and work address of the addressee. The applicant will be aware from the guidelines issued by the University in relation to this promotion process that three of the reports withheld from him must have been provided by the relevant Head of Department, Dean of Faculty and Pro-Vice-Chancellor, whose identities would be known to him.

Evidence Filed by the Respondent

29. The evidence filed by the respondent dealt comparatively briefly with the actual documents remaining in issue, and rather more expansively with the general question of the claimed prejudicial effects of disclosure of confidential referee reports. The general question is, of course, relevant to the specific question of whether the particular documents and parts of documents in issue in this case comprise exempt matter under the FOI Act, but ultimately it is the specific question which it is my task to determine (see *Department of Social Security v Dyrenfurth* (1988) 80 ALR 533 at pp.541-2). I will set out first the evidence which relates to the particular documents in issue, followed by the evidence which pertains to the general issue. The evidence filed on the general issue runs to hundreds of pages, and while I have examined it all carefully, considerations of space require that I set out in these reasons for decision only samples of the evidence filed which highlight some representative views from both sides of this difficult issue.

Evidence which relates specifically to the particular documents in issue

30. Mr Porter's statutory declaration executed on 18 May 1993 described the promotion procedures relevant to the documents in issue discussed at paragraphs 11 to 27 above as follows:

> *13. With respect to applications for promotion from Lecturer to Senior Lecturer and from Senior Lecturer to Reader in the years between 1979 and 1986 I have no personal knowledge of the procedures adopted but I am informed by staff of the University and verily believe that the procedures were as follows:*

(a) Application was open to any staff member.

(b) Applications were in the first instance dealt with by one of a number of area sub-committees, depending upon the applicant's Department.

(c) The area sub-committee obtained reports from the Head of Department, teaching referees and academic assessors for all applicants. The teaching referees were nominated by the applicant and the Head of Department. The academic assessors were nominated by the Head of Department.

(d) The area sub-committee then interviewed all applicants and on the basis of the interview and the materials before it made a report to the central committee which contained comments on individual applicants and a ranking of all applicants.

(e) The central committee then considered all applications in the context of the area sub-committee reports.

(f) The Vice-Chancellor then approved applications on the recommendation of the Academic Board after consideration of the central committee report.

31. In paragraphs 18 and 19 of his statutory declaration, Mr Porter stated:

> *18. Promotion to Professor (as distinct from application for an advertised Chair vacancy or nomination for a personal Chair) was introduced in the University in 1992.*
>
> *19. The procedure adopted for consideration of applications for promotion to Professor in 1992 are set out in a letter from the Vice-Chancellor dated 30 March 1992. A copy of that letter is attached and marked as Exhibit 9.*

32. Exhibit 9 to Mr Porter's statutory declaration sets out in detail the procedures to be followed in this new system, and the following parts of exhibit 9 are worth recording:

> *Senate has approved a system of promotion to the rank of Professor. Promotion to Professor will be considered by the Senate Professorial Promotions Committee.*
>
> *The rank of Professor is reserved for individuals with outstanding performance records. Quality is a key criterion and, although no quotas are prescribed, promotion to this rank is expected to be limited in number, annually. Successful candidates are expected to meet the standards for Chair level appointments in major universities.*
>
> *...*
>
> *Candidates should submit their application and all supplementary material to their Heads of Department no later than 24 April so that the Head may consult with other senior Department members before the closing date.*
>
> *...*

There is no specific application form for promotion to Professor. Candidates should ensure, however, that their application includes at least the following information:

a. Employment history.

b. Educational history and qualifications.

c. Teaching activities (including objective teaching evaluations).

d. A list of higher degree candidates successfully supervised.

e. A complete list of the outcomes or products of research and professional activity, including publications, prizes and awards, in relation to scholarship and original achievement.

f. A list of references from the literature in the candidate's field providing external evidence of merit (e.g. citations, published reviews of performances or books and exhibitions).

g. A copy of the 3 works considered by the applicant most important. (These may relate to teaching, research or both).

h. A description of administrative accomplishments of a substantial nature which have produced demonstrable benefit to the University.

The Committee may obtain such additional information as it deems appropriate in each case, including reports obtained in confidence from referees selected by the Committee.

4. ***Report and Recommendation by Head of Department***

A detailed report will be sought in confidence from the Head of Department. These reports will be submitted to the Committee with the application and will address each of the criteria, provide an overall recommendation with respect to the application, and nominate referees who may be approached by the Committee.

Heads of Department will receive, under separate cover, guidelines for the preparation of these reports.

5. ***Dean and Pro-Vice-Chancellors***

Copies of the application, together with the Head of Department's recommendation, should be sent by the Head both to the Pro-Vice-Chancellor and to the Dean considered by the Head to be the most appropriate in respect of the particular applicant. Pro-Vice-Chancellors and Deans will provide reports in confidence to the Committee.

...

8. ***Feedback***

Unsuccessful candidates will receive feedback on their application. Interviews will be given on request.

9. ***Limit on Re-application***

Unsuccessful candidates may not reapply until three years have elapsed, although exceptions can be made by the Vice-Chancellor in rare circumstances.

CRITERIA

The criteria for promotion to Professor are as follows:

(a) academic leadership as demonstrated by:

an international reputation for outstanding research and scholarship as exemplified by scholarly publications, performances, creative works, citations, invitations to give keynote addresses, success in obtaining research grants, election to learned academies, honorary degrees, awards and prizes;

outstanding teaching achievements and student assessments;

research team leadership;

guiding the development of colleagues and postgraduate students through supervision and collaboration;

administrative accomplishments of a substantial nature which have produced demonstrable benefit to the University; (simply holding an administrative post would not fulfil this criterion; candidates must be able to demonstrate significant achievements in office);

professional peer recognition of significant achievements at a state, national or international level, exemplified by leadership of learned societies and outstanding contributions to continuing education;

(b) extraordinary achievements equivalent to those that could have previously resulted in the award of a personal chair may be sufficient for promotion to Professor.

It is recognised that few individuals will be outstanding on all the criteria listed under (a) above and that extraordinary achievements in one category may compensate for lesser achievement in another.

33. At paragraph 6 above, I referred to the fact that, prior to making his internal review decision, Mr Porter wrote to each referee whose report had been withheld seeking their views on disclosure. I have been provided with a copy of each response obtained, both those consenting to disclosure or part disclosure, and those insisting upon the maintenance of confidentiality. After Dr Pemberton lodged his application for external review, Mr Porter arranged for the University Freedom of Information Officer to seek further comments from the referees whose reports or whose identities remain undisclosed. The approach to each referee stated that *"the purpose of this letter is to ask whether you wish to provide any information to assist the University to argue and to justify its position of non-disclosure*". Extracts from the responses received are set out in exhibit 15 to Mr

Porter's statutory declaration, in a form which does not identify their respective authors. Considerations of space prevent me from setting out the views expressed by all of the referees whose documents remain in issue, but I think it is important to include a sample in explaining the nature of the concerns that have prompted those referees to insist on the maintenance of strict confidentiality, or alternatively upon strict maintenance of anonymity of authorship. The following extracts are from exhibit 15 to Mr Porter's statutory declaration:

REFEREES RESPONSES

EXTERNAL REFEREES - UNITED STATES

A. Initial responses

A.1 *'I certainly have no problem in Dr Pemberton seeing the content of the letter in question, but as a matter of principle I do believe that the correspondent should remain anonymous. Like you, I feel that such anonymity leads to the most candid and objective evaluation.*

Additionally, I might add that were some of the correspondents to become known while others remained anonymous one might be tempted to "play games" in assessing who the other might have been. This could prove to be an embarrassment.'

A.2 *'It was my understanding that the information I provided to the University was confidential and provided in the strictest confidence, and that it would not be released to anyone except members of the committee evaluating the qualifications of Dr Pemberton for promotion. While it continues to be my understanding that it is University policy to treat my report in the strictest confidence, I am willing for the contents of my report to be released to Dr Pemberton, subject to strict maintenance of my anonymity.*

While I understand the intent of the Freedom of Information Act that is now in effect in Australia, I point out that my letter of 1985 antedated the FOI Act and that my letter, like many others written in response to a request for a candid assessment of a candidate's qualifications, was communicated to the University in confidence.'

B. Responses to further letter

B.1 *'1) If we lived in a perfect world involving nothing but perfect people (scientists included), the question you posed would be moot. Unfortunately, scientists are reflective of the populace at large, they can harbour ill feelings, possess prejudices and emanate suspicion of and to their peers. Because the community is small, we are continuously being asked to evaluate one another, whether for promotion, research grants, manuscripts, etc. Thus, given the frailties of us humans, would we always resist the opportunity to be less objective and more subjective regarding someone whom we think might have or did impinge upon us in someway? Clearly, the reverse argument that knowing the identity of a respondent could protect the individual against similar treatment. However, this argument is shallow because by having a number of respondents involved in the evaluation process protects against the outrageous activities of any one.*

2) Additionally, I know individuals who will not write a letter of evaluation if they thought for a moment that the letter, as well as the identity of the respondent, would become available to the individual involved. I don't think we wish to exclude such respondents, since their reasons for feeling the way they do may be well justified.

3) I raise the question as to why it is important to the person being evaluated to know the contents and identity of such letters? Certainly, a travesty could be committed but that would have to involve a rather grand conspiracy and one that is easily detectable by a third party serving as ombudsman.

4) Finally, I say this with some trepidation, but the individual being evaluated may need protection from him-or-herself, i.e. not knowing is probably the best elixir for the mental health of the individual'.

EXTERNAL REFEREES - AUSTRALIA

A. Initial responses

A.3 *'I have come to the conclusion that any documents that I wrote in previous years were provided in the belief that they would remain confidential, and that at least in 1986, my agreement to act as a referee for Dr Pemberton was under the conventions of the day, namely that anything I wrote remained confidential ...'*

B. Responses to further letter

B.2 *'... it should be made clear that if his name and report were released, he would not write another referee report. He had no doubt that when the case was written up other academics would adopt a similar attitude: referee reports would merely consist of motherhood statements - the quality of reviews of candidates would decline markedly; or academics would resort to giving reports over the telephone.'*

[Record of telephone conversation]

...

B.6 *'The first point I would make is that this is indeed a matter of general principle, and has nothing to do with the detail of my recommendations concerning Assoc Prof Pemberton or any other person. My earlier advice to you still stands, namely that all reports requested in confidence from Deans, Heads and referees should remain confidential, and that those who give such reports should resist the temptation to release selectively those reports which are benign or flattering to the staff involved, for that would serve to identify those reports which are critical or negative. Confidentiality of reports must be uniform if they are to serve their purpose, which is to ensure that the fullest information about an applicant is available, in writing, to a selection or promotions committee, which can then balance that total information and, if necessary, seek further clarification of particular items.*

It is in the public interest that this University should appoint the best possible academic staff and promote those whose performance helps the University achieve its goals. The selection and promotion committees which must make these difficult decisions usually have two sources of information. The first is the candidate's curriculum vitae*, which is supplied by, therefore controlled by, the candidate. It contains information which the candidate wishes to be known and, which, for the most part, can be easily documented or measured, such as research publications, research grants, subjects taught, postgraduate students supervised, professional committee or society membership, and so on. Candidates frequently include in the* curriculum vitae *the reports or comments of others on their activities, when these are favourable.*

The second source of information which a selection or promotions committee needs is referees' reports, which assess the quality or impact of a candidate's activity. For example, the quality of a candidate's research is not measured simply by the number of publications, for one needs additional information on whether the research is significant or trivial, and it is difficult to see how this can be gained except through the reports of other researchers in the same area. A selection or promotions committee would have neither the time nor the expertise to read all of every candidate's publications and make the judgement that way. Another matter on which referees' reports are essential concerns the interaction between a candidate and other staff and students. One needs to know whether the candidate is a source or a sink of inspiration to students, and whether the candidate interacts constructively with other staff in a Department or with the outside community. Heads of Department, Deans and Pro-Vice-Chancellors are well placed to report on these aspects of a candidate's performance by virtue of their frequent interaction with other staff and students.

Lack of confidentiality seriously compromises the honesty of referees' reports and I can give examples of this from my own experience. I recall one case of an application for promotion where the Head's report was supportive, but in private conversation the Head admitted that the applicant was a disruptive influence within

the Department and a poor teacher who could not be trusted with any of the Department's major subjects. The reason this Head offered for not reporting honestly was that the report was prepared in collaboration with other senior members of the Department (as is the practice), and he had reason to believe that the content of the report would find its way back to the candidate. Much as one may deplore the flaw in human nature which produced this situation, it does illustrate the point that even the prospect, of breach of confidentiality, inhibits honesty.

My other example is referees' reports originating in the USA. Because the general expectation there is that the report will ***not*** *remain confidential, they rarely say anything negative. Our selection committees, in assessing such reports, have learned to re-normalise the English language. A candidate who is described merely as 'competent' or 'diligent' is probably neither, while someone described as an 'outstanding genius' is probably worth considering further. We have also learned to look for what is not said, e.g. if no comment is made about a candidate's teaching, we suspect that he/she is a poor teacher. At best, referees' reports from the USA are treated with caution, if not suspicion. At worst, they can act to the detriment of a candidate because we try to read between the lines, messages which the authors did not intend. All this uncertainty originates from an environment in which the reports are assumed to lack confidentiality.*

Of course, the way this situation is managed in the USA is by means of the telephone, and we are quite capable of using the same technique ourselves. Personally, I would rather not see referees' reports so reduced in credibility that the only valuable information they contain is the telephone number of the author. The result would be that information currently available in writing for scrutiny by all members of a selection or promotion committee, would be reported second-hand and verbally by individual members of the committee. Such a situation would be detrimental both to candidates and to the University.

Evidence which goes to the general issue as to whether referee reports should remain confidential

34. The general issue is considered so significant for the administration of the University that a policy was formulated for ratification by the Senate of the University, as explained at paragraphs 6-10 of Mr Porter's statutory declaration:

> *6. One of the issues which has recurred in discussion of freedom of information within the University is the confidentiality of referees' reports. The Academic Board of the University considered this matter on 9 November 1992.*
>
> *7. The Academic Board of the University is a representative body of almost 150 members comprised in the main of Pro-Vice-Chancellors, Deans, Heads of Departments, and elected representatives of academic staff of the University. It is an advisory body which gives the academic community an avenue through which issues they believe are important can be brought to the*

attention of the Senate.

8. At its meeting on 9 November 1992 the Academic Board resolved to recommend to Senate that it put in place a policy requiring that confidentiality of referees' reports for academics be maintained. An extract from the minutes of that meeting is attached and marked as Exhibit 2.

9. On 26 November 1992 the Senate considered the resolution of the Academic Board and approved a confidentiality policy, a copy of which is attached and marked as Exhibit 3.

10. The policy of 26 November does not represent a significant change in the University policy on these issues. The University has for many years maintained a policy of confidentiality of referees' reports for academics. The policy of 26 November represents a reassessment of University policies in light of the move to freedom of access and a reaffirmation in this particular instance that the University and the bulk of its academic staff see the maintenance of confidentiality of referees' reports as necessary for the proper running of the University.

35. Exhibit 3 to Mr Porter's statutory declaration discloses that on 26 November 1992, the Senate of the University resolved to approve a policy in the following terms:

Senate <u>resolved</u> -

1. that referees' reports and comments from University officers sought on staff in the following categories as part of the promotions, tenure or selection process be regarded as having been sought in confidence:

* *all academic staff in Levels B to E*
* *full-time tenureable staff in Level A*
* *all research only academic staff at levels equivalent to academic staff in Levels B to E;*

2. that any request letters sent to referees seeking reports on promotion, tenure and appointment candidates be amended to include a request that the referee indicate the terms on which the report was provided;

3. that subject to approval of 2. above, the following paragraphs be included in the request letters:

'Your appraisal of the candidate's suitability for [promotion] [tenure] [appointment to the position] will be treated in the strictest confidence by the University, unless you indicate in your report your willingness to release the report to the candidate on request. The University would appreciate an indication of the terms on which your report was provided through the inclusion of one of the following paragraphs in your report:'

'This report contains confidential information and was provided in the strictest confidence. It was my understanding that the University will not release the report to the candidate.'

or

'This report contains confidential information and was provided in the strictest confidence. It was my understanding that the University will not release the report to the candidate without first seeking and obtaining my permission to do so.'

or

'I understand that it was University policy to treat this report in the strictest confidence; however, I am willing for this report to be released to the candidate on request.'

or

'I understand that it was University policy to treat this report in the strictest confidence; however, I am willing for the contents of this report to be released to the candidate on request, subject to maintenance of the author's anonymity.'

4. that all references to Freedom of Information be deleted from referees' request letters, information leaflets, instruction sheets and the like that are sent or distributed as part of the promotions, tenure and selection processes.

36. In paragraphs 11 and 12 of his statutory declaration, Mr Porter stated:

11. On 29 April 1993 I caused to be distributed to Heads of Departments, Deans and some other officers of the University a document asking for comment on issues raised by this application [i.e. Dr Pemberton's application for review]. *A copy of the document is attached and marked as Exhibit 4.*

12. To date I have received 49 responses to my request. Copies of all responses are attached and marked as Exhibit 5.

37. The survey questions which are Exhibit 4 to Mr Porter's statutory declaration are divided into 5 segments, each containing several questions (though I note that the document itself states in bold type that "*The University is seeking not only answers to questions, but your reasoning behind those answers. It also seeks examples or evidence which support your views.*") The first segment is aimed at establishing that there is a well-understood convention that referee reports in respect of University appointments and promotions are given in confidence (see paragraphs 97-102 below). The second segment asks whether, when giving references for academic colleagues, the respondents to the survey regard themselves as acting in their official capacity as an officer of the University. This issue is dealt with at paragraphs 71-87 below. The third segment asks for details of adverse effects on personnel management and assessment through disclosure of referee reports, and the fourth segment asks whether the balance of competing public interest considerations favours disclosure or non-disclosure of referee reports. These issues are relevant to the application of s.40(c) and s.41 of the FOI Act which are considered below at paragraph 120 and following. The fifth segment relates to whether it is practicable for referee reports to be disclosed with all identifying material removed.

38. I think that survey evidence of this nature has to be treated with some caution. Survey questions can be worded so as to indicate or prompt the desired response. Segments 3 and 4 of the survey form illustrate this:

3. *Another exemption* [s.40(c) of the FOI Act] *operates if disclosure could reasonably be expected to have a substantial adverse effect on management or assessment of the University's staff. One possible effect is that disclosure of past internal documents of the kind being considered may lead to disruption within a Department, if they contain opinions that are adverse to the applicant. Management of personnel will be made more difficult if staff within the Department are at odds over a report. In addition, if it is decided that a report must be released, a possible future effect is that reports will be less frank due to authors trying to avoid anticipated disruptions of the type referred to above. Assessment of staff for promotion may therefore be less effective.*

   3.1 *In what ways would disclosure of your name and comments made by you adversely affect the management or assessment of staff?*

   3.2 *In what ways would disclosure of your comments as a referee, without giving your name, adversely affect the management or assessment of staff?*

   3.3 *With regard to the above, would the adverse effect, if any, be substantial?*

4. *This exemption applies, unless disclosure would, on balance, be in the public interest. In determining what is in the public interest, the Commissioner will have to consider the balance between two competing interests.*

   The public interest in an applicant's right to know what has been said about him or her in a reference and the right to correct inaccurate or misleading information.

   The public interest in avoiding any adverse effect which disclosure might have on the University in its efforts to ensure the quality of promoted candidates.

   In the past it has been suggested that there is little evidence of adverse effect in disclosure of reports of a supervisor on a subordinate. In the event of a subordinate being advised of a bad report, it is said there is little that the subordinate can do in retaliation against the supervisor.

   4.1 *Would there be adverse effects, other than those referred to in 3, on the University, you or anyone else if there was disclosure of referees' reports?*

   4.2 *Would you be less inclined to give full and frank reports if there was disclosure of referees' reports?*

   4.3 *Do you think academics generally would be less inclined to give full and frank reports if there was no confidentiality?*

   4.4 *Does the collegial system operating in universities distinguish the academic staff position from that of an ordinary supervisor/subordinate position? If so, in what ways and how does*

this affect your answers to the above questions?

4.5 Are there any other public interest factors which you think are relevant to this case?

4.6 Do you consider the balance of the public interest lies with disclosure of reports?

4.7 Would the answers to any of the above questions be different if reports were to be released with material identifying the author deleted? If so, how?"

39. In Part 3, for example, the respondents to the survey are asked only to identify adverse effects that would follow from disclosure of referee reports. The general tenor of the survey form is to invite the respondent to support the suggestions contained therein that disclosure of referee reports is a bad thing. I think it is unwise, in the particular circumstances of this case, to make too much of this. On the one hand it can reasonably be expected that persons in the group surveyed have the intellectual capacity not to be manipulated by the phrasing of the survey, if they held contrary views. That is borne out to some extent by the fact that some 20% of the respondents to the survey, by my rough calculations, responded in favour of disclosure of referee reports. On the other hand, the group surveyed (Heads of Department and Deans of Faculty) for the most part is comprised of members of the Academic Board of the University, which recommended the University's current policy on confidentiality of referee reports. In other words, the survey was, for the most part, preaching to the converted, and soliciting evidence in support of the University's system from persons who had already progressed through the system to senior levels of University administration. I have no evidence of whether a similar survey of more junior academic staff would have produced a quantitatively different result in terms of the measure of support for the maintenance of the *status quo*. The assistance to be derived from the responses to the survey is, in my opinion, primarily qualitative rather than quantitative. Unfortunately, it is clear that many respondents (having been allowed only limited time to respond) gave only cursory consideration to their responses. While I have considered all of the material in exhibit 5 carefully, I have gained most assistance from the responses of persons who have clearly taken some time to formulate a careful and considered response. Again, considerations of space mean it is only possible to set out a sample of the views disclosed in the responses to the survey.

40. I have selected extracts which best represent and illustrate the different strands of thought, on the consequences of disclosure of referee reports, which are evident in the survey responses. (The University selected three of the respondents to the survey to give more detailed evidence in statutory declarations filed in support of the University's case, and that evidence is set out in more detail below at paragraphs 59-62.)

41. The response of the Head of the Department of Civil Engineering set out a number of concerns which were fairly widely held amongst those who did not favour disclosure of referee reports. His responses to the questions in Parts 3 and 4 of the survey (as set out above at paragraph 38) were as follows:

3.1 Disclosure of my name and comments made by me about staff within the Department has potential for very serious adverse effects. While some individuals are able to accept objective assessment which is not wholly complimentary, some others appear to be unable to deal with any comments which are adverse. I have had experience of situations where confidentiality has been breached and the animosity which has resulted has created on-going problems of a serious nature which have prevented effective

collaboration between staff in the Department.

3.2 *Disclosure of my comments as a referee without giving my name would be effectively the same as complete disclosure. I do not believe it is possible to disclose comments by the Head of Department in a way that prevents the association of the comments with the Head of Department. The adverse effects of such disclosure are of the type referred to in 3.1.*

3.3 *Yes. See 3.1.*

4. *I dispute very strongly the assertion 'There is little that the subordinate can do against the supervisor'. In some cases it could be that the subordinate can do little to harm the supervisor directly but in the University environment there is almost unlimited scope for a subordinate to undermine the authority of a supervisor and subvert the processes the supervisor is setting in place. I do not believe that our system has within it the mechanisms to deal effectively with this kind of 'guerilla warfare'.*

4.1 *I believe that disclosure of referees' reports would result in provision of advice which is less than frank in dealing with aspects of individuals which are unsatisfactory. My experience of open reports is that the information provided is virtually useless when the situation requires accurate assessment of the potential and appropriateness of individuals for positions.*

4.2 *Yes. I would be very reluctant to give full and frank reports about some individuals if the report is to be disclosed to them. I have had experience of academics threatening to sue for defamation when they have not liked the comments made about them by colleagues. I would not be willing to be subjected myself to this kind of harassment if the University is not willing to safeguard confidentiality.*

4.3 *I have no doubt that academics generally would be less inclined to give full and frank reports if there were no confidentiality. I have been in discussions on several occasions with people who have had to work within a situation of this kind and in each case their approach has been to say only those things which are good or neutral. They have described techniques for trying to signal that there is more about this person than they are prepared to write but this is clearly an unsatisfactory situation.*

4.4 *The collegial system in universities does distinguish the academic staff position very clearly from that of an ordinary supervisor/subordinate situation. In my experience academics need to work closely together particularly in teaching but also in developing research programs. Any dissension or grudge holding between academics makes such co-operation almost impossible.*

4.6 *I am strongly of the view that the balance of public interest lies with preservation of confidentiality in these matters.*

4.7 *My answers above apply without change, whether the author's name and identifying material are included in the material released or deleted from it. I consider that in most cases it is impossible to achieve total anonymity by partial deletion of material.*

42. I note that the response given above in respect of point 4.2 was indicative of what appears to be a fairly widespread, but in my view, unfounded fear amongst the group surveyed, in that many claimed that adverse effects could be expected from the threat of defamation proceedings brought by staff members in response to comments in a referee report. The law of defamation, however, recognises the need for honest opinions to be expressed in referee reports and provides a defence of qualified privilege, which means in effect that a statement is protected even if untrue and *prima facie* defamatory, unless the plaintiff can prove absence of good faith on the part of the maker of the statement: see s.377 and s.378 of the *Criminal Code 1899 Qld.* Authors of referee reports have little to fear in terms of an action for defamation unless they have acted in bad faith (e.g. out of malice towards the subject of the report), in which case it is difficult to justify protecting them with the cloak of confidentiality.

43. The Head of the Department of Computer Science responded to Parts 3 and 4 of the survey as follows:

> *3.1 Management would be affected in all the ways mentioned. Additionally, non-confidentiality would result in inequity, as some referees would moderate what they write and others (more courageous) wouldn't. It would therefore be very difficult to compare people on the basis of referees' reports.*
>
> *3.2 In most cases my name would be easily deducible from the nature of the comments or the status of the document.*
>
> *3.3 Yes, I believe the adverse effects on Departmental management would be very substantial. I believe the appointment and promotion procedures would be almost impossible to operate.*
>
> *4.2 There would be a constant temptation to pull punches, or to phrase things in a cryptic or ambiguous way.*
>
> *4.3 Yes -- many academics would not want the hassle of possible challenges and disputes. The refereeing system would fall into uselessness and disrepute.*

44. The Dean of the Faculty of Law responded to Parts 3 and 4 of the survey as follows:

> *3.1 In the University environment, academic staff are working together for long periods, perhaps up to 20 years. Disclosure of comments could create animosity and, through the formation of alliances, could create divisions within the Department that might prove enduring and highly detrimental.*
>
> *3.2 Disclosure without the name of the referee would be almost as detrimental, because it would give rise to unfortunate speculation and conjecture.*
>
> *3.3 The effect could be substantial, depending on the nature of the comments and their consequences in terms of career prospects.*
>
> *4.1 Obviously, it may be difficult to find evidence of adverse effects of the disclosure of reports, because the main consequence of disclosure or possible disclosure is a radical shift into behaviour patterns of which it is difficult to find useable evidence at all. In essence, academics resort to what the economists call a 'corrective transaction'. If written assessments are*

likely to provoke division and disruption, there will be increased reliance on oral reports and other forms of non-documentable evidence. The unfortunate aspect of this behaviour change is that much of this evidence is less reliable than a written report. There will be increased reliance on gossip, sub rosa asides or plain prejudice. For this reason it is not in the interests of applicants and potential applicants that the system of written referees' reports be undermined.

4.2 I would certainly be more circumspect.

4.3 Yes. In fact, this tendency already became quite noticeable well before the Freedom of Information Act came into force. The reason for this, I suspect, is that the advent of FOI legislation in other jurisdictions, and its advocacy here, tended to undermine the whole moral basis for maintaining institutional confidentiality. Any attempt to preserve confidentiality is now treated in the political-media culture as a 'coverup' and as evidence that the institution has something unsavoury to hide. Consequently, very few academics now feel under any moral obligation to preserve the privacy of communications discussed in university committee meetings.

4.4 One difference is that under the collegial system staff may be judged, and their career prospects affected, by people who are their competitors in the race for promotion and for other academic benefits or honours.

...

45. A number of other respondents to the survey made the same points as the Dean of the Faculty of Law made in his responses to 3.2 and 4.3 as set out above. For instance, the Head of the Department of Commerce said:

> *Because of the fear of freedom of information a number of referees have indicated to me that they are already being very careful in their wording of referee reports in the nature of them being less frank.*

46. The Acting Head of Romance Languages said in response to questions 3.2-3 of the survey:

> *It is perfectly clear that an anonymous adverse report creates more paranoia than a named report because it is capable of generating unfocussed distrust. A named report, however adverse, focuses the difficulty and leaves it open to the affected staff member to take account of the opinions of her/his adversary in further dealings with the University.*

47. The final sample of views supportive of the University position is taken from the response of the Dean of the Faculty of Science, who responded to Parts 3 and 4 of the survey as follows:

> *3.1 Disclosure of confidential reports would seriously compromise the process of formative staff review. I had considerable experience of formative reviews under the previous system where staff were reviewed on a 10 year cycle by a committee consisting of Dean, Head of Department and one other staff member nominated by the staff member being reviewed. The purpose of these reviews, and of the more recent ones by a Head of Department or section, was/is to improve staff behaviour or performance. One goes about this in a non-confrontational manner, and it may be necessary to resist*

bringing into the open all of the reviewed staff member's inadequacies in order to gain his/her co-operation in finding a remedy to some of them. I submit that if the confidential reports of Heads and Deans, made for assessment purposes, were released to staff, then when these are not supportive, the subsequent formative review process would become a confrontation. The staff member would try to alter the Head or Dean's opinion, or take steps to have that opinion discredited for the purpose of future applications for promotion.

3.2 I do not see how it is possible to disclose the whole of a report from a Head, Dean or PVC without it being obvious which of the three wrote the report.

It should be pointed out that there is already a mechanism by which the general thrust of selected portions of these reports can become known to an unsuccessful applicant for promotion. Such an applicant may seek an interview with the chairperson of the promotions committee, to discuss the areas in which the application was not considered sufficient. In most cases, the inadequacies are apparent in the curriculum vitae *itself, without reference to referees reports, and targets for remedy easily set. It would be possible, however, for a chairperson to discuss problems of interaction with other staff or students, such as might be flagged in referees reports, without actually quoting from them.*

3.3 Yes.

4.1 The major effect would be that referees reports would become less honest and informative, at least in those cases where the referee has a negative assessment to make. The American experience is sufficient proof of this.

...

4.4 The major difference is that academic supervisors (Heads in particular) do not have power commensurate with their responsibilities. It is possible for a very hostile staff member to make life very difficult for a Head. Heads try to establish consensus about most matters, and this is difficult if one particular staff member is always working to destroy consensus.

4.5 I do not understand why it is in the public interest for an applicant to know in all cases what has been said about him/her. ...

48. The Dean of Science was one of a few who expressed the view that he or she personally would not be less inclined to give full and frank reports if there was disclosure of referee reports, but who also took the view that academics generally would be less inclined to give full and frank reports if there was no confidentiality. Approximately 80% of respondents stated broadly that they would personally be less inclined to give full and frank reports if there was disclosure of referee reports.

49. Despite the obvious slant in the phrasing of the survey towards seeking responses that support the University's current policy on disclosure of referee reports, approximately 20% of those who responded supported disclosure. For example, the Head of the Department of Chemical Engineering responded to Part 3 of the survey as follows:

If criticism is not genuine you could argue that it should be brought to the open and debunked. Impossible to generalise - some people welcome genuine criticism some

don't - academics by definition of their profession should welcome it.

50. His response to question 4.2 in the survey (*"Would you be less inclined to give full and frank reports if there was disclosure of referees' reports?"*) was:

No! If I agree to give a report it is only ethical to give a full and frank report.

In response to question 4.3 in the survey (*"Do you think academics generally would be less inclined to give full and frank reports if there was no confidentiality?"*), his response was:

Maybe. If they were shirking their duties.

51. The Acting Head of the Department of Romance Languages responded to question 3.1 in the survey as follows:

My own feeling is that the rhetorical difficulties alluded to in the final sentences of the preamble to this question are not serious: anyone with some experience in these matters, and some mastery over the use of language for these purposes, knows what rhetorical tactics can be employed to overcome them. Experienced members of assessment committees are also at home with the interpretation of references and other reports. However, dissension amongst the members of staff of a Department or section is a serious problem.

52. The Acting Head of the Department of Romance Languages responded to Part 4 of the survey as follows:

... in general, I am inclined to agree with the thrust of FOI legislation, that the public interest is served better by disclosure than by non-disclosure. In some conceivable instances, it is manifestly clear that the University's attempts to protect its credentials by not disclosing documents is against its own long term interests, and particularly, against the public interest insofar as it is involved with guaranteeing the quality of an institution that affects a majority of the population and that is paid for with the public purse ...

Those general points being made, my answer to 4.6 is certainly yes. I am inclined to think that the introduction of FOI conditions will change our practices, and not necessarily for the worse as is suggested by 4.2 and 4.3. It should become normal practice for us to refuse to give references to colleagues, and to do so for explicit reasons, if we feel unable to support them. However, this is very hard to do and may require some training ...

53. The response of the Head of the Department of Parasitology opened with the following statements:

I believe that there is a convention in universities that reports from referees will be kept confidential. I have never believed, however, that this is a good convention and I have, therefore, attempted to disclose my opinions and assessments unless disclosure either could bring personal harm or I was directed specifically not to do so. In general I think that the subject of a report, reference or assessment has a right to know what has been written but I respect the judgment of those seeking the information to maintain confidentiality.

The reasons for my position relate to the enhancement of personal dignity on the one hand and maintenance of good management on the other: confidentiality kept merely to maintain secrecy is a form of paranoia in power.

In general I do not expect that the reports I write will be kept confidential except where the request makes explicit reference to the form and extent of the confidentiality. I do expect, however, that disclosure will be made only to the subject of the report; after all only the subject has a pressing need to know. ...

My opinions here relate to my experience that most reports are not controversial, damaging or vicious and that any criticism often moves to help rather than harm even if it has the immediate effect to prick some sensibilities.

54. In response to Parts 3 and 4 of the survey form, the Head of the Department of Parasitology continued as follows:

3. There is truth in the introductory statement, but management of personnel is difficult anyway and there are techniques in counselling that have been developed to reduce such conflict. I would want to know what evidence there is that conflict arises from the disclosure of information and what evidence there is that the quality is reduced in reports that are to be released before prescribing any definite effect to disclosure.

Experience with the International Journal for Parasitology *shows that signed reports are received more favourably than unsigned reports, particularly when the comments are adverse. The signature gives the ring of truth to the critique.*

I do not think that the assessment of staff for promotion will be affected adversely; in any case verbal assurances which would be totally confidential can be obtained easily.

3.1 There are too many idiosyncrasies involved to give a meaningful opinion. The business of management and assessment is about reducing conflict and promoting harmony. Full disclosure together with appropriate counselling goes a long way to eliminating recrimination and acrimony.

3.2 Cutting the name of the author from reports makes the tasks in 3.1 easier but it disqualifies the report. Disclosure for me does not have a lasting ill effect on management, although I am privileged to lead a very harmonious group of people.

3.3 Adversity, like pain, is soon forgotten! Most people look on the bright side of life.

4. I agree, from experience, that there is little adverse effect from disclosure of even bad reports. The blow that sometimes results can be softened however by the adoption of appropriate procedures in personnel management. Retaliation by the subject will be rare, although there are vindictive people around!

4.1 Adverse effects range from Temporary to None.

4.2 I like to think that I give full and frank reports irrespective of whether or not the document is covered by confidentiality. I strive for this goal but may not succeed fully.

4.3 No, but my judgment relates to the small number of colleagues across the

University I know well enough to make an assessment.

4.4 Not so, for me, but I have heard that there are others among us who have a very elevated opinion about life in the University.

4.5 People have a right to know where they stand relative to their colleagues. There are numerous proverbs which relate to disclosure and adverse reports - one such aphorism deals with hot fires and staying put.

4.6 Yes; good communication encourages harmony, eases the tasks of management and improves productivity. There is little that the public should not know. It is courageous to live in an open society.

4.7 Little real effect, but it smacks of the insult that discretion is the better part of valour. I said earlier that deletion of the author disqualifies the content of the report.

55. The Head of the Department of Physiology and Pharmacology responded to Parts 3 and 4 of the survey as follows:

Personnel Management and Assessment

While it is true that an adverse report might create a "disruption", it is my experience that a hidden agenda would be worse. When people are aware of the facts or opinions of others, there may be an initial disruption based on emotion or the like. Despite this, when staff know that they will always receive an honest appraisal from the Head of Department or supervisor, they are less likely to conjure up things that are far worse. In fact, when there is no perceived 'hidden agenda', staff are better equipped to make decisions than if they are told only the 'good side' of the story.

*Those people who are apt to be less frank if their name is disclosed may be the same people who are ruthless when their name is not on the report. It is basically a 'no win' situation with those who alter their opinion to fit the circumstances. It is also far easier to write an adverse report when it is known that one's name will not be disclosed and this could allow a personality conflict to affect a decision. It is clearly best (to use a cliche) that '***honesty is the best policy***'.*

The public interest

Everyone has a right to know what is being **said** *about them in the same way that a person is entitled to know his/her own credit rating. One must be given the opportunity to discuss or amend a misleading or false report and the only way to do so is to disclose these reports. As stated above, those who are honest and forthright will give the same report whether it is confidential or not.*

...

Conclusion

The intention of the FOI legislation is to make a person's private affairs known to him/her so that the accuracy and completeness can be verified. The University must not be seen to be 'protecting its sources' at the expense of supporting its employees. A referee should not receive privileged treatment based on his/her 'expertise' or

> *position of authority. It is important that the rights of the referee are not jeopardised at the expense of the individual.* **There is always the possibility that the referee is wrong or biased and the individual must have the right to challenge an adverse report. The University must remain unbiased until both sides are known. It is only then that a proper decision can be made.**

56. A number of respondents who considered that the balance of public interest favoured the non-disclosure of referee reports, expressed qualifications to the effect that there needed to be a system to ensure fairness to the individual whose candidature could be adversely affected by confidential referee reports. For instance, the response to question 4.6 of the survey given by the Dean of the Faculty of Agricultural Science was:

> *No - provided there are independent arbiter(s) present to deal with matters of administrative fairness and academic objectivity and factuality.*

57. The Dean of the Faculty of Agricultural Science made some general comments in opening which are worth recording:

> *In this battle the criteria under consideration are:*
>
> *a). The unconstrained ability of a referee, internal or external, to make objective statements to and for the University about a subject, without fear of reprisal.*
>
> *b). The ability of the subject of the report to ensure the report contains no errors of fact and is fair.*
>
> *Referee reports are either from referees recommended by the subject or those selected by some other mechanism, including Dean's and Head's of Department reports.*
>
> *The pervasive effect on reports from countries that have the equivalent of an FOI Act is that they are less objective. There is considerable stress on what is good about the subject and a muted or no comment on his/her bad features, even when information is requested. This greatly increases the workload of the University and its staff in determining the true worth of the subject, to the point where such reports can border on the useless. Undoubtedly, these countries do live with an FOI Act and I believe this is associated with the provision of additional oral information which can be just as if not more damaging to the subject.*
> *The subject of a report does have a right to know why his/her submission has been unsuccessful. In the case of selection there was a 'better' candidate whilst in the case of tenure and promotion the important criteria are to encourage more meritorious teaching, research and administrative performance for a subsequent submission. The matter of internal reports from Deans and Heads of Departments should be much less of a problem* ***provided*** *the peer review system works adequately. For tenure and promotion the chairman of committee should provide a substantial report to the subject. This largely obviates problems and disruptions associated with the subject correctly or incorrectly assigning blame to unnamed referees.*

58. To similar effect are the comments of the Head of the Department of History, Professor G C Bolton, who responded to Parts 3 and 4 of the survey as follows:

> *<u>Section 3</u>: Experience suggests that few of us are able to endure the candid*

comments of our colleagues without imputing bias or hostility if those comments are unfavourable. If it is necessary to tender an adverse report on a member of staff, it is preferable to let that person know; but it is often necessary to communicate criticism in a manner which the hearer will absorb and act upon, and this does not always call for the same language as a confidential report requires. The adverse effect of open disclosure would be significant, but perhaps not substantial. However it would lead to a great increase in the expression of opinions in conversation or by telephone. A confidential written report is safer than gossip in protecting academics' careers.

Section 4: As above. If confidentiality of written reports disappears, it will be replaced by nods, winks, and informal conversations. It is important, however, that adequate mechanisms are in place to provide feedback to applicants whose careers are likely to be affected by adverse or indifferent reports about their performance.

59. Professor Bolton also provided a statutory declaration executed on 18 May 1993 in which he stated:

3. There is a strong convention in the Universities of Australia, the United Kingdom and most of the countries that once formed the British Commonwealth to the effect that referees' reports will be kept confidential. I am convinced that, if it became widely known that the University of Queensland were unable to continue that convention because of being required to allow access to such confidential referees' reports, a significant proportion of senior academics in other universities where the convention applies will either refrain from giving the University of Queensland any reports or will modify their content. I believe that such a situation would significantly disadvantage the University.

4. I base the views I expressed in the preceding paragraph in part on an incident that occurred at Murdoch University.

A referee who was a professor in the United Kingdom had been critical of a Murdoch applicant also from the United Kingdom. A professor at Murdoch who hailed from the United States of America and who was unsympathetic to the convention of confidentiality, took it upon himself to make the Murdoch applicant aware of the unsatisfactory reference he had been given. The Murdoch applicant, acting on the information provided by the American professor, challenged the referee publicly and intemperately to his considerable discomfort.

As a result, the referee complained strongly to Murdoch University and to the Australian Vice-Chancellor's Committee that Murdoch had breached the convention. The reputation of Murdoch University suffered significantly as a result.

5. I do not suggest that the University of Queensland would be open to the same criticism as Murdoch University was in the circumstances described in the preceding paragraph if the University did no more than abide by the law of the State of Queensland. Nevertheless, it is my firm belief that the University would be cut off from international sources of important information.

...

> *8. My experience of references written in the United States leads me to believe that providing access to references would result either in the total absence of critical comment or in the exploitation of ambiguity such as was seen when a referee told a prospective employer that, 'You would be fortunate indeed if you could persuade Dr Blank to work for you'.*

60. The University has also filed a statutory declaration executed on 18 May 1993 by Professor Bruce Rigsby, Professor of Anthropology and Head of the Department of Anthropology and Sociology. Professor Rigsby stated that he immigrated to Australia in 1975 after teaching anthropology for nine years at the University of New Mexico in the United States of America, and continues:

> *3. After shifting to Australia, I became aware of the considerable differences in interpersonal and written style between the system of making appointments in Australian universities and other countries derived from the United Kingdom, on the one hand, and those in the USA, on the other. I believe that references in the USA are not as candid as those that are customarily written in the Anglo-Australian system, and this so is because of the different attitudes to the obligations of confidentiality in the two systems.*

61. Paragraphs 8-12 inclusive of Professor Rigsby's statutory declaration repeat the views which he initially expressed in his response to the survey, as follows:

> *8. Promotion is a sensitive matter to our academic staff, to the point that many do not wish their colleagues to know even that they have applied for promotion, because they would be severely embarrassed by public knowledge of an unsuccessful application. Some unsuccessful applicants are simply unable to accept a less than fulsome acceptance of their claim to merit promotion, and their reactions range from hurt withdrawal to aggressive rejection of the Board President's and Committee Chair's attempts to advise them how to strengthen a future application, not to mention the Head's attempts to counsel them and to get them back on track to improve or increase their work and have another go. I am certain that disclosure of my comments as Head and of my identity would adversely affect my management of staff where I have written negatively about those staff, say, to assess their research and publications as average or weak or to note that I have reprimanded them for engaging in consensual sexual relationships with students they are teaching or supervising. In my own and other Departments I have seen unsuccessful promotion applicants go off the rails, withdraw and do minimal academic work, as well as attack their colleagues and otherwise act the rogue.*
>
> *9. Disclosure of my name and Head's comments (which are often made in consultation with other senior staff) where negative or less than fully positive would surely exacerbate a touchy situation and make the management of staff more difficult. I can easily imagine some of my staff verbally and even physically assaulting me or others, not to mention talking about the matter to other staff and students publicly and privately. Even more likely would be increased angry confrontations and arguments in staff meetings and elsewhere. Such events increase tensions within Departments and divert attention away from our teaching and research. I know what it is like to have an outraged staff member spreading their anger and fury through the corridors, offices and classrooms. Disclosure of confidential reports must increase the incidence of such anger and consequent tensions.*

10. The knowledge that, on each occasion I have been Head of Department, I would return to the Departmental staff to work under the Headship of my successor has also been a factor in forming my views about the effect knowledge of disclosure would have on what I would write in references and reports.

11. I would be less inclined to give full and frank reports if they are to be disclosed, say, due to an FOI request. I'm not a fool and there are many situations where the easiest course of action is to remain silent or to mute one's opinion or assessment. In fact, academics generally will be less inclined to give full and candid reports if confidentiality is removed from our reports. Our collegiality is contingent and fragile such that our ability to work together in teaching and research would be diminished significantly if we come to know every less than positive thing that our colleagues think and say about us in reports. By and large, we're a lot who find criticism hard to take.

12. It will no doubt work a sea change in conventional practices of openness and directness in writing referees' reports for appointments, promotions, etc. in Australian universities. That change does not bode well for maintaining high standards of forthrightness in writing reports. A completely open system of disclosing written reports will lead people to circumvent it by using the telephone even more than they do now to seek and give fuller information and frank opinions. Many American reports read as though their authors were looking over their shoulders and monitoring what they say in anticipation of an FOI request.

62. The University has also filed a statutory declaration executed on 18 May 1993 by Professor A B Abernethy, Head of the Department of Human Movement Studies. Professor Abernethy states:

2. I have had experience both at this University and elsewhere of being asked to write referees' reports about applicants for positions on university staff and for promotion. My experience has been largely in Australia and New Zealand and, save for two exceptions that are the subject of subsequent paragraphs, I have always been under the belief that universities treat such reports as confidential as a matter of convention.

3. On one occasion, I agreed to provide a reference for a person who was applying for an academic position at the University of Canberra. I marked the report 'confidential' but the University responded that it would be unable to use a reference that was confidential because it was the policy of that University to make references available to applicants. The University asked me if I was prepared to remove the requirement of confidentiality. I was loathe to do this because of my view that the convention I have referred to is highly beneficial to the operation of Universities in Australia, but in the end I did so. I did this only because I wanted to help the individual making the application and I knew that, not only was there nothing adverse in the report I was making, but it was, in fact, strongly supportive. Had it not been the case, I would have refused to provide the reference unless the University agreed to keep it confidential.

4. The second exception occurred when I was asked to be an external person involved in a promotion process at the University of New England (Northern

Rivers). There the reports by Heads of Centres and Deans can be seen by the applicants about whom the reports are made. I was interested, but not altogether surprised, to find that there was no relation between what individual Deans and Heads said about an applicant in their written reports on the one hand, and what the same Head or Dean said about the same applicant in the oral contributions made during the promotion process. I believe the process at the University of New England was adversely affected to a significant extent by the disparity I observed between the written reports and the oral contributions.

...

10. I am convinced that assessments of academic staff will be different in content and style than they presently are if the convention of confidentiality is abandoned ...

12. I believe that people writing referees' reports or reviewing journal articles will write in blander terms if the reviews are not confidential and their identities are revealed for a number of reasons that include a desire:

(a) to avoid undermining collegiality within a Department or an area of academic specialisation;

(b) to avoid undermining individual personal relationships between the writer and the subject;

(c) to avoid unnecessarily creating tensions and hostility by revealing alleged shortfalls in staff performance, in an unnecessarily hurtful and brusque form.

63. Finally, the University has filed a statutory declaration executed on 14 May 1993 by Professor Brian Wilson, the Vice-Chancellor of the University of Queensland. Professor Wilson's statutory declaration draws together all the strands of the University's case for exemption in a balanced exposition, and I think it deserves to be set out in full. Professor Wilson stated:

2. I have had extensive experience in academic and research institutions, as a student, staff member and administrator for a period of over forty years. My experience has been obtained in Ireland, Canada, and since 1979, Australia.

3. I am the Chief Administrative Officer of the University. In the performance of my duties I am guided by the Mission and Goals of the University, a copy of which is attached and marked as Exhibit 1.

4. In seeking the 'promotion of intellectual rigour', 'the achievement of excellence' and the 'maintenance of the highest intellectual and ethical standards', the University must adopt personnel assessment practices which ensure that those academic staff who are contributing most to fulfilment of the Mission are promoted. If the staff who are best fulfilling the Mission are promoted, they will be encouraged to remain at the University and others will be encouraged to emulate their achievements. The best personnel assessment decisions can only be made if as much accurate information as possible is placed before the determining authority.

5. The University must, in formulating these practices, also strive to maintain a workplace environment which is conducive to its academic staff's efforts to achieve.

6. In my experience of human nature, it is almost universally true that praise is more welcome than adverse comment. Two points flow from this. One is that adverse comment will frequently, but not always, cause upset and resentment to the person about whom it is made. The other is that people wishing to maintain a relationship with the subject of their adverse comment, who know the subject will learn of it, will often refrain from making the comment at all or temper its content accordingly.

7. The second point is true to some extent in all relationships whether they be personal or in the workplace. It may arise out of a natural tendency towards tact or a desire not to strain the relationship. It may arise because of fear of retaliation if the comment is resented.

8. The amount of tact seen as necessary will depend on the nature of the relationship and the need to continue it, the level of concern for the other party and the adverse consequences that may flow from resentment of the comment.

9. From my experience as a supervisor of general staff, I have seen that normal superior/subordinate relationships in employment involve both working relationships and relationships at a personal level. In deciding whether, and if so how, to convey an adverse comment to a staff member, a supervisor will be influenced by all the considerations referred to above. Adverse consequences in this situation might include loss of personal rapport with a subordinate, disruption of the office by the subordinate or a retaliatory personal attack by the subordinate.

10. In a supervisor/subordinate relationship the scope for retaliation may be seen as limited because the subordinate can do little to affect the supervisor's standing in the organisation. It is, however, possible by means of rumours or allegations of harassment, discrimination, other impropriety, or mismanagement for a subordinate to strike back in resentment.

11. It may be argued by some that it is wrong for public servants to react to concerns for personal relationships, worry at disruption of an office or fear of reprisals. Whether that be the case or not, public servants are human beings and in my experience, possible consequences will be taken into account in the preparation of adverse comments.

12. A consideration of public interest factors should involve what is in fact likely to happen if referees reports are disclosed, not what might or might not happen in an artificial model where everyone was forthright, had no tact and had no fear of the consequences of their statements.

13. The relationship between an academic referee and a staff member of a University is significantly different from a normal supervisor/subordinate relationship.

14. Within this University the basic structure of academic staff administration is

the Department. For administrative purposes a Department is under the control of a Head of Department. Within a Department staff members are appointed as Professor, Reader, Senior Lecturer or Lecturer.

15. *A Professor has no general power of supervision over a less senior staff member unless he or she is also Head of Department. A Head of Department need not be drawn from the ranks of Professors and in some cases, Heads have had administrative control over staff with superior academic rank.*

16. *A Department works on a collegial system whereby all staff, regardless of rank are a part of a team. Even on reaching the rank of Professor a staff member is expected to work on an equal footing with other staff members in preparing and presenting courses, marking examinations, conducting joint research and publishing joint papers.*

17. *In addition to the need for co-operation in carrying out their duties staff rely on other staff of the Department to comment on their applications for research funds, special studies programs, promotion and tenure. These comments come from various sources within a Department. They are not given by one person. In these cases the subject of a reference one day may be the referee for another matter the next.*

18. *Even the role of the Head of Department cannot be seen as solely supervisory. Heads must also be part of the team so far as many of their activities are concerned. This is particularly the case when one considers that the Head of Department position is not seen as a permanent appointment. Heads of Department are appointed for a fixed term. A person who has made an adverse comment in one year as a Head of Department may find the subject has become the Head of Department the next year.*

19. *The relationships within a Department should therefore be seen as largely the interaction of academic equals rather than the normal supervisor/ subordinate structure. All staff must co-operate to further the purposes of the University.*

20. *The collegial system extends beyond the confines of any one university. There are many specialist fields where the number of academics is limited. In Australia a few specialists may be called upon to co-operate in the formation of plans for joint research projects, publication of joint works and organisation of national and international conferences.*

21. *In addition academics in the same field of study rely on one another for objective comments on publications in refereed journals, research applications, job applications and applications for promotion and tenure.*

22. *This community of scholars extends around the world.*

23. *In light of my knowledge of the operation of the collegial system, I consider that although some referees would continue to provide frank reports if it was known that reports would be disclosed to their subject, by far the majority would not. This would have a substantial adverse effect on assessment of*

academic staff. The combination of factors referred to above would lead most academics to refrain from completely open comment.

24. *I have had previous experience in Canada in the evaluation of candidacies for appointment and promotion based, in part, on input from individuals living in the United States. At least when I was there 15 years ago, the freedom of information legislation had, to a large extent, eliminated written evaluations other than platitudinous statements. In my experience, considerable follow-up of opinions was carried out by telephone with the results transmitted orally to selection committees. This process not only provides incomplete, and off-the-cuff information but arrives at the Committee moderated through the interpretation of the person who has communicated by telephone. Clearly this is less than an optimum approach to providing accurate information for the assessment of individuals for promotion.*

25. *If a system of bland reports followed by oral statements prevails the University runs the risk of either not possessing all the relevant information on which to make an assessment or, in some cases, having individual decision-makers relying on irrelevant material; in the latter case leaving the applicant with little or no chance to respond.*

26. *If disclosure was made compulsory, certain referees would no doubt continue to provide frank reports. In those cases, where a subject is made aware of adverse comments, there is likely to be a substantial adverse effect on the management of academic staff.*

27. *Within a Department disclosure is likely to disrupt personal relations between staff and lessen the level of co-operation between staff, reducing the chance of the University achieving its Mission. Outside the University it is likely to lead to a reduction in co-operation between staff in different institutions and the lessening of the standard of overall academic achievement.*

28. It is further likely to lead in some cases to acts of retaliation by means of biased reports from the subjects of adverse comment on an application of one form or another by the referee. False or imperfect information supplied in these circumstances will make it more difficult for the University to make correct decisions in the assessment and management of its personnel and other resources. Biased reports will also affect the ability of funding organisations to assess applications and refereed journals to select the best articles for publication lessening the benefit of research to society.

29. I consider that there is a benefit to the University and its staff members in ensuring the provision of the substance of adverse comments to the staff members concerned. It allows them to defend themselves in the course of their application and to work to improve any perceived weaknesses in the future.

30. Release of referees' reports, however, with the associated problems discussed above, is not the best way to achieve this. The current policy for all tenure and promotions committees within the University is that the committee discuss any relevant adverse comment with the applicant. This serves both the purposes referred to in paragraph 29.

31. In order to strengthen this provision I have instructed staff that a policy be prepared for consideration by the University Senate that a written statement of adverse comments be provided to each applicant. This procedure will provide the applicant with the substance of adverse comments without the need to identify referees.

32. In addition to these measures the University has introduced a system of regular staff appraisals where members of a Department meet with their Head of Department to discuss their performance and goals for the future. A copy of a booklet distributed to all members of academic staff in relation to staff appraisal, is attached and marked Exhibit 2.

33. I do not believe the anonymity of referees could always be protected simply by removing their name or signature from references. Statements often appear in references which could make the identity of the referee clear to the applicant. Handwriting and even typeface may disclose identity if the choice of suitable referees is narrow. An extract of the subject of comments will protect the identity of the referee. A copy of the document with names removed will not always do so.

34. In my experience in Australia, there is a well founded convention that referees' reports and the circumstances surrounding them will be kept confidential.

35. If this confidentiality is to be ensured it extends to withholding the fact that a person has been suggested as a referee, has been requested to provide a report, and/or has in fact provided a report.

64. Exhibit 2 to Professor Wilson's statutory declaration is a copy of a document entitled "Staff Appraisal Booklet for Academic Staff". Exhibit 2 explains that following the 1991 award restructuring agreements for academic staff, the University of Queensland has introduced a staff appraisal system for staff development purposes. The system extends to all staff of the University.

A staff appraisal is described as "*a confidential exchange between a staff member and a Departmental colleague. It constitutes an agreement about the quantity and quality of future work, based on a mutual appreciation of past performance.*" Exhibit 2 explains the reasons for introducing the staff appraisal system, one of which is Departmental planning:

> *Although many academics work independently, much of the work of the University, such as its teaching programs, is the corporate responsibility of the Departments. More and more, Departments are becoming management units, responsible for planning, resource allocation, financial management and various kinds of quality assurance. In these matters of corporate responsibility, Departmental staff work as a team. Planning the allocation of work and monitoring its progress become inescapable Departmental responsibilities. This system of staff appraisal helps the Department manage itself while maintaining the principle of collegial responsibility. It can be a positive tool for realising Departmental plans and for improving Departmental performance.*

65. The booklet states that one of the objectives of the staff appraisal policy is "*the provision of constructive feedback about performance*". The following aspects of the scheme as set out in the booklet should be noted:

> *the key element of staff appraisal is a meeting between the staff member and a Departmental colleague - usually, but not always, the Head of Department - to discuss what the staff member has done in the last twelve months, and to plan the next year's work.* (page 8)
>
> *in any particular instance, staff appraisal should incorporate*:
>
> > *discussion of the work undertaken by the staff member during the past 12 months;*
> >
> > *an assessment of performance against previously agreed standards or goals;*
> >
> > *regular information and guidance about performance;*
> >
> > *joint setting of goals for the following year;*
> >
> > *clearly defined plans for actions which will help the individual and the Department to work jointly to further the staff member's effectiveness and academic development as well as the Department's goals;*
> >
> > *a written record of the review discussion and the agreements reached during it. ...* (page 9-10)
>
> *The aims of the staff appraisal meeting reflect those of the staff appraisal process as a whole:*
>
> > *to acknowledge the staff member's achievement and strengths;*
> >
> > *to identify needs for development;*

> > > *to help the Department and individuals to make plans that will assist the staff member's career; and*
> > >
> > > *to further the academic discipline pursued in the Department and promote any other aims of the Department.*
> >
> > The staff member's self-review will provide a means for both the supervisor and the reviewee to identify current and potential strengths as well as any problems, and to plan for the future. (page 16)
>
> *documentation arising from this scheme will remain confidential to the reviewer, the reviewee and the Head of Department, and will not be used as part of any other process ...*
>
> > *There is no direct link between staff appraisal for development purposes and other evaluative processes such as probation review, promotion or tenure review and SSP/PEP consideration. The documentation may not be used in any of those processes.* (page 12-13)
>
> *the staff appraisal scheme described in this booklet has been developed to conform with the ruling of the Australian Industrial Relations Commission in 1991 that the scheme shall be for developmental purposes only, and that it shall be introduced on a trial basis during its first year. Revisions to the scheme may be required in the light of later rulings of the Commission.* (Note to the booklet)

66. The applicant, Dr Pemberton, did not file formal evidence in support of his case, though his written submission highlighted those parts of the University's evidence (specifically those responses to the survey contained in exhibit 5 to Mr Porter's statutory declaration which favoured disclosure of referee reports) which support the applicant's case for disclosure.

67. I turn now to deal with the University's claims for exemption. The logical starting point in a dispute over access to confidential referee reports is s.46 of the FOI Act, which deals with matter communicated in confidence.

Application of s.46 of the FOI Act

68. Section 46 of the FOI Act provides as follows:

> ***46.(1)*** *Matter is exempt if -*
>
> > *(a) its disclosure would found an action for breach of confidence; or*
> >
> > *(b) it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*
>
> ***(2)*** *Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless its disclosure would found an action for breach of confidence owed*

to a person or body other than -

(a) a person in the capacity of -

(i) a Minister; or

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

(iii) an officer of an agency; or

(b) the State or an agency.

Application of s.46(2)

69. I undertook a detailed analysis of s.46 in my reasons for decision in *Re "B" and Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported). At paragraph 35 of my reasons for decision in *Re "B"*, I explained that s.46(2) is generally the logical starting point for the application of s.46 of the FOI Act:

> *35. FOI administrators who approach the application of s.46 should direct their attention at the outset to s.46(2) which has the effect of excluding a substantial amount of information generated within government from the potential sphere of operation of the s.46(1)(a) and s.46(1)(b) exemptions. Subsection 46(2) provides in effect that the grounds of exemption in s.46(1)(a) and s.46(1)(b) are not available in respect of matter of a kind mentioned in s.41(1)(a) (which deals with matter relating to the deliberative processes of government) unless the disclosure of matter of a kind mentioned in s.41(1)(a) would found an action for breach of confidence owed to a person or body outside of the State of Queensland, an agency (as defined for the purposes of the FOI Act), or any official thereof, in his or her capacity as such an official. Section 46(2) refers not to matter of a kind that would be exempt under s.41(1), but to matter of a kind mentioned in s.41(1)(a). The material that could fall within the terms of s.41(1)(a) is quite extensive (see* Re Eccleston *at paragraphs 27-31) and can include for instance, material of a kind that is mentioned in s.41(2) (a provision which prescribes that certain kinds of matter likely to fall within s.41(1)(a) are not eligible for exemption under s.41(1) itself).*

70. The breadth of what may be encompassed within the phrase "deliberative processes involved in the functions of government" in s.41(1)(a) of the FOI Act was examined in my reasons for decision in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (Information Commissioner Qld, Decision No. 93002, 30 June 1993), now reported at (1993) 1 QAR 60, and for present purposes I draw attention to what I said at paragraphs 27-29 of *Re Eccleston*. It is unnecessary to refer in detail to that passage since the respondent, in its written submission, accepted what I consider to be clear beyond doubt, namely, that the contents of referee reports, submitted for the purpose of use in selection processes for appointment or promotion of University staff, comprise matter of a kind mentioned in s.41(1)(a) of the FOI Act; i.e. opinion, advice or recommendation that has been obtained, prepared or recorded, or a consultation or deliberation that has taken place in the course of, or for the purposes of, deliberative processes involved in the functions of the University.

71. The words of s.46(2)(a)(iii) raise an issue of some importance in this case. The phrase "a person in the capacity of ... an officer of an agency" was clearly, in my opinion, intended to distinguish acts

done by a person who is an officer of an agency (as that word is defined in s.8 of the FOI Act), in his or her capacity as such an officer (i.e. acts done for and on behalf of the person's employing agency, in the course of performing his or her duties of office) from acts done by the person in other capacities, e.g. in a purely private or personal capacity.

72. Segment 2 of the University's survey questionnaire (see paragraph 37 above) contained questions relating to this issue. The vast majority of senior academics who responded answered affirmatively to question 2.2: "If you are a Pro-Vice-Chancellor, Dean or Head of Department, when you provide a reference for, or comments on, a member of staff of this University, do you regard yourself as doing so as an officer of this University." The majority perception, in this instance, accords with the correct legal position. It is the duty of Heads of Department, Deans and Pro-Vice-Chancellors to accept primary managerial responsibility for the effective functioning of their respective organisational units, in furtherance of the mission and goals of the University. It is clear from the evidence before me that for certain kinds of promotional procedures in place at the University, Heads of Department, Deans and Pro-Vice-Chancellors are required, as part of their duties of office, to provide reports or comments on the suitability for promotion of aspiring members of academic staff of the organisational units for which they have responsibility. Quite apart from specific duties imposed in accordance with the University's internal promotional procedures, I note that it has been held by the Victorian Administrative Appeals Tribunal (the Victorian AAT) that a Head of School, who voluntarily supplied a written reference for a staff member (who was applying for a position at another tertiary institution) did so as part of his duties and in his capacity as Head of School: see *Re De Souza-Daw and Gippsland Institute of Technology* (1987) 2 VAR 6 at p.8.

73. It was conceded in the University's written submission (and the concession is, in my opinion, clearly correct) that documents 1, 18, 19 and 20 are reports on Dr Pemberton written by academics acting in their official capacity as Head of Department, Dean or Pro-Vice-Chancellor, within the University. The University's submission accepts that documents 1, 18, 19 and 20 are not eligible for consideration for exemption under s.46(1) of the FOI Act, but argues that they are exempt under s.40(c) or s.41(1) of the FOI Act. I find that documents 1, 18, 19 and 20 are not exempt matter under s.46(1) of the FOI Act, by virtue of s.46(2) of the FOI Act.

74. Of the other documents in issue, documents 2, 14 and 22 were written by persons who were officers of the University at the time they prepared the documents, but the University argues that the documents were not written by the authors in their capacities as officers of the University. That raises a significant issue which I will consider first. The rest of the documents in issue (documents 3, 5, 6, 7, 8, 10, 11, 12, 13, 16(a), 16(b), 21 and 24) were either written by, or contained identifying details of, persons who clearly were not officers of an agency (as that term is defined for the purposes of the FOI Act) within the meaning of s.46(2) of the FOI Act, all of those authors having been academics at interstate or overseas universities. The referee reports, or identifying details, of academics at interstate or overseas universities are eligible for consideration under s.46(1) of the FOI Act, and their status under that provision is considered at paragraphs 88-110 below.

75. As noted at paragraphs 14 and 26 above documents 2 and 14 are completed *pro forma* "Assessment of Teaching Ability" referee reports from Dr Pemberton's 1982 and 1986 applications for promotion, respectively. Document 22 is a referee report obtained in connection with Dr Pemberton's 1992 application for promotion from Reader to Professor. The University's written submission made the following arguments in respect of documents 2, 14 and 22:

> *Each is written by an employee of this University but the author in each case was selected not in that capacity but because of his detailed personal knowledge of the relevant facet of Dr Pemberton's activities. It is not part of the duties and responsibilities of staff of the University to provide such teaching reports and referees' reports. They are provided voluntarily. The views expressed are those of*

the individuals in question and are not provided for and on behalf of the University.

The writers of these documents are covered by the findings in [Re Healy and the Australian National University (Commonwealth AAT, No. N84/445, 23 May 1985, unreported)], *paras 17 and 62. The University adopts the view in relation to referees' reports generally that it is the writer's "personal standing in the community of scholars which gives value to his assessment of the candidate ..., not the appointment which he holds".*

The view taken in [Re De Souza-Daw] *at 8 of the reference letter in that case turns on the special relationship that a Head of Department holds in relation to the members of staff of that Department and does not weaken the application of the finding in* Healy *to the general case.*

Therefore, any action for breach of confidence would not be brought by the writers "in the capacity of ... an officer of an agency".

76. The University places reliance on paragraphs 17 and 62 of the Commonwealth AAT's decision in *Re Healy and the Australian National University.* The documents under consideration in those segments of the *Healy* decision were referee reports prepared by a Professor in public history at the Australian National University in respect of a Research Fellow at that University, in connection with the Research Fellow's applications for appointment at other tertiary institutions. The Tribunal said, at paragraph 17, that for reasons given subsequently in the decision, it had come to the conclusion that: "*The reports are essentially supplied by the academics on their own personal behalf and not by or on behalf of their employing universities*.". The reasoning in support of that conclusion appears at paragraphs 60-62 of the Tribunal's decision:

> *60. ... Each document relates to the applicant's suitability for a particular appointment, both in terms of his academic calibre and in terms of his general suitability to be a member of the staff of the university or institution.*
>
> *61. Professor Mackie said that such reports by referees are relied on by universities throughout the world as a means of assessing candidates for appointment as members of their academic staff. He pointed out that it is now common for applications for such appointments to be made by persons from all over the world. The body of scholars in the world in any field of study is now so large that it is impossible for universities to have a knowledge of all the academics in that field; nor is it practical for them to bring all candidates for interview. It is necessary that they should be able to rely on assessments by academics of standing in the relevant fields. For that reason a system of obtaining such reports by referees has become established. Professor Mackie said that it was fundamental to the maintenance of standards of scholarship by universities throughout the world that they should be able to rely on the accuracy and completeness of such reports. Most academics of standing within their respective fields regarded themselves as having an obligation to the international community of scholars to provide such reports when requested to do so. They were always sought and usually given in confidence.*
>
> *62. Mr Plowman* [the Registrar of the Australian National University] *suggested that the confidentiality which attached to such reports belonged not only to the academics who supplied them but also to their universities. He said that frequently the reason why references were sought from them was that they held a particular post in a university. Professor Mackie did not agree with that view. He considered that the reports were essentially supplied by the*

> *academic personally. We are inclined to accept that this is so. It is the academic standing of the referee which is of importance. That will often be exemplified by the academic appointment which he holds within a particular university for the time being but it is his personal standing in the community of scholars which gives value to his assessment of the candidate for appointment, not the appointment which he holds.*

77. In respect of Dr Pemberton's most recent application for promotion from Reader to Professor, the criteria for promotion are those set out in the document quoted at paragraph 32 above under the heading "CRITERIA". They are, briefly, an international reputation for outstanding research and scholarship, outstanding teaching achievements, research team leadership, guiding the development of colleagues and post graduate students, administrative accomplishments of demonstrable benefit to the University and professional peer recognition/professional leadership. In respect of Dr Pemberton's previous promotion applications during the 1980s, the main criteria for promotion appear to have been teaching experience, ability and performance; scholarship and original achievement (as evidenced by research and publications); and service to the University (e.g. efficient performance of administrative tasks and committee work).

78. When the opinions of referees, expert in a particular field of scholarship and/or research, are sought as to the reputation of a candidate for promotion in respect of the candidate's scholarship, research and original achievement (which I understand is to be primarily assessed by reference to the candidate's publications, participation in scholarly seminars, success in obtaining research grants, election to learned academies, honorary degrees, awards and prizes) I think it is correct to say, as was found by the Commonwealth AAT in *Re Healy*, that a referee is approached to provide his or her opinion as an individual who has acquired a personal reputation for excellence in the international community of scholars, rather than in his or her capacity as an officer of a particular tertiary institution. It may not be necessary for such a referee to have personal knowledge of the candidate, provided the referee is in a position to evaluate the candidate's scholarship and research (e.g. as evidenced in the candidate's publications).

79. I think the position is less clear, however, when a referee is approached to obtain an opinion on the performance of a candidate for promotion in respect of his or her teaching experience, ability and performance, and the position is different again when a referee is approached to evaluate a candidate's contribution to the administration of the University. Referees in respect of those criteria will be approached precisely because they are in a position to have personal knowledge of the performance of the candidate for promotion in respect of those criteria. The capacity to comment in respect of the contribution of a candidate for promotion to the administration of the University could ordinarily only have been acquired in the referee's capacity as an officer of the University.

80. In respect of the criterion of teaching experience, ability and performance, the University's instructions for the completion of "Assessment of Teaching Ability" reports state that "referees should have first-hand knowledge of the candidate's teaching and should cover as many aspects of the candidate's teaching as possible." The relevant guidelines for the University's internal promotion processes (from lecturer to senior lecturer, and from senior lecturer to reader) during 1982 and 1986 (i.e. the years to which documents 2 and 14 relate) both state as follows:

> *Teaching shall be evaluated with the aid of reports from -*
>
> *(i) staff members who have had the opportunity to observe the candidate's work;*
>
> *(ii) past students; and exceptionally,*

> *(iii) present students.*
>
> *The importance of the objective evaluation of teaching is stressed.*
>
> *...*
>
> *A candidate for promotion provides the names of not more than two referees who can be contacted with regard to teaching ability. The candidate's Head of Department is also asked to nominate two additional persons to be consulted. Those nominated by the candidate and the Head are requested to provide a confidential assessment on a special form. Candidates are encouraged also to provide their own evidence of teaching ability.*

81. In the present case, the persons who were approached to act as referees in respect of Dr Pemberton's teaching experience, ability and performance were in fact officers of the University who had acquired their first-hand knowledge of Dr Pemberton's teaching by virtue of the fact that they were officers of the University. However, it does not necessarily follow that referees of a candidate's teaching ability act in the capacity of officers of the University.

82. While the guidelines refer to teaching being evaluated with the aid of reports from staff members (i.e. officers of the University), these were guidelines only and no doubt a degree of flexibility was available. For instance, if the candidate for promotion had recently taught at another tertiary institution, or if a potential referee with first-hand knowledge of the candidate's teaching had transferred to work at another tertiary institution, it would be open to the University to approach academics at other tertiary institutions (who have the requisite first-hand knowledge of the teaching experience, ability and performance of a candidate for promotion) to act as referees. This suggests that the essential qualities which make a person an acceptable referee of a candidate's teaching ability are that the referee is acknowledged as personally having sufficient experience and expertise to make informed judgment, and that the referee has sufficient personal knowledge of the candidate's teaching, wherever or however that knowledge was acquired.

83. Moreover, the evidence makes it clear that an officer of the University approached to act as referee in respect of the teaching experience, ability and performance of a candidate for promotion is not obliged to so act. The relevant guidelines state that the willingness of the nominated person to act as referee must be ascertained in advance. Certainly it does not appear to have been part of the duties of office of staff of the University (other than Heads of Department), to provide referee reports of this nature. While the issue is not free from doubt, I think the better view is that documents 2 and 14 were provided on a voluntary basis by individuals considered to be of sufficient eminence in the academic community to act as referee of the teaching experience, ability and performance of a colleague, rather than in their capacity as officers of the University.

84. Dr Pemberton, in his written submission, took specific objection to the argument in the first paragraph of the University's submission, set out at paragraph 75 above, to the effect that the author of document 22 was not selected as a referee in his capacity as an officer of the University but because of his detailed knowledge of the relevant facet of Dr Pemberton's activities. Dr Pemberton argued that:

> *... if* [document 22] *purports to provide a "detailed knowledge" of my research then the contents of the report are fraudulent. The reason I say this is that:*
>
> *1. the referee was an employee of the University, ...*
>
> *2. There is no past or present employee who has detailed knowledge of my*

> *research work in the Molecular Biology of Prokaryotic Tetrapyrrole and Tetraterpenoid Biosynthesis and the Molecular Biology of the Bacterial Degradation of Xenobiotics; not one but a number of international referees would be required. Extraordinarily, given that one of the conditions for promotion was that the applicant be of international standing, I have no idea whether or not international referees were chosen and I was not given any opportunity to nominate such persons.*
>
> *For the University to claim that this document was not written for and on behalf of the University is simply a nonsense; clearly the document was produced as part of the process which examined my application for promotion, and it was produced by a University employee ...*

85. In fairness to the author of document 22, I should say that neither that author, nor document 22 itself, purports to provide a detailed knowledge of Dr Pemberton's research. (The words to which Dr Pemberton objects are the words of the authors of the University's submission.) There is no basis for suggesting that the contents of document 22 are fraudulent on that account. Dr Pemberton's remarks about the failure of the University to seek out international referees in Dr Pemberton's specialised field may well be fair comment on the adequacy of the University's selection process. However, I do not think it is improper for a scientist of Professorial calibre within the University, who works in the same general field as Dr Pemberton, to comment on the quality of Dr Pemberton's published work in his specialised field. Whether those comments are deserving of much weight compared to the comments of referees of international standing in Dr Pemberton's specialised field is a matter for the judgment of the selection committee. The real issue for present purposes, however, is the capacity in which the author of document 22 provided that report. In that regard, I think Dr Pemberton's submission is mistaken.

86. The author of document 22 was, at the time of creating document 22, an officer of the University, and was requested by the Vice-Chancellor to provide a reference addressing the selection criteria applicable to Dr Pemberton's 1992 application for promotion from Reader to Professor. The relevant guidelines (reproduced at paragraph 32 above) make it clear that the Head of Department, Dean and Pro-Vice-Chancellor with responsibility for the organisational unit in which the candidate for promotion is employed, are obliged to provide reports on the candidate's claims for promotion. In addition, other referees may be nominated by the Head of Department and approached by the relevant Promotions Committee. That is what occurred with respect to the author of document 22. It is clear that the referee was approached because the referee was in a position to have knowledge of Dr Pemberton's work, but it is also clear from the terms of the approach that the author was under no obligation to provide a referee report. I think the better view is that the author of document 22 was acting in a personal capacity as an eminent scholar and researcher able to comment on Dr Pemberton's work, and that document 22 was provided by the author in a personal capacity and not as an officer of the University.

87. I am satisfied, therefore, that documents 2, 14 and 22 are not excluded from consideration for exemption under s.46(1) of the FOI Act, by virtue of s.46(2).

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

88. In *Re "B" and Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported), I considered in detail the elements which must be established in order for matter to qualify for exemption under s.46(1)(a) of the FOI Act. The test of exemption is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency or Minister faced with an application, under s.25 of the FOI Act, for access to the information in issue (see paragraph 44 in *Re "B"*). I am satisfied that, in the circumstances of this application, there are identifiable plaintiffs (the authors of relevant referee reports) who would have standing to bring actions for breach of confidence.

89. There is no suggestion in the present case of a contractual obligation of confidence arising in the circumstances of the communication of the information in issue from the authors of relevant referee reports to the University. Therefore, the test for exemption under s.46(1)(a) must be evaluated in terms of the requirements for an action in equity for breach of confidence, there being five criteria which must be established:

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

(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 paragraphs 64-75 in *Re "B"*);

(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 paragraphs 76-102 in *Re "B"*);

(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 paragraphs 103-106 in *Re "B"*); 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 paragraphs 107-118 in *Re "B"*).

90. With respect to the first criterion set out in the preceding paragraph, I am satisfied that the information in issue which is claimed to be confidential information can be identified with specificity in each of documents 2, 3, 5, 6, 7, 8, 10, 11, 12, 13, 14, 16(a), 16(b), 21, 22 and 24.

91. With regard to the second criterion, the number of potential referees in respect of Dr Pemberton's rather specialised field of expertise, even internationally, is comparatively small. So, too, is the number of colleagues with personal knowledge of Dr Pemberton's work performance who would be able to provide meaningful referee reports on other promotion criteria. Dr Pemberton has therefore been able to make a series of educated guesses as to the identities of the authors of referee reports which have been withheld from him in full (he has been assisted in that regard by a process of elimination, having received a number of referee reports with the consent of the authors), and as to the identities of the authors of those referee reports which have been disclosed to him with only identifying details of the authors deleted. Dr Pemberton has received no confirmation as to whether

his educated guesses are correct, and I think that the identities of the authors of referee reports are properly to be regarded as having the necessary quality of confidence. Dr Pemberton certainly has no knowledge of the contents of the referee reports which have been withheld from him in full.

92. In his written submission to me, Dr Pemberton made the following comments:

> *Many experienced academics will agree with the observation that most if not all committees "leak" information. ...*
>
> *I agree in part with the comment by Professor Walker* [Dean of the Faculty of Law, in his response to the survey questionnaire] *that "very few academics now feel any inner moral obligation to preserve the privacy of communications discussed in University committee meetings". What I disagree with is that this is a recent phenomenon brought on by the enactment of FOI legislation. What past and present applicants for promotion, referees and committee members must assume is that there is a high probability that the confidential comments or submissions have been "leaked", and used in ways other than those intended. An additional complicating factor is the sheer numbers of people who sight the promotion documents. This includes the Promotions Committee (the Professorial Promotion Committee has 12 members), then there are anything up to four referees, the Head of the Department and Senior Academic staff are consulted (up to 6-8 people). Up to 25 or more persons may see the documents. Referees both nominated by the applicant and the University are sent confidential appointments and promotions documents. Since the FOI requirements differ from country to country, what safeguards are there on the redistribution of this material by international referees?*
>
> ...
>
> *The applicant has his or her application leaked, but what is worse, other information, such as the contents of referees' reports, the comments of the selection committee and other materials are released in part or whole. In the end the applicant is probably the only person who doesn't know what went on in the appointments or promotions committee. If the material is damaging then the applicant in most cases is quite oblivious to the damage; if the material is defamatory then the applicant is blissfully unaware that defamation has occurred.*

93. At paragraph 71(b) of *Re "B"*, I quoted the following passage:

> <u>*It is not necessary to demonstrate absolute secrecy or inaccessibility*</u>
>
> (b) *"The law does not require information to be absolutely inaccessible before it can be characterised as confidential. This is obvious from the nature of the breach of confidence action itself, which arises out of a limited disclosure by the confider to a confidant. ... It is clear that the publication of information to a limited number of persons will not of itself destroy the confidential nature of information ... On the other hand, it is equally clear that the disclosure of information to the public at large will destroy the confidentiality of the information. ... Whether the publication which information has received is sufficient to destroy confidentiality is 'a question of degree depending on the particular case' (citing* Franchi v Franchi *[1967] RPC 149, at 153 per Cross J)". (Gurry, pages 73-4)*

This principle was also explained and applied by the Full Court of the Federal Court of Australia in *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180.

94. It is a serious allegation that confidential referee reports are routinely leaked by academics involved in the selection process. If true, it would make a mockery of the University's policy which aims to attract, to the process of obtaining confidential referee reports, the protection of the law relating to breach of confidence. It would, for example, be reprehensible for a member of a selection committee who had access to a referee report obtained in confidence, to subsequently relay to persons not involved in the selection process details of comments provided in confidence by the referee. There is, however, no evidence before me which suggests that unauthorised disclosure, widespread or otherwise, has occurred in respect of the particular documents in issue in this case. Dr Pemberton refers to the large number of persons who see confidential referee reports, but this is inherent in the nature of the particular promotion processes established in the University. The extent of the disclosure of confidential referee reports to persons for the limited purpose of their participation in the selection process does not seem to me, having regard to the principles noted in paragraph 93 above, to be sufficient to destroy the confidential nature of the referee reports.

95. Documents 2, 10, 14 and 22 have been withheld from the applicant in their entirety. In respect of documents 3, 5, 6, 7, 8, 11, 12, 13, 16(a), 16(b), 21 and 24, the only matter withheld from the applicant comprises identifying details of the authors of referee reports, the contents of which have otherwise been disclosed to the applicant. I am satisfied that the information in issue in the documents referred to in this paragraph is not trivial and has the requisite degree of secrecy to invest it with the "necessary quality of confidence" so as to satisfy the second criterion.

96. I now turn to the third criterion referred to in paragraph 89 above, i.e. the determination of whether the matter in issue was communicated in circumstances importing an obligation of confidence on the recipient. Considerations relevant to the determination of this question are examined at length at paragraphs 76-96 of my decision in *Re "B"*.

97. In *Re Kamminga and Australian National University* (1992) 15 AAR 297, at p.306, the Commonwealth AAT, chaired by O'Connor J (President), accepted evidence from the Assistant Vice-Chancellor of the Australian National University, and the Director of the Institute of Advanced Studies of the Australian National University, to the effect that there is a convention, extremely well known to academics, that referee reports are given and received in confidence. The Tribunal found that such a convention exists and extends at least to Universities in the United Kingdom, Australia and New Zealand. Similar findings were made by the differently constituted Tribunal in *Re Healy* at paragraph 61 and following. In *Re Kamminga*, the Tribunal was dealing with s.45(1) of the *Freedom of Information Act 1982 Cth* (the Commonwealth FOI Act) which is, for practical purposes, identical to s.46(1)(a) of the Queensland FOI Act. On the basis of its finding of the existence of the convention, the Tribunal in *Re Kamminga* found that referee reports provided in connection Dr Kamminga's applications for positions as a Research Fellow at the Australian National University comprised information received by the University in such circumstances as to import an obligation of confidence. The Tribunal in *Re Kamminga* also appears to have been influenced by some remarks of the Full Court of the Federal Court in *Smith Kline and French Laboratories (Aust) Ltd & Ors v Department of Community Services and Health* (1991) 28 FCR 291 at pp.302-303, to the effect that where a referee supplies confidential information "*the understanding ordinarily would be that the prospective employer would not disclose the information to any third party*".

98. The University was aware of the above cases and included at segment 1 of the survey questionnaire referred to in paragraph 37 above, a series of questions as follows:

> *Apart from specific requests for confidentiality the University wishes to establish that there is a general convention of confidentiality for referees' reports. ...*

1.1 Do you believe there is a convention in Universities that referees' reports will be kept confidential?

1.2 Would you expect any reports you provide to be kept confidential, without specific reference to you?

1.3 In your experience does the convention (if any) extend to Australia, the UK and New Zealand?

1.4 Does the convention (if any) extend to the US and other countries? Please specify any other countries you have reason to believe which share the convention.

99. The responses from 49 Heads of Department or Deans of Faculty at the University produced an almost 100% "yes" response to questions 1.1, 1.2 and 1.3 above (see also Professor Wilson's evidence at paragraph 34 of his statutory declaration, which I accept). I note that in his written submission Dr Pemberton did not seek to dispute the existence of the convention. The University's submission in respect of the third criterion identified at paragraph 89 above was as follows:

> *The reports were tendered in confidence. Some were expressly sought in confidence. Some were expressly tendered in confidence. All are documents of the kind to which the convention of confidentiality applies.*
>
> *The convention of confidentiality referred to above is the convention referred to in* Kamminga, *para 29. The University asserts that the convention applies throughout the Universities of Australia; the United Kingdom; New Zealand; countries previously part of the British Commonwealth, and the countries of Western Europe, including Germany, Switzerland, France. In the case of each country the convention may be displaced by the practices of a particular University.*
>
> *The convention is also well understood in the United States of America, although not so widely applicable there. As a consequence, a reference to a report being sought in confidence by this University would render the report writer aware of the convention's existence and content. The writer would anticipate this University would restrict access to the report to those involved in the process for which it was sought and would not expect it to be disclosed to the subject of the report.*
>
> *The evidence contained in the declarations and exhibits supports this submission.*

100. I accept the existence of the convention referred to in the University's submission. I also accept that the convention may be displaced by the practices of a particular University. I note that the policies adopted by the University as to disclosure of the substance of some referee comments (see paragraphs 143-144 below) involve a variation from the usual understanding of the convention. I am satisfied that -

(a) documents 2, 10, 14 and 22; and
(b) the referee reports provided by those referees, identifying details of whom have been deleted from documents 3, 5, 6, 7, 8, 11, 12, 13, 16(a), 16(b), 21 and 24;

were communicated in circumstances which enlivened the convention.

101. In each case, either there were published University guidelines known to the referee which clearly stated that referee reports would be sought in confidence, or the University made it clear when

seeking the report (either by the terms of the letter requesting the report, or the use of *pro formas* clearly marked with the word "CONFIDENTIAL") that the referee report would be received in confidence in accordance with the usual convention. All of the providers of those referee reports were senior academics of considerable standing within their discipline, and considerable experience of the provision of referee reports on candidates for promotion in universities. I am satisfied that they would have been well aware of, and understood the implications (in terms of the convention) of the request for a report being put in such terms. In respect of particular referees from the United States of America (where the evidence suggests that the existence of the convention is well understood, although not so widely applied), I am satisfied that the individual referees understood that their reports would be received by the University in confidence, except to the extent that the requirement of confidentiality was waived by the author. In most instances, the providers of the referee reports themselves indicated their intention that the reports were provided in confidence, by marking them with the word "Confidential", or including some other stipulation to like effect.

102. I accept that the referee reports mentioned in the preceding paragraph were provided on the basis of a clear understanding on the part of the author of the report, and on the part of the University, that the University would restrict access to the report to those involved in the promotion process for which it was sought, for the limited purpose of being used to evaluate the claims of the candidate for promotion against relevant selection criteria. I consider that the third criterion set out in paragraph 89 above is satisfied in these circumstances.

103. Dealing with the fourth criterion set out at paragraph 89 above, I find that disclosure under the FOI Act of the matter remaining in issue would in each instance constitute unauthorised use of the relevant information. It is clear that each of the relevant referees has been contacted to ascertain his or her attitude to the disclosure to Dr Pemberton of either their report or the details which would identify them, and each has quite clearly conveyed to the University an objection to disclosure to Dr Pemberton. I am also satisfied that the relevant understanding of the scope of the convention of confidentiality ordinarily applying to these reports, was that a report would not be disclosed to the subject of the report without the consent of the author of the report.

104. It is of course the privilege of the supplier of confidential information (i.e. in the circumstances of this case, the authors of the relevant referee reports) to waive confidentiality and authorise release of the reports to the subject of the report. The University could not as a matter of law require the author of a confidential referee report to maintain confidentiality in respect of the report, in the absence of a contractual obligation binding on the author, or perhaps some legislative provision binding on the author (for example if a University statute was binding on University employees who provided referee reports). To that extent the University's new policy in respect of disclosure of referee reports (see paragraph 35 above) really does no more than recognise the realities of the relevant legal rights and obligations of the University and the authors of referee reports, in regard to controlling dissemination of those reports.

105. I am also satisfied that disclosure to Dr Pemberton of the information in issue contained in the documents mentioned in paragraph 100 above, would cause detriment to the authors of those reports (see the fifth criterion set out at paragraph 89 above). In paragraph 111 of my decision in *Re "B"*, I stated that it was not necessary to establish that a threatened disclosure of confidential information would cause detriment in a financial sense, but that detriment could also include embarrassment, a loss of privacy, fear or an indirect detriment, for example, that disclosure of the information may injure some relation or friend. In *Re Kamminga*, at page 307, the Commonwealth AAT was satisfied that there would be sufficient detriment to the author of a referee report if disclosure might occasion a loss of personal rapport with the subject of the referee report. I am satisfied that disclosure to the applicant of the information in issue contained in the documents mentioned in paragraph 100 above would cause detriment to the authors of those reports of one or more of the kinds mentioned above.

106. I am satisfied that disclosure of the matter remaining in issue which is contained in documents 2, 3,

5, 6, 7, 8, 10, 11, 12, 13, 14, 16(a), 16(b), 21, 22 and 24 would found an action for breach of confidence, and that it is therefore exempt matter under s.46(1)(a) of the FOI Act.

107. In the circumstances of the present case, no occasion arises to consider the application of any of the defences to an equitable action for breach of confidence discussed in my decision in *Re "B"* at paragraphs 119-134.

108. The documents in issue from which the only matter withheld from the applicant comprises the identifying details of the authors of referee reports (the contents of which have otherwise been disclosed to Dr Pemberton) perhaps require some further explanatory comments. In each instance, the relevant referee report was originally supplied in confidence, but the author has consented to disclosure of an anonymised version of the referee report, after being contacted following Dr Pemberton's FOI access application. In my opinion, this represents an acceptable exercise of the privilege, possessed by a supplier of confidential information which is subject to an obligation of confidence in the hands of a recipient, to selectively authorise disclosure of information which is subject to an obligation of confidence (see paragraphs 103 to 105 of *Re "B").* I am satisfied that the small amount of information still withheld from Dr Pemberton in these circumstances is capable of satisfying all the requirements necessary for exemption under s.46(1)(a) of the FOI Act.

109. The decision of Yeldham J of the Supreme Court of New South Wales in *G v Day* [1982] 1 NSWLR 24, is authority for the proposition that although a person's identity is ordinarily not information which is confidential in quality, the connection of a person's identity with the imparting of confidential information can itself be secret information capable of protection in equity (see para 137 of my decision in *Re "B").* Yeldham J said (at pp.35-6):

> *... passages in the speeches of their Lordships* [in D v National Society for the Prevention of Cruelty to Children *[1978] AC 171*] *support the view that the principles of equity which protect confidentiality should extend not only to the information imparted but also, where appropriate, to the identity of the person imparting it where the disclosure of that identity (as in the present case) would be a matter of substantial concern to the informant - see especially pp.218, per Lord Diplock; 228, 229, per Lord Hailsham of St Marylebone and 232, per Lord Simon of Glaisdale.*
>
> *... if a person is likely to suffer prejudice from the disclosure of his name, if no sound reasons of public interest or public policy exist why such disclosure should take place, and if he has obtained assurances of confidence in relation to his identity before imparting his information, I find no reason in principle why his identity should not be treated as confidential information in the same way as the material which he provides to the authorities.*

110. In *G v Day*, the identity of a person who initially supplied confidential information to a proper authority was held to be entitled to protection in equity even though it must have been contemplated that the information originally supplied would at some subsequent stage enter the public domain in the course of formal proceedings. I am satisfied that the circumstances under consideration are appropriate to attract the principles of equity which extend to protect the identity of persons imparting confidential information, even though most of the information initially supplied in confidence is subsequently disclosed. Disclosure of identity would still be to the detriment of the authors in a not insubstantial way.

Application of s.40(c) and s.41(1)

111. Section 40(c) of the FOI Act provides as follows:

> ***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.*

112. Section 41 of the FOI Act provides as follows:

> ***41.(1)*** *Matter is exempt matter if its disclosure -*
>
> *(a) would disclose -*
>
> *(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or*
>
> *(ii) a consultation or deliberation that has taken place;*
>
> *in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and*
>
> *(b) would, on balance, be contrary to the public interest.*
>
> ***(2)*** *Matter is not exempt under subsection (1) if it merely consists of -*
>
> *(a) matter that appears in an agency's policy document; or*
>
> *(b) factual or statistical matter; or*
>
> *(c) expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.*
>
> ***(3)*** *Matter is not exempt under subsection (1) if it consists of -*
>
> *(a) a report of a prescribed body or organisation established within an agency; or*
>
> *(b) the record of, as a formal statement of the reasons for, a final decision, order or ruling given in the exercise of -*
>
> *(i) a power; or*
>
> *(ii) an adjudicative function; or*
>
> *(iii) a statutory function; or*
>
> *(iv) the administration of a publicly funded scheme.*

113. The University's written submission treats its case in respect of the application of s.40(c) and s.41(1) of the FOI Act as being essentially interchangeable, which I accept that it is possible to do in the particular circumstances of this case. The University has identified a number of adverse effects on the management or assessment of the University's personnel which it claims could reasonably be expected to follow from disclosure of confidential referee reports. Some additional public interest considerations said to favour non-disclosure are referred to in the context of the public interest balancing test which qualifies s.40(c). All of the adverse effects, and additional public interest considerations favouring non-disclosure, are then relied upon in the context of s.41(1) to argue that disclosure of confidential referee reports would, on balance, be contrary to the public interest.

114. The following extracts from the submissions of both participants can therefore be regarded as referable to the application of both s.40(c) and s.41. It should be borne in mind that the University's submission was framed so as to cover all of the documents in issue, rather than just the four documents which it conceded (and I have found) were not eligible for consideration for exemption under s.46(1) of the FOI Act. Because of my findings at paragraph 106 above, I have to consider the application of s.40(c) and s.41 only to documents 1, 18, 19 and 20.

Respondent's submissions with respect to s.40(c) and s.41

115. The first major point made in the University's submission is as follows:

> *The system of referees' reports plays a key role in the assessment of the University's personnel. Selection for promotion is carried out first by area and then by central committees, the majority of whose members will not have an intimate knowledge of the performance of candidates within the University. In the case of the central committee, a candidate may not be known personally by any member.*
>
> *Those committees must rely on reports from Heads of Department, Deans and Pro-Vice-Chancellors on the performance of the candidate in carrying out teaching and administrative duties. They must rely on reports from internal and external scholars in the candidate's specialist field on the candidate's performance as a scholar and researcher.*

116. The University's case in respect of the adverse effects on the management or assessment of University personnel through disclosure of confidential referee reports is conveyed in the following extract from the University's written submission:

> *The views of over 50 academics as to the adverse effects of release of referees' reports have been put forward. The great majority of them (all but one) have indicated that they believe disclosure of reports will cause a reduction in the candour displayed in reports by academics generally. At most, 10 have indicated that they personally would continue to provide full and frank reports but the clear majority have stated that they are likely to temper their comments if they know the reference will be available to its subject. One has gone so far as to say that a reference would not be provided if it was known the reference would be disclosed.*
>
> *The reasons for this attitude are set out in the declaration of Brian Graham Wilson and other responses from academics. The natural tendency towards tempering open references is accentuated by the collegial, rather than hierarchical, nature of the University's academic community.*
>
> ...

The evidence shows a number of likely effects of disclosure of referees' reports on personnel assessment:

(a) Many academics will temper their reports, giving bland statements which are vaguely supportive of the candidate.

(b) Some academics will refuse to give references in the future.

(c) There will be an increased reliance on oral advice and comments.

The first effect will reduce the effectiveness of the promotion process because valid criticism will not always be put forward. Committees will have less accurate information on which to assess the worth of the candidate.

The second will mean that the people in the best position to make judgements on a candidate's academic worth will not always give references. Many academics work in specialist fields where there are only a few colleagues who are well placed to comment on their work. Disclosing referees' reports would reduce the field of ideally suited referees whom the committees could consult.

The third will mean that selection committees will have less reliable or even inaccurate information before them on which to make an assessment. Comments will be communicated through an intermediary who may not clearly transmit the referee's views.

Allowing disclosure of referees' reports would also have an adverse effect on the management of personnel. As indicated in the evidence, some staff members will continue to produce full and frank reports even if they know those reports will be disclosed. This will lead in some cases to resentment on the part of candidates because of the comments, which will evidence itself in a lack of co-operation between the staff members concerned. Even more serious will be deliberate disruption of the referee's or the Department's teaching, administrative and research activities.

The scope for serious effects caused by such disruptive behaviour is significantly extended by the collegial rather than hierarchical nature of the University's academic community. A system which emphasises co-operation rather than direction provides much more opportunity for interference with the proper functioning of the University.

The above submissions are not based on a view that all academics have a fundamentally flawed personality. Nor do they suggest that every disclosed report will have each of the effects contended for. It is rather a claim that academics are human. They do consider what effect their actions will have on their personal and professional relationships. After considering this, some would continue to provide full and frank reports, many would hesitate to make negative comments; and a few would refuse to give reports.

Academics are also human in that, when faced with criticism, some will resent it. Some will take retaliatory action. It is submitted that it is the role of the Commissioner to consider the likely effect of disclosure on the academic community as it actually exists, not on an artificial or idealised model.

117. The University's submission recognises that even if a reasonable expectation of a substantial adverse

effect in terms of s.40(c) can be established, the public interest balancing test incorporated in s.40 requires that regard must be had to other public interest considerations weighing for or against disclosure. The University has identified seven public interest considerations weighing against disclosure of confidential referee reports. The first four of these, however, are identical to the claimed adverse effects on management or assessment of University personnel which it has earlier relied upon. I do not think it is permissible to in effect seek to have those factors counted twice. Satisfaction of the first element of s.40(c) (i.e. 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 the agency's personnel) itself tilts the balance of public interest against disclosure of the matter in issue. One then looks to identify whether there are any other separate public interest considerations weighing in favour of (or against) disclosure, and if so, accords them appropriate weight in the further balancing process imported by the closing words of s.40. The three separate and additional public interest factors weighing against disclosure (which cannot properly be characterised as adverse effects on the management or assessment of agency personnel) identified by the University are as follows:

> *(5) Disruption to University resource management*
>
> *In a similar manner to personnel management, resource management decisions within a Department are often made or at least influenced by a number of members of staff. Resentment borne against one member or against the Head of Department as a representative of the administration may lead to poor decisions on allocation of funds for research or teaching.*
>
> *Resentment may, of course, arise for a number of reasons. People may simply not like one another. However, a challenge to someone's academic ability in a reference is, as indicated earlier, a sure way of raising the ire of the candidate. It is also one that can be avoided by retaining the confidentiality of reports.*
>
> *(6) Refereed journals and research projects*
>
> *Many journals require assessment of articles by an independent academic before publication. Likewise, private, state, Commonwealth and overseas funding bodies may require confirmation from an independent academic before funding is committed. Because of the collegial nature of the academic community within Australia and internationally, release of referees' reports is likely to affect the quality and availability of such references. All the arguments put forward above can be adapted to this situation.*
>
> *For example, a referee from a university in New South Wales is less likely to give a frank report on a University of Queensland promotion application if the referee knows the candidate may be examining an application by the referee for funding from a research body. Some referees will simply refuse to give a reference at all. Increases in oral references will also follow.*
>
> *Optimum output from the academic community in Australia will not be achieved if reduction in co-operation between staff of different institutions caused by release of reports leads to a reduction in the number and quality of journals produced, national and international conferences held, and joint research projects undertaken.*
>
> *The effect of release of referees' reports will extend, not only to this University, but to other universities in Australia and to private and public funding bodies.*

(7) Reciprocity

The University is part of an international academic community. A radical departure from accepted practice within Commonwealth countries would affect its status within that community. A decision to allow disclosure would tend to isolate this University from others in that international community.

118. The University also took the opportunity to state its case against the public interest considerations which it perceives as weighing in favour of disclosure of confidential referee reports:

(1) Personnel assessment

It has been suggested that it is important for candidates for promotion to be given an opportunity to respond to adverse comments during the promotion process. Overstated or unfounded comments can then be challenged. The evidence shows that selection committees already give the candidate this opportunity in relation to promotion to Senior Lecturer or Reader. Candidates who make the interview stage in the newly introduced Professorial promotion procedure will also be given this opportunity. The Vice-Chancellor has declared that he has issued instructions to strengthen this process further by the provision of a written statement of any adverse comments.

The public interest can best be served by adopting this oral or written procedure rather than compelling release of referees' reports. The candidate is made aware of adverse comments and can respond to them before the committee, without the negative public interest effects referred to above.

Even if this is not accepted it is submitted that there is little in the public interest on the side of disclosure of pre-1992 reports. They deal with promotion to Senior Lecturer and Reader. Dr Pemberton has already achieved those goals.

(2) Self improvement

It has also been suggested that access to adverse comments will allow candidates to pick up on points raised and to improve their performance in areas where weaknesses are identified. Here again, other procedures are in place which will bring adverse comments to the notice of candidates. The procedure in respect of promotion to Senior Lecturer or Reader has already been mentioned. In the case of promotion to Professor, all unsuccessful candidates have an opportunity to meet with the Vice-Chancellor to discuss the reason for their lack of success in the current round of promotions.

In addition, regular reviews of staff performance have recently been implemented in which the Head of Department meets with the staff member to discuss future work performance. The procedure involved is set out in Exhibit 2 to the Declaration of Brian Graham Wilson.

These procedures adequately cater for notification of adverse comments to staff. It is not in the public interest that the University and the community be exposed to the negative factors [raised earlier in the submission] *in order to give a candidate access to documents the substance of which he has already been made aware. Furthermore, in giving effect to the procedures referred to in the preceding paragraph, care is taken to present adverse comments in a form and in a context*

judged likely to maximise the level of self-improvement that will result. It will be actively counter-productive if the same information is anticipated or repeated in a more brusque form, as will frequently be the case if referees' reports are disclosed.

(3) General public interest

Cases such as Healy *(para 41) have referred to a public interest that procedures of public institutions should be open to scrutiny to ensure that they are appropriate to achieve their purpose and that they are being properly followed and not abused.*

Like Healy*, this case involves an application by the subject of the report, not a member of the general public. If this factor were found to be relevant, and were to be given effect, the Commissioner would need to find further that any members of the public could have access to the reports. It is almost certain, however, that these reports would be exempt from access by anyone other than their subject because of s44. It is therefore submitted that this factor should be given little weight in the balancing process in this case.*

Applicant's submissions in respect of s.40(c) and s.41

119. The following extract from Dr Pemberton's written submission (the individual points in the first paragraph have been alphabetised by me for ease of subsequent reference- see paragraphs 159 to 163 below) captures most of the significant points made by him in response to the University's submission:

It is my contention that the failure of the University to provide access to confidential referees' reports and other documents associated with the appointments and promotions process is against the public interest and does not fulfil the requirement for greater accountability and objectivity in the decision making process under the FOI Act, nor can it be seen that -

- *(a) the advice given by referees is soundly based*
- *(b) promotion judgements are substantiated*
- *(c) the decisions have been reached in an appropriate manner, properly documented and true and proper minutes kept of the proceedings of committee meetings*
- *(d) the committee has rejected unlawful material which is of a kind to found an action for defamation*
- *(e) a university officer did not exceed his/her statutory authority*
- *(f) there is a mechanism for correcting false or misleading statements*
- *(g) the facts have been checked and arguments supporting a decision are relevant*
- *(h) no ill-informed, frivolous or malicious comments have been included in their determinations*
- *(i) cases of nepotism can be detected and remedial action taken*
- *(j) comments are as objective as possible*
- *(k) international referees of high academic repute are chosen*
- *(l) applicants are able to see verbatim transcripts of any adverse comments and have proper opportunity to provide a rebuttal*
- *(m) applicants who share common backgrounds, cultures, politics, ethnic origins, educational training, physical characteristics, marital status, gender, religion and lifestyles with those involved in the selection processes are not given favoured treatment in appointment and*

promotion

(n) *no fraudulent material or illegal behaviour has been introduced into the appointments and promotions process*

(o) *documents provided for the appointment and promotions process by applicants, referees, committee members and others are bona fide e.g. are true transcripts of qualifications or referees reports. That none of the documents are used for purposes other than those laid down in clearly defined and publicly available appointments and promotions procedures*

(p) *should an applicant have reasonable grounds to believe that part or all of the contents of appointments and promotions documents have been disclosed to a third party, for purposes other than those stated in the appointments and promotions policy document, he or she is not hindered or prevented from taking appropriate remedial action.*

(q) *the appointments or promotion process has not been suborned to favour one candidate over another*

(r) *should an applicant fail to be appointed or promoted they are given specific and detailed reasons for this failure.*

...

IS THERE LACK OF FRANKNESS AND CANDOUR IN NON-CONFIDENTIAL REPORTS?

I reject the view that there will be an overall loss of candour in referees' comments. I believe that a candidate for promotion should be able to see verbatim transcripts of referees' comments so that they may be able to rebut any criticisms and correct any false or misleading information. I see it as a failure of communication on the part of a small minority of referees that they are unable to couch their criticisms in direct and constructive terms. Clearly it is impossible to defend oneself against criticism which one does not see but which one may experience indirectly, particularly when being interviewed by an appointments or promotions committee. The use of confidentiality over the years has denied applicants the basic right to answer any criticism made, by a referee, a member of the promotions committee or any other person who might have input into this process, of his/her application for appointment or promotion. Lack of direct access to such comments in the past has unfairly discriminated against many applicants, who with access to such information would have the opportunity to provide countervailing arguments in current or future applications. It is central to academic life that each member of the academic community should have the unfettered right to defend himself or herself against what they might consider unfair criticism.

There is a great deal of emphasis on confidential reports being frank, they might be better if they were factual and constructive in any criticisms they may have; these are certainly the directions given to referees of ARC and NH&MRC grant applications where applicants are given access to verbatim accounts of referees' comments. It is my long experience with ARC referees reports that there is a small minority of referees whose comments are deliberately destructive and who hide behind confidentiality; for ARC and NH&MRC this type of referee is readily identifiable. Professor M. McManus, Head, Department of Pharmacology, University of Queensland (Exhibit 5 page 129) is also well aware of such persons "Those who are apt to be less frank if their name is disclosed may be the same people who are ruthless when their name is not on the report. It is basically a "no

win" situation with those who alter their opinion to fit the circumstances. It is also far easier to write an adverse report when it is known that one's name will not be disclosed and this could allow a personality conflict to affect a decision. It is clearly best (to use a cliche) that "honesty is the best policy." ..... There is always the possibility that the referee is wrong or biased and the individual must have the right to challenge an adverse report. The University must remain unbiased until both sides are known. It is only then that a proper decision can be made"

THE CONSEQUENCES OF DISCLOSURE

...

In some University Departments there is a strong nexus between success in appointment and applicants who share common backgrounds, ages, cultures, politics, ethnic origins, educational training, physical characteristics, marital status, gender, religion and lifestyles with members of the senior academic staff; in some Departments in this and other universities nepotism is common, with staff members actively engaging in the appointment of their former graduate students to positions in their own Department. I am confident that an examination of the constitution of past and present appointment and promotion committees will reveal that they have been and are narrowly based with regard to gender, age, marital status, culture and ethnic origin and incestuous in their appointments of former students.

One argument that has been put forward for not releasing confidential referees' reports is that their "frank and candid" comments may in fact found an action for defamation. Defamation is unlawful. I suspect that any University rules, regulations or directives which attempt to hide defamatory materials are themselves unlawful. In most cases University academics rely on their professional reputations to gain and retain employment, to gain and retain research grants and to gain and retain promotion, prominence and progression in their chosen profession. It is not so surprising then, considering what is at stake, that academics will stoutly defend their reputations. It would seem grossly unreasonable for the University to use confidentiality provisions to prevent a member of its staff from defending his/her reputation against ill-informed, frivolous or malicious comments; even to the point of taking an action for defamation.

Another adverse effect of release of confidential material which the University has flagged, is the effect it would have on staff management and the collegial system. I feel that the negative effects have been overstated, as in the submission by Professor Rigsby, Department of Anthropology and Sociology (Exhibit 5, page 3) [reference is made here to the passage set out at paragraph 61 above].

A more positive and constructive response is one which was given by Professor Dobson, Head of the Parasitology Department (Exhibit 5, p.84-85)[Dr Pemberton here quotes the passage set out at paragraph 54 above].

...

Issues in the application of s.40(c)

<u>The test for establishing *prima facie* exemption under s.40(c)</u>

120. The phrase "could reasonably be expected to" in s.40(c) of the FOI Act bears the same meaning as it

does in s.46(1)(b) of the FOI Act, which meaning was explained in *Re "B"* at paragraphs 154 to 161. In particular, I stated at paragraph 160:

> *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.*

121. It is appropriate to record what was said by the Full Court of the Federal Court in *Searle Australia Pty Ltd v Public Interest Advocacy Centre & Anor* (1992) 108 ALR 163 at p.176, about the meaning of the identical words in s.43(1)(b) of the *Freedom of Information Act 1982 Cth* (the Commonwealth FOI Act):

> *In the application of section 43(1)(b), there would ordinarily be material before the decision-maker which would show whether or not the commercial value of the information would be or could be expected to be destroyed or diminished if the information were disclosed. It would be for the decision-maker to determine whether, if there were an expectation that this would occur, the expectation was reasonable* [my underlining].

The University has stated the expected adverse effects which it asserts will follow from the disclosure of confidential referee reports, including the four documents which I am presently considering. It is for me to determine whether those expectations are reasonable, in respect of the four documents which I am presently considering.

122. If I am satisfied that any of the claimed adverse effects could reasonably be expected to follow from disclosure of documents 1, 18, 19 and 20, it is also for me to determine whether any of the claimed adverse effects, either individually or in aggregate, constitute a substantial adverse effect on the management or assessment by the University of the University's personnel. I have previously considered the meaning of the adjective "substantial" in the phrase "substantial adverse effect", where it appears in s.49 of the FOI Act. I adhere to the view which I expressed at paragraphs 147 to 150 of my reasons for decision in *Re Cairns Port Authority and Department of Lands* (Information Commissioner Qld, Decision No. 94017, 11 August 1994, unreported), that where the Queensland Parliament has employed the phrase "substantial adverse effect" in s.49, s.40(c), s.40(d) and s.47(1)(a) of the FOI Act, it must have intended the adjective "substantial" to be used in the sense of grave, weighty, significant or serious. In *Re Dyki and Federal Commissioner of Taxation* (1990) 22 ALD 124, Deputy President Gerber of the Commonwealth AAT remarked (at p.129, paragraph 21) that: "*The onus of establishing a 'substantial adverse effect' is a heavy one* ...".

The "loss of candour" argument

123. The first adverse effect claimed by the University (and I apprehend the most significant from its point of view) is that disclosure of confidential referee reports under the FOI Act will inevitably lead to a loss of candour in future referee reports with consequent prejudicial effects (to the assessment of university staff for promotion) of the kind referred to in its submission (see paragraph 116 above). The second and third adverse effects claimed by the University (see paragraph 116 above) are closely related to the first, in that they are alternative responses to the same alleged widespread basic reluctance of senior academics to have their honest assessments of the work of candidates for promotion disclosed under the FOI Act.

124. The second adverse effect claimed by the University was that some academics will refuse to give references in the future, if they are liable to be disclosed. I presume that this point was raised in respect of academics who are not obliged, as part of their duties, to supply reports on candidates for promotion. I consider that the second claimed adverse effect can be discounted for the purpose of considering the effects of disclosure (under s.40(c) and s.41(1) of the FOI Act) of the four documents which remain in issue, being reports which Heads of Department, Deans of Faculty and Pro-Vice-Chancellors are obliged to supply as part of their duties of office, under the University's relevant promotion arrangements. I am not prepared to find that disclosure of documents 1, 18, 19 and 20 could reasonably be expected to have the effect that Heads of Department, Deans of Faculty and Pro-Vice-Chancellors would refuse in future to supply reports on candidates for promotion.

125. The third adverse effect claimed by the University (increased reliance on oral reports) is closely related to the first (loss of candour leading to bland written reports), and the two will be considered together.

126. At paragraphs 124 to 135 of my reasons for decision in *Re Eccleston,* I reviewed previous cases where the "loss of candour" argument had been raised as a public interest consideration favouring non-disclosure of documents. At paragraphs 132 to 135 I stated my views as follows:

> *132. I consider that the approach which should be adopted in Queensland to claims ... that the public interest would be injured by the disclosure of particular documents because candour and frankness would be inhibited in future communications of a similar kind ... should accord with that stated by Deputy President Todd of the Commonwealth AAT in the second* Fewster *case (see paragraph 129 above): they should be disregarded unless a very particular factual basis is laid for the claim that disclosure will inhibit frankness and candour in future deliberative process communications of a like kind, and that tangible harm to the public interest will result from that inhibition.*
>
> *133. I respectfully agree with the opinion expressed by Mason J in* Sankey v Whitlam *that the possibility of future publicity would act as a deterrent against advice which is specious or expedient or otherwise inappropriate. It could be argued in fact that the possibility of disclosure under the FOI Act is, in that respect, just as likely to favour the public interest.*
>
> *134. Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary to the public interest. If the diminution in previous candour and frankness merely means that unnecessarily brusque, colourful or even defamatory remarks are removed from the expression of deliberative process*

> *advice, the public interest will not suffer. Advice which is written in temperate and reasoned language and provides justification and substantiation for the points it seeks to make is more likely to benefit the deliberative processes of government. In the absence of clear, specific and credible evidence, I would not be prepared to accept that the substance or quality of advice prepared by professional public servants could be materially altered for the worse, by the threat of disclosure under the FOI Act.*
>
> *135. I leave open the possibility that circumstances could occur in which it could be demonstrated by evidence that the public interest is likely to be injured by a disclosure of deliberative process advice that would inhibit the candour and frankness of future communications of a like kind. An example of such a possibility is given at p.216 of the "Report on the Freedom of Information Bill 1978" by the Senate Standing Committee on Constitutional and Legal Affairs (1979). The example relates to a public servant who is responsible for advising the Minister in a particular area, and who needs to be acceptable to a number of parties who have competing interests - preservation of confidentiality of the official's views may be the only way of preserving the relationship of frankness between the official and all parties. The remark is made that this consideration is particularly important in areas where Government exercises a regulatory function.*

127. In this case, the University has attempted to lay the "very particular factual basis" referred to in the above extract, with its extensive evidence of the personal attitudes of senior academics to the writing of referee reports if they are liable to be disclosed to the subject of the report. Moreover, I should note that the documents in issue in *Re Eccleston* were policy documents rather than referee reports on the suitability of an individual for promotion. Some judges and tribunal members, who have expressed strong views to the effect that they would not accept that public servants are likely to temper the candour and frankness of policy advice for fear of its disclosure, have nevertheless recognised that referee reports may fall into a special or exceptional category. For instance, in *Sankey v Whitlam* (1978) 142 CLR 1, Gibbs ACJ said (at p.40):

> *One reason that is traditionally given for the protection of documents of this class is that proper decisions can be made at high levels of government only if there is complete freedom and candour in stating facts, tendering advice and exchanging views and opinions and the possibility that documents might ultimately be published might affect the frankness and candour of those preparing them. Some judges now regard this reason as unconvincing, but I do not think it altogether unreal to suppose that in some matters at least, communications between Ministers and servants of the Crown may be more frank and candid if those concerned believe that they are protected from disclosure. For instance, not all Crown servants can be expected to be made of such stern stuff that they would not be to some extent inhibited in furnishing a report on the suitability of one of their fellows for appointment to high office, if the report was likely to be read by the officer concerned. However, this consideration does not justify the grant of a complete immunity from disclosure to documents of this kind.*

128. In *Re Dyrenfurth and Department of Social Security* (1987) 12 ALD 577, the Commonwealth AAT, chaired by Deputy President Todd, had to consider whether individual and comparative assessments of job applicants were exempt under the provision of the Commonwealth FOI Act which corresponds to s.40(c) of the Queensland FOI Act. The Tribunal said (at p.584) that while it -

> *has again and again declined to be persuaded by the so-called "candour and frankness" argument in relation to the giving of advice on matters of policy, we are nevertheless satisfied that in the sensitive area of assessment of personnel ... there is ground for considering that there would be substantially less candour and frankness in written reports, assessments and references if it were known that there was a real likelihood that such reports etc were not confidential and may have to be disclosed. It is, we think, notorious that open references are given with a reduced frankness, and at a level of generality, that are inimical to the placing of much reliance upon them. The result could be either that the relevant documentation would be of reduced reliability and value or that greater stress would have to be placed on oral reports or both. In any event, the consequences for good administration in the area of management and/or assessment of personnel would be serious indeed. At any level of appointments, assessment of candidates for appointment must be as honest and forthright as possible if the right decisions are to be made, and it may be correct to say that the higher the level of the office the truer this will be.*

129. In *Re Healy* (at paragraph 64) the Commonwealth AAT said in respect of university referee reports:

> *... We consider that it is not in accordance with human experience generally that open reports are as frank and as explicit as confidential reports. We consider it likely that, if referees knew their reports supplied under the reference system which has become established by universities internationally were to be available to the candidates, many of the reports would lack the frankness and explicit detail which they have at present and their value to the universities in assessing the suitability of the candidates for academic appointments would be considerably diminished.*

130. To like effect were the comments of the Victorian AAT in *Re De Souza-Daw* (at p.10):

> *I accept that if the writer of a reference were to know that a copy of it were to find its way into the hands of the individual, then there is a great likelihood that the reference would, as Mr Thorne says, be in bland form and would tend to highlight the positive aspects of the applicant, and to make minimal reference to or no reference at all to the negative qualities.*

131. Contrary views are also to be found. For example, in *Conway v Rimmer* [1968] AC 910, Lord Upjohn said at (p.994):

> *... I cannot believe that any Minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest view in the course of his duty on some subject, such as even the personal qualifications and delinquencies of some colleague, if he thought that his observations might one day see the light of day. His worst fear might be libel and there he has the defence of qualified privilege like anyone else in every walk of professional, industrial and commercial life who every day has to express views on topics indistinguishable in substance from those of the servants of the Crown.*

132. In *Science Research Council v Nassé* [1980] AC 1028, Lord Salmon said (at p.1070):

> *I cannot accept the proposition that those <u>whose duty it was</u> to write reports about a candidate and his record, suitability for promotion, etc., would lack in candour because the reports, or some of them, might possibly sometimes see the light of day.* (my underlining)

133. Also, in *Re Kamminga,* the Commonwealth AAT, chaired by O'Connor J (President) did not accept (at pp.320-3) the submission on behalf of the Australian National University that if referees could not be assured of the confidentiality of their reports, their reports would lack candour and therefore be of little value.

134. I believe that the issues at stake in this case are of some importance to the broader public interest. Universities occupy an important position in our society, and receive large amounts of public funding to pursue functions intended to benefit the wider public interest. For present purposes, these are conveniently encapsulated in the following extract from the "Mission and Goals" of the University of Queensland (Ex. 1 to Professor Wilson's statutory declaration):

> *The mission of the University of Queensland is to extend, evaluate, preserve and transmit ideas and knowledge through teaching and research of the highest international standards for the particular benefit of Queensland and the good of the wider national and international community.*
>
> ...
>
> *The broad goals of the University in pursuing its mission are:*
>
> ...
>
> *3. To pursue excellence in all respects of teaching and learning.*
>
> *4. To achieve high international standards in research, scholarship postgraduate education and training in all its disciplines, and facilitate the communication, application and transfer of university research and scholarship for the benefit of the national and international community.*
>
> *5. To manage effectively and efficiently all its human, financial and physical resources.*

135. I accept that the task of achieving its Mission and Goals will be furthered by the University adopting (to use the words of paragraph 4 of Professor Wilson's statutory declaration) "*personnel assessment practices which ensure that those academic staff who are contributing most to fulfilment of the Mission are promoted*", or in other words, by ensuring promotion on merit.

136. The tenor of the University's written submission suggests that it has a longstanding system for assessing the merit of candidates for promotion that is as good as it can practicably be, that with guarantees of confidentiality referees routinely write honest and accurate assessments of candidates for promotion, but the prospect of disclosure under the FOI Act poses a threat to the efficacy of the system. In the interests of a balanced perspective on the imperfections necessarily inherent in any system of merit selection/promotion (at least any which is not based solely on a small number of objectively measurable criteria that apply equally to all candidates, e.g., the amount of revenue generated for the employer by candidates performing like duties), I offer the following observations:

> The University's case would be more convincing if all referee reports were guaranteed secrecy, but for the reasons explained at paragraph 104 above, the University is not in a position to enforce such a policy - it is the privilege of the referee to control dissemination of the report which the referee prepared, and it is clear from the evidence that different academics adopt different practices in this regard. This point is of significance since some of the senior academics whose views have been put into evidence have stressed the need for

referee reports to be uniformly treated as confidential (from the subject of the report) for the system to be effective: see in particular the comments of the author of one of the documents in issue, who is identified at paragraph 33 above as B6. The Head of the Department of Computer Science (see paragraph 43 above) believes that non-confidentiality would result in inequity, as some referees would moderate what they write while those more courageous would not, making it difficult to compare people on the basis of referee reports. Yet non-confidentiality has always been an option for the author of a referee report. There is nothing to prevent an academic who is minded to write a favourable report on a candidate for promotion discussing the terms of the report beforehand with the candidate.

Referee reports are just one of several sources of relevant information to be evaluated, though I accept that they may assume more than usual importance in the rather complex arrangements for evaluating candidates for promotion that are described in the University's evidence.

In all workplaces which offer the prospect of career advancement, promotion through the stages in the organisational hierarchy ordinarily depends on the candidate for promotion securing the endorsement and support of a sufficient number of those who have already advanced through the system. The elements of subjective judgment, by those who are already at or near the peak of the hierarchy, cannot be realistically eliminated from any system of assessment of staff for promotion. Those who participate in making the judgments (be they members of selection panels or referees) are inevitably influenced by their personal values, prejudices and predilections. The evaluation of candidates for promotion is an art rather than a science. Anyone with experience in participating in the work of selection and promotion committees will have experienced the difficulty of reconciling the differing value frameworks of different referees: the perennial problem of coping with "hard" raters and "easy" raters. The use of referee reports has always been attended by difficulties of this nature, even in systems in which referee reports are routinely provided in confidence.

One of the problems with confidentiality is that it is capable of being a double-edged sword. The cloak of confidentiality may permit some people to feel confident enough to express criticisms which they might otherwise refrain from making. The cloak of confidentiality can also permit a person to indulge a dislike of, or prejudice against, an applicant for promotion, without the fear of being exposed. I note that in *Re Kamminga* one of the considerations which persuaded the Commonwealth AAT that disclosure of referee reports would not be contrary to the public interest was the following (at p.302):

The Tribunal considers that there may be cases where adverse comment is made on an applicant which is unfounded or out of context. The goal of selecting the best staff in such cases would be facilitated by allowing applicants access to the reports.

If there is substance in the University's central proposition that senior academics are prepared to be less than fully honest in writing a referee report on a colleague who might see the report, in the interests of preserving harmonious working relationships or friendships, it logically seems to be no less likely that senior academics may be inclined to promote the claims for promotion of a friend, protege or supporter over better qualified candidates for promotion. Under the cloak of confidentiality, it may well be easier to escape careful scrutiny (by a selection committee) of a glowingly favourable opinion on a candidate for promotion, that is not substantiated, than it is of adverse comment that is not substantiated.

137. I think one method of testing the University's central premise is to pose the question of whether a selection committee, under the present system, should logically be entitled to afford greater weight

to a referee report which the author makes clear is intended to be impressed with an obligation of confidence, than to a referee report which the author is prepared to disclose to the subject of the report. Does the author's choice as to confidentiality really represent a rational basis for determining the weight which should properly be accorded to a referee report in a selection process? Leaving to one side the subjective element of the reputation or standing which a particular referee may have in the minds of members of the selection committee, I should have thought that the most reasonable guide to the worth of a referee report, whether or not confidential, is the extent to which the opinions and conclusions expressed in it appear to be balanced, well-reasoned and supported by particulars of the evidence which substantiates the opinions and conclusions reached, whether favourable or adverse.

138. Weighing the competing advantages and disadvantages, it is certainly arguable that the best and fairest system would be one in which referee reports were available to the subject of the report, and the guidelines to referees stressed the importance of providing fair and considered reports of the kind I have described in the preceding sentence. Were it not for the evidence filed on behalf of the University, I should have thought that, as a class, the community's leading academics would be likely to have the skills and the intellectual integrity to make such a system work effectively. The University's evidence, however, paints a somewhat unflattering picture of (at least a segment of) its academic staff: of persons liable to respond to adverse comment on their performance by disrupting a Department's teaching, administrative and research activities or making retaliatory personal attacks. The University's submission asks that I take account of the academic community as it actually exists, not an artificial or idealised model. Based on their experience of the academic community as it actually exists, the senior academics who comprise the Academic Board of the University recommended the policy favouring confidentiality of referee reports which is stated at paragraph 35 above. My findings at paragraph 106 above mean that, for the most part, their recommended policy will survive the application of the FOI Act.

139. However, I am now dealing with reports written by Heads of Department, Deans and Pro-Vice-Chancellors as part of their duties of office. Their position is distinct from that of other referees for at least two reasons. The first is that whereas the precise identity of other referees who contribute reports to the selection process will ordinarily not be made known to a candidate for promotion without the referee's consent, the guidelines relating to a promotion process ordinarily stipulate that a Head of Department (or a Dean or Pro-Vice-Chancellor in the case of more senior positions) is required to provide a report, and the candidate for promotion will know that person's identity. Secondly, Heads of Department, Deans and Pro-Vice-Chancellors carry primary management responsibility, in respect of the particular organisational units which they head, for achieving the University's Mission and Goals. Heads of Department, and also Pro-Vice-Chancellors, have particular responsibility for the fifth goal set out in paragraph 134 above, i.e. managing effectively and efficiently the resources in their organisational units, in particular (for present purposes) the human resources. They are responsible for trying to ensure that all staff are efficiently and effectively performing the employment duties (e.g. teaching, research) which are intended to benefit the wider public interest, and for which they are largely paid from public funds. Part of their responsibilities must include attempting to address unsatisfactory performance and areas for improvement in the performance of individual members of staff. To refrain from doing so in the interests of preserving collegiality and harmonious relationships among academic staff, to my mind, represents a partial abdication of management responsibility. Universities are not intended to operate primarily for the benefit of their staff, but for the benefit of their students and the wider community. I have more to say on this issue, in the context of performance appraisal schemes, at paragraphs 145-147 below.

140. While any person who is prepared to undertake the task of providing a referee report should do so honestly, whether or not the report is liable to be disclosed to the subject of the report, I am prepared to accept that human nature being what it is, there will be many academics, perhaps even a majority,

who would wish to temper the language in which "open" referee reports are written. That in itself may be no bad thing. In respect of some of the referee reports which I have seen during the course of this review, a diminution in candour and frankness may merely mean that unnecessarily brusque and summarily dismissive comments about an applicant's claims for promotion, unsubstantiated by any supporting evidence, are no longer submitted to promotion committees. Unless selection committees are primarily influenced by their subjective judgment of the reputation or standing of the author of a referee report, I should have thought that they would obtain most assistance from referee reports which present a balanced appraisal of the candidate for promotion, supported by particulars of the evidence which substantiates the opinions and conclusions reached, whether favourable or adverse. Fortunately, I have also seen examples of this kind of referee report during the course of my review.

141. The crucial issue to my mind is whether future reports of the kind in issue will continue to provide the author's honest opinion on the merits of the candidate for promotion, even though the language be tempered (in which case I would have difficulty in finding a reasonable expectation of a substantial adverse effect on the management or assessment of the University's personnel) or whether disclosure under the FOI Act could reasonably be expected to have the effect that a significant number of Heads of Department, Deans of Faculty and Pro-Vice-Chancellors would actually refrain from expressing in a written report their honest opinion of the merits of some candidates for promotion, and resort instead to providing bland written reports with more forthright opinions expressed orally. If disclosure of reports of this kind on candidates for promotion were available only to the candidate who is the subject of the report, then I think it is reasonable to expect the former rather than the latter. I will explain my reasons for holding that view, while adding the caveat (the consequences of which are addressed at paragraphs 152-154 below) that an assessment of the effects of disclosure of particular documents (for the purpose of determining whether an exemption provision applies) generally requires that regard be had to the effects of disclosure to any person who might apply for them rather than just to the particular applicant for access under the FOI Act (see paragraphs 165-168 below).

142. I do not think it is reasonable to expect that if documents 1, 18, 19 and 20 are disclosed to Dr Pemberton (or indeed if reports by Heads of Department, Deans of Faculty or Pro-Vice-Chancellors on candidates for promotion were disclosed to the subjects of the reports) that a significant number of the authors of future reports of that kind would actually refrain from expressing their honest opinions. I consider that people who have manifested the sense of responsibility and achievement orientation to progress to such positions as Head of Department, Dean of Faculty, and Pro-Vice-Chancellor will continue to appreciate the need to ensure that the most worthy candidates for promotion progress through the system in preference to the unworthy or the less worthy. No doubt many will continue to write honest assessments of candidates for promotion without regard to any consequences of disclosure. I do consider, however, that it is reasonable to expect that the prospect of disclosure under the FOI Act will cause many to modify their approach to writing reports of the kind in issue. I consider that reports in future are more likely to be written in temperate and reasoned language, being careful to emphasise the strengths of an applicant for promotion, while drawing attention to any perceived weaknesses in a way which provides justification and substantiation for the points that are made. That is not only likely to benefit the selection process, but to benefit the management of personnel generally by providing considered "feedback" on individual performance. Leading academics are no strangers to the professional discipline of having to marshall evidence to support opinions and conclusions expressed in formal written work. More effort may have to go into the process of preparing reports, but given the importance which the University attaches to ensuring promotion on merit, that effort appears to be warranted, and would certainly greatly assist the tasks of selection committees.

143. There are three main factors which reinforce the views I have expressed in the preceding paragraph. Firstly, paragraph 31 of Professor Wilson's statutory declaration indicates that Professor Wilson had instructed staff that a policy be prepared, for consideration by the University Senate, concerning a

procedure by which an applicant for promotion would be provided with the substance of adverse comments contained in referee reports. The University has subsequently supplied me with copies of relevant documents relating to the University Senate's consideration of this issue. They disclose that on 25 November 1993, the Senate resolved:

> *That where relevant specific criticisms were made in referees' reports, whether internal or external, a written statement of adverse comments be provided to each applicant at any level of promotion in advance of interview.*

144. Background papers indicate that the University was concerned that the legal requirement to observe procedural fairness in promotion processes may necessitate such a system in any event. (Cases such as *Ansell v Wells* (1982) 63 FLR 127, suggest that the right of an officer in a public sector organisation to be considered for promotion attracts the application of the rules of natural justice: see especially per Lockhart J at pp.147-8.) If this system is to be effective, adverse comment will need to be substantiated by particulars of the evidence on which it is based.

145. Secondly, as disclosed at paragraphs 64-65 above, the University has recently been obliged to implement a scheme for regular performance appraisal of academic staff. There is widespread agreement in management literature that performance appraisal is one of the most significant human resource management tools for maintaining a satisfactory level of employee performance. Accurate feedback about performance is regarded as critical to an employee's ability to perform effectively in an organisation. Regular performance appraisal and review has been a management initiative aimed at promoting the performance of leading corporations for several decades. Since the mid-1980s it has gradually been penetrating the Commonwealth and State public sectors. It is based on a simple premise that those charged with management responsibility should, in addition to regular informal feedback on staff performance, undertake regular formal appraisals of staff performance, which afford an opportunity for -

(a) acknowledging positive contributions by the employee to the organisation;
(b) providing clear goals and standards so that an individual employee knows what is expected in terms of his or her individual performance; and
(c) a systematic approach to addressing shortcomings in performance, or room for improvement in performance, in a constructive way aimed at securing better outcomes for the organisation and the individual.

146. Performance appraisal carries with it much the same risks as the University claims are likely to follow from disclosure of confidential referee reports. The persons charged with the primary responsibility for making this system work are the Heads of Department and Pro-Vice-Chancellors, with the former usually, but not always, undertaking the appraisal of academic staff in their Departments. It is one of the skills required of good management to make such a system work effectively, and minimise the potential risks posed by, for example, resentment of staff who have difficulty in accepting criticism of their workplace performance. It is, in my opinion, reasonable to expect that Heads of Department and Pro-Vice-Chancellors charged with the responsibility for making that system work effectively, will, in the process, have to master the skills which will also allow them to write reports on candidates for promotion in terms that draw attention to shortcomings in performance against relevant selection criteria in a way that is temperate and reasoned, and provides justification and substantiation for the points that are made. Few people positively welcome criticism of their workplace performance, but when most people think carefully about it, they realise they are far better served by knowing what those in authority consider to be shortcomings in performance, or areas where there is room for improvement in performance, so that they have the opportunity to constructively address them rather than have their desires for career progression stymied by critical views of which they remain unaware.

147. According to the terms of the University's scheme (see paragraphs 64-65 above) documentation arising from the performance appraisal system is to remain confidential to those involved in a particular appraisal (and the Head of Department if he or she is not directly involved in the

appraisal) and is not to be used as part of any other process, including promotion processes. The scheme nevertheless requires an honest appraisal of staff by the Head of Department, and it would, in my opinion, be unconscionable for a Head of Department to convey to a promotion committee serious criticisms of the performance of a candidate for promotion which the Head of Department had not been prepared to convey to the candidate in the course of staff appraisal. I agree with the comment made in response to the survey questionnaire by the Head of the Department of Medical Biochemistry:

> *Now that the system of performance appraisal has been established, there is no good reason for Heads to conceal their appraisals of the academic merits of staff under their supervision from these individuals.*

148. The third factor is the recent recognition by the English Law Lords that in a proper case liability in negligence may be imposed on the author of a reference if the subject of the reference suffers damage caused by the reference being compiled without reasonable care: see *Spring v Guardian Assurance Plc & Ors* [1994] 3 WLR 354. The plaintiff in that case was an insurance salesman whose former employer provided a reference (found to have been compiled without reasonable care) to a prospective employer. One judge described the reference as being "the kiss of death" to the plaintiff's career in insurance. Whether the factors found by the majority of the House of Lords to give rise to a duty of care owed by the author of a reference to the subject of the reference would also be present in the case of an employer (the University of Queensland) who, through the agency of a senior employee (e.g. a Head of Department), produces a referee report on another employee who is a candidate for internal promotion within the employer's organisation, is not a question on which I need to express any considered opinion, other than that the proposition appears to be reasonably arguable. This should be enough in itself to ensure that officers of the University who are obliged, as part of their duties, to provide written referee reports endeavour to comply with the requirements of any duty of care that may be applicable. According to Lord Goff (at p.370):

> *... the central requirement is that reasonable care and skill should be exercised by the employer in ensuring the accuracy of any facts which either (1) are communicated to the recipient of the reference from which he may form an adverse opinion of the employee, or (2) are the basis of an adverse opinion expressed by the employer himself about the employee.*

149. This case is also of interest because arguments similar to those raised by the University against disclosure of confidential referee reports under the FOI Act were raised to support a proposition that it would be contrary to public policy to impose liability in negligence on the author of a reference for economic loss suffered by the subject of the reference.That proposition found favour with the minority, for example, Lord Keith of Kinkel said (at pp. 360-1):

> *If liability in negligence were to follow from a reference prepared without reasonable care, the same adverse consequences would flow as those sought to be guarded against by the defence of qualified privilege* [in the context of defamation law]. *Those asked to give a reference would be inhibited from speaking frankly lest it should be found that they were liable in damages through not taking sufficient care in its preparation. They might well prefer, if under no legal duty to give a reference, to refrain from doing so at all. Any reference given might be bland and unhelpful and information which it would be in the interest of those seeking the reference to receive might be withheld.*

150. Obviously, such considerations did not inhibit the majority, one of whom, Lord Slynn of Hadley, said (at p.385):

> *I do not accept the* in terrorem *arguments that to allow a claim in negligence will constitute a restriction on freedom of speech or that in the employment sphere employers will refuse to give references or will only give such bland or adulatory ones as is forecast. They should be and are capable of being sufficiently robust as to express frank and honest views after taking reasonable care both as to the factual content and as to the opinion expressed. They will not shrink from the duty of taking reasonable care when they realise the importance of the reference both to the recipient (to whom it is assumed that a duty of care exists) and to the employee (to whom it is contended on existing authority there is no such duty). They are not being asked to warrant absolutely the accuracy of the facts or the incontrovertible validity of the opinions expressed but to take reasonable care in compiling or giving the reference and in verifying the information on which it is based. The courts can be trusted to set a standard which is not higher than the law of negligence demands. Even if it is right that the number of references given will be reduced, the quality and value will be greater and it is by no means certain that to have more references is more in the public interest than to have more careful references.*

151. Thus, if I were assessing whether disclosure to a candidate for promotion of the reports required to be prepared on the candidate by the relevant Head of Department, Dean of Faculty and Pro-Vice-Chancellor, could reasonably be expected to have a substantial adverse effect on the management or assessment of the University's personnel, my answer would be in the negative. There may be a small number of senior academics who would prefer to issue a completely bland report in respect of a candidate not supported for promotion, and provide adverse comments by way of verbal reports to the selection committee. I think such instances would be rare because there would be very few instances in which there would be reasonable justification for an officer, with management responsibility for the performance of staff, to withhold an opinion of that nature from the staff member concerned. The prospect of that occurring, if disclosure of reports of the kind in issue were only available to the subject of the report, could not reasonably be expected on a scale sufficient to have a substantial adverse effect for the purposes of s.40(c). Moreover, if it is correct that the promotion processes under consideration attract the common law duty to accord procedural fairness (see paragraph 144), the duty to act fairly ordinarily requires that a person be given an effective opportunity to know the substance of the case against the person, including, in particular, the critical issues or factors on which the case is likely to turn: see *Kioa v West* (1985) 60 ALJR 113 at pp.128-9 per Mason J. That principle would apply to adverse oral comments just as much as it would apply to adverse written comments: see paragraph 143 above.

152. However, the prospect of disclosure of reports of this kind to any person who applies for them under the FOI Act (there being no requirement under the FOI Act to show a special interest in obtaining particular information - see the discussion at paragraphs 165-168 below) raises additional factors which lend greater credence to the University's claims, and could well inhibit a substantial number of responsible senior academics from recording in written reports their honest assessments of candidates for promotion. While I have emphasised the view that Heads of Department and Pro-Vice-Chancellors who responsibly perform their management role (including the requirements of the staff appraisal scheme) should not have occasion to convey to a selection committee any substantial adverse comment on the performance of a candidate for promotion which has not been conveyed directly to the candidate (in the interests of constructively addressing the need for improvements in performance), I nevertheless consider that it is reasonable to expect that even responsible managers would baulk at recording in writing such adverse comment if it were to be available for access under the FOI Act to any person who applied for it, including, for instance, the candidate's rivals for promotion, or students in the candidate's Department. The task of constructively addressing shortcomings in staff performance has greater prospects of success through co-operative effort if details of the perceived shortcomings in performance, and the action plan to address them, remain confidential to the relevant managers and the staff member concerned.

153. If reports of the kind under consideration were to be available under the FOI Act to any person who applied for them, I think it is reasonable to expect that a great many Heads of Department, Deans of Faculty and Pro-Vice-Chancellors would resort to the preparation of bland written reports, that were not particularly helpful to selection committees, and seek to convey orally to selection committees any adverse comments that they felt must be drawn to attention. I accept that this would carry with it most of the adverse effects identified in the University's submission (see paragraph 116 above, and paragraphs 24-25 of Professor Wilson's statutory declaration reproduced at paragraph 63 above). In one sense, the fact that criticisms are conveyed orally may not substantially prejudice the University's goal of ensuring that the most worthy candidates for promotion are successful. (In many organisations, oral rather than written references are the norm, though few organisations have the elaborate system of selection committees which operate within the University.) However, I accept that it introduces significant inefficiencies into the system of assessment, and makes it less likely that opinions on a candidate will be supported by particulars of the evidence considered to justify the opinion, thereby making it harder for selection committees to make fully informed assessments and denying the candidate for promotion the benefit of meaningful feedback on weaknesses in performance that need to be addressed in order to further future claims for promotion. I think it is reasonable to expect that the reaction I have described would occur in the case of a significant proportion of Heads of Department, Deans of Faculty and Pro-Vice-Chancellors, and I consider that it would have a substantial adverse effect on the management or assessment of the University's personnel for the purposes of s.40(c) of the FOI Act.

154. If this were a case where s.6 of the FOI Act was applicable, meaning that the fact that the documents in issue contain matter relating to the personal affairs of the applicant must be taken into account as an element in deciding the effect that the disclosure of the matter in issue might have (for the purposes of s.40(c)), it is possible that I would reach a different finding. However, the information contained in documents, 1, 18, 19 and 20 is information comprising assessments of Dr Pemberton's work capacity and performance, and therefore does not relate to Dr Pemberton's personal affairs, for the reasons explained in *Re Stewart and Department of Transport* (Information Commissioner Qld, Decision No. 93006, 9 December 1993, unreported) at paragraphs 33-36; and in *Re Pope and Queensland Health* (Information Commissioner Qld, Decision No. 94016, 18 July 1994, unreported) at paragraphs 108-116. Section 40 is an exemption provision of a kind where it is ordinarily proper, in assessing the relevant prejudicial effects of disclosure of the matter in issue to have regard to the effects of disclosure on persons other than just the particular applicant for access under the FOI Act. (I say "ordinarily", for the reasons explained at paragraphs 165-172 below). On that basis, for the reasons explained in paragraphs 152-153 above, I find that disclosure of documents 1, 18, 19 and 20 could reasonably be expected to have a substantial adverse effect on the management or assessment by the University of the University's personnel.

The "retaliation/disruption" argument

155. The fourth-claimed adverse effect raised in the University's written submission was that disclosure of some reports to some candidates for promotion may lead to resentment, manifesting itself in deliberate disruption of the Department's or the referees' teaching, administrative and research activities. There is evidence before me to the effect that this behaviour already occurs (see, for example, paragraphs 8 and 9 of the statutory declaration of Professor Rigsby) despite the University's past policy of preserving the confidentiality of referee reports. In some respects, it is not surprising that resentment might be displayed by a candidate for promotion, who has not previously been given any feedback by his or her Head of Department to suggest that the candidate's performance requires improvement in certain areas before the candidate will be supported for promotion, on discovering or deducing that his or her aspirations for promotion have been blocked by an adverse report by the relevant Head of Department. I do not consider it reasonable to expect that a substantial adverse effect of this kind will result from disclosure of reports of the kind under

consideration once the staff appraisal scheme is operating properly. Disappointment, even resentment, at failure to obtain promotion is a common and expected human reaction in all organisations, and has to be managed.

156. In any event, the prospect that disclosure of some reports on some candidates for promotion could lead to adverse effects of the kind claimed by the University cannot logically justify the non-disclosure of all reports falling into the category under consideration. If there are reasonable grounds for expecting that a particular individual will respond to the disclosure of adverse material in a particular report in a way that would have a substantial adverse effect, that may well constitute sufficient ground for not disclosing that report. However, there is no evidence before me on the basis of which I would be prepared to find that disclosure of documents 1, 18, 19 and 20 to Dr Pemberton could reasonably be expected to result in Dr Pemberton causing disruption of the University's activities.

Additional public interest considerations relevant to the public interest balancing test which qualifies s.40(c)

157. Having found the *prima facie* test for exemption under s.40(c) of the FOI Act is satisfied, it is necessary to consider whether disclosure of the documents in issue would, on balance, be in the public interest. As noted at paragraph 117 above, the University has raised three additional public interest considerations said to favour non-disclosure of referee reports. The first (disruption to University resource management) I do not consider to have any real substance, for similar reasons to those explained in paragraphs 155-156 above. As to the second (impact on refereed journals and research projects) even if this carried any substantial weight in relation to the disclosure of confidential referee reports generally, I consider that it carries negligible weight when applied to disclosure of reports which Heads of Department, Deans of Faculty and Pro-Vice-Chancellors are required to prepare on subordinate staff as part of their duties of office. The final factor, reciprocity within the international academic community, can be eliminated entirely given that referee reports from interstate or overseas universities are not here under consideration.

158. The first major argument raised by Dr Pemberton as to why disclosure of confidential referee reports would be in the public interest relates to ensuring greater accountability and objectivity in the decision making processes with respect to the system of promotion available to academics within the University of Queensland. In my opinion, this is a public interest consideration of substance, which must be accorded appropriate weight. I note that in the context of promotion in the Commonwealth public sector, Deputy President Gerber of the Commonwealth AAT has said: "*There is an element of public interest involved in ensuring that promotions are not only made fairly, but seen to be made fairly*" (*Re Dyki* at p.132).

159. I do not think there is substance in some of the individual points identified in the first paragraph extracted from Dr Pemberton's written submission at paragraph 119 above (e.g. point (d), as to which see my comments at paragraph 42 above, and points (e), (f) and (p)), nor that some of the beneficial consequences claimed (e.g. points (c), (k), (o) and (q)) are likely to flow from disclosure of the documents now under consideration. One of the difficulties with Dr Pemberton's case is that it is logically difficult to accord much weight to otherwise pertinent considerations like points (a), (g), (h), (j) and (n), when the University's case, which I have accepted, is that disclosure of the documents in issue could reasonably be expected to have the effect that referees' comments, the disclosure of which would be necessary to achieve the beneficial effects identified by Dr Pemberton, may no longer be made in writing so as to be available for disclosure under the FOI Act. I have therefore to adjust the weight to be given to these considerations, accordingly. I do not think that these considerations, alone, are sufficient to outweigh the public interest in non-disclosure which is inherent in the satisfaction of the *prima facie* test for exemption under s.40(c).

160. If, on the other hand, disclosure of the documents in issue were only to be made to Dr Pemberton, accountability through the prospect of general public scrutiny would not be achieved, but there would still be some benefits in terms of accountability for the conduct of the University's promotion systems since Dr Pemberton is best placed to raise concerns with respect to points (a), (g), (h), (j) and (n) insofar as they apply to the documents now under consideration.

161. Some of the beneficial effects of disclosure claimed by Dr Pemberton could only be achieved if all referee reports on all candidates for promotion (and indeed all documents relating to the selection process of all candidates for promotion) were available under the FOI Act to any interested person. I have already stated that I am satisfied that that prospect could reasonably be expected to have a substantial adverse effect for the purposes of s.40(c) and I do not think those claimed beneficial effects (e.g. (l), (m) and (q)) are sufficient to outweigh the substantial adverse effect.

162. Dr Pemberton's second major argument is that confidentiality denies candidates for promotion the basic right to answer any criticism made by a referee, thereby denying the opportunity to provide countervailing arguments in current or future applications. I doubt that there is a basic right, in law, which extends as far as Dr Pemberton asserts. If the rules of procedural fairness apply to University promotion processes, the right to answer criticism probably extends only to adverse comment which constitutes the critical factor on which a decision adverse to the candidate for promotion is likely to turn. Even then the duty to follow fair procedures will attempt to accommodate, as far as possible, any relevant duty of confidence: see *Science Research Council v Nassé* [1980] AC 1028 per Lord Wilberforce at p.1067. There is also the consideration, noted in paragraph 159 above, that if criticism is in future to be made orally, disclosure under the FOI Act will not be any kind of effective antidote to the problem perceived by Dr Pemberton. The answer may lie in trying to enforce any applicable duty to accord procedural fairness by insisting that selection committees disclose the substance of adverse oral comments, in addition to any adverse written comments (see paragraphs 143-144 above).

163. Point (r) in the first paragraph of Dr Pemberton's written submission is, in my opinion, a legitimate public interest consideration worthy of substantial weight. In another section of his written submission, in which he addresses particular documents in issue (and which is not reproduced above), Dr Pemberton stresses his "right to know" the contents of documents that have affected, and may continue to affect, his interests, and the public interest in his obtaining detailed feedback on the reasons why his work performance and achievements have not been considered sufficient for him to obtain promotion.

Recognition of a public interest in a particular applicant having access to particular documents

164. There is a large and respectable body of precedent in the case law under the Commonwealth FOI Act and the *Freedom of Information Act 1982 Vic* (the Victorian FOI Act) which holds that when an exemption provision contains a public interest balancing test, it is possible in an appropriate case to recognise a legitimate public interest which favours disclosure of particular documents to a particular applicant for access, even though no such public interest consideration would be present when disclosure to other applicants was in contemplation (see the cases reviewed at paragraphs 173-190 below).

165. In some respects, this does not sit comfortably with the orthodox approach to the application of exemption provisions which turn on the prejudicial effects of disclosure of particular documents (as opposed to whether documents fall within a prescribed class). That orthodox approach ordinarily requires that the motives of a particular applicant for seeking the documents in issue are to be disregarded, and the effects of disclosure were to be evaluated as if disclosure was to any person entitled to apply for the documents. Thus in *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor* (1992) 108 ALR 163 at p.179, a Full Court of the Federal Court of Australia said:

> *Disclosure under the FOI Act is, of course, disclosure to the public, and the particulars and personality of the applicant are of no significance. See s.11 of the* [Commonwealth] *FOI Act, which provides that "every person has a legally enforceable right to obtain access in accordance with this Act".*

166. Provisions like s.11 of the Commonwealth FOI Act, and its counterpart, s.21 of the Queensland FOI Act, are important in establishing that there is no test of standing to gain access to documents under the FOI Act, i.e. an applicant for access need not show a special interest in obtaining the information which the applicant seeks. In my opinion, however, the words of s.11 of the Commonwealth FOI Act, or s.21 of the Queensland FOI Act, carry no necessary implication that an applicant having a personal stake or involvement in the subject matter of particular documents, which is greater than other members of the public, has no greater right to obtain them than anyone else.

167. A more logically satisfying justification for the orthodox approach of applying exemption provisions by reference to the consequences of disclosure to any person, rather than to the particular applicant for access, was given by Jenkinson J in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) & Anor* (1987) 74 ALR 428 at p.431:

> *The Freedom of Information Act 1982 confers no power to exact any undertaking, or to impose any condition, concerning the use to which a person granted access to a document under that Act would put the document, or information contained in it.*

168. I do not think, however, that it is appropriate to erect any rigid or inflexible rule based upon these *dicta* of the Federal Court, which do not appear to have been based on any detailed consideration of all the consequences of such an approach. The justification for the orthodox approach of assessing the effects of disclosure as though disclosure could be to any person, seems to me to be at its highest in respect of those exemption provisions which have specific reservations to make it clear that the exemption is not to apply as against the person whom the information in issue concerns: see s.44(2), s.45(2) and s.45(4) of the Queensland FOI Act. It is proper, therefore, to assess the effects of disclosure of information relating to the business or commercial affairs of a person or organisation, for the purposes of s.45(1) of the FOI Act, as if the contemplated disclosure were to a competitor of that person or organisation, either because any person, including a competitor, is entitled to apply under the FOI Act for the same information, or because there is nothing to prevent the particular applicant, once having obtained the information, from disclosing it to a competitor of the person or organisation whose business or commercial information was in issue: see *Re Cannon and Australian Quality Egg Farms Limited* (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported) at paragraph 84.

169. However, it is necessary to sound a note of caution against any rigid or inflexible adherence to the orthodox approach because, in many instances, it would lead to absurd results which could not, in my opinion, have been intended by the legislatures which have enacted freedom of information legislation. The terms of a particular exemption provision, and the nature of its sphere of operation, may permit account to be taken of the position of the particular applicant for access. There are several examples in reported cases where tribunals have considered the prejudicial effects of disclosure by reference to disclosure to the particular applicant, rather than to any person who could have applied for the documents, because to do otherwise would have been absurd in the context of the particular case and the particular exemption provisions in issue: see, for example, *Re Lander and Australian Taxation Office* (1985) 85 ATC 4674 (analysed by P Bayne in "Freedom of Information and Access for Privacy Purposes" (1990) 64 ALJ 142 at pp.142-143); *Re Saunders and Commissioner of Taxation* (1988) 15 ALD 761 (considered at paragraphs 186-187 below). Also, in *Re "B"* at paragraphs 103-4 and 153, I explained that the exemptions in s.46(1)(a) and s.46(1)(b) could not be applied against a particular applicant to whom disclosure would not be an unauthorised

use of the confidential information in issue, even though disclosure to the "world at large" would be an unauthorised use, justifying exemption.

170. In *Ryder & Anor v Booth; State Superannuation Board v O'Connor* [1985] VR 869, a Full Court of the Supreme Court of Victoria considered the issue of whether disclosure of confidential medical reports to the persons who were the subjects of those reports would be contrary to the public interest under s.30(1) of the Victorian FOI Act. The exemption provisions were applied solely by reference to the effects of disclosure of the confidential medical reports to the applicants for access, rather than to any person who might have applied for them (which doubtless would have raised different considerations) as was acknowledged by Young C J at the end of the first paragraph of his judgment (at p.870):

> *In each case, the confidential medical reports related to the respective respondents* [who were applicants for access under the FOI Act]. *No doubt considerations other than those argued might be relevant if the reports had been sought by a third party.*

171. A further consequence which tells against any rigid adherence to what I have described above as the orthodox approach to the application of exemption provisions which turn on the prejudicial effects of disclosure, is that it would mean that a person who could demonstrate a particular interest or concern in respect of particular documents (perhaps amounting to a justifiable "need to know" that was more compelling than for other members of the public) would have no greater right to obtain access than anyone else. The need to take account of such circumstances probably explains the development by tribunals of the principle outlined in paragraph 164 above. Such an approach is justifiable in conceptual terms, having regard to the objects of freedom of information legislation, and seems to me to be a necessary and justifiable response by courts and tribunals to the need for a degree of flexibility to do justice according to the circumstances of an individual applicant, in an appropriate case. (Agency decision-makers at first instance have that flexibility through the discretion conferred on them by provisions like s.28 of the Queensland FOI Act, which means that the power to refuse access to exempt matter or exempt documents, may be exercised or not exercised at the discretion of the relevant decision-maker: see *Re Norman and Mulgrave Shire Council* (Information Commissioner Qld, Decision No. 94013, 28 June 1994, unreported) at paragraphs 21-26. That discretion has generally been denied to the independent external review authorities under the various Australian freedom of information statutes, which possess the power to undertake full merits review but only of the question of whether or not documents claimed to be exempt are in fact exempt: see, for example, s.58(2) of the Commonwealth FOI Act; s.88(2) of the Queensland FOI Act).

172. A public interest in the disclosure of particular documents to a particular applicant, is capable of being a public interest consideration of determinative weight (depending on the relative weight of competing public interest considerations favouring non-disclosure). This means that if it is to overcome the weight of a public interest consideration favouring non-disclosure which is inherent in the satisfaction of a test for *prima facie* exemption (where the "orthodox approach" described above has been applied) there must be some implicit judgment that the public interest in the particular applicant obtaining access is strong enough to outweigh any potential prejudicial effects of any wider dissemination by the particular applicant of the documents in issue. (I note that in *Re Stewart* at p.3, I suggested that the rationale for the exception to the "orthodox approach" made by s.6 of the Queensland FOI Act was because the applicant is the appropriate person to exercise control over any use or wider dissemination of information relating to the applicant's personal affairs, which has been obtained under the FOI Act.)

173. The earliest consideration, of which I am aware, of a public interest of this kind is in the reasons for decision of the Commonwealth AAT, chaired by Davies J (President) in *Re Witheford and Department of Foreign Affairs* (1983) 5 ALD 534, where the Tribunal said (at p.537):

> *These provisions* [i.e., s.12(2), s.30(3) and Pt.V of the Commonwealth FOI Act] *in our view, make it abundantly clear that this FOI Act intends that an applicant will have a right of access to documents that contain information which relates to his or her personal affairs. We think that the FOI Act intends that, in the determination of a claim for access, a decision-maker will take into account, in relation to documents containing information relating to personal affairs, that the applicant is the person whose affairs are spoken of in the document.*

174. I should point out that Davies J's understanding of the scope of the phrase "personal affairs" at that early stage in the history of the Commonwealth FOI Act was explained by him in a decision given only a few months earlier, *News Corporation Limited & Ors v National Companies and Securities Commission* (1983) 5 ALD 334, where Davies J said (at pp.336-7):

> *... I am disposed to think the term "personal affairs" refers to the "individual affairs" of a person rather than to the "private affairs" (as distinct from the "business affairs") of a person. In my view, the provision looks to information which relates to the affairs of a particular person rather than to public or general affairs.*

175. Davies J's understanding of the scope of the phrase "personal affairs" was subsequently overruled by a Full Court of the Federal Court in *News Corporation Limited & Ors v National Companies and Securities Commission* (1984) 52 ALR 277 (see *Re Stewart* at paragraphs 20-25). It seems, however, that Davies J contemplated the approach endorsed in *Re Witheford* as being appropriate in respect of documents relating to any affairs of the applicant for access, other than public or general affairs.

176. A slightly different rationale for arriving at a similar result is evident in the decision of Deputy President Todd of the Commonwealth AAT in *Re Burns and Australian National University (No 1)* (1984) 6 ALD 193, where, after citing a passage from the decision of Morling J, constituting the Document Review Tribunal, in *Re Peters and Department of Prime Minister and Cabinet* (1983) 5 ALN N306, Deputy President Todd said (at p.197):

> *But what is important is that his Honour clearly considered that there was a public interest in a citizen having such access in an appropriate case, so that if the citizen's "need to know" should in a particular case be large, the public interest in his being permitted to know would be commensurately enlarged.*
>
> *...*
>
> *... the present respondent has not, so far as it appears in the certificate, placed in the balance any concept of public interest in the assertion of private rights. I do not say this critically, because the working out of the concept of "public interest" under the FOI Act is a process of which we are still only at the threshold, and as a concept it is certainly very difficult and amorphous. It has, under the FOI Act, indigenous features that may lead to its not being wholly co-terminous with the concept of public interest as adumbrated in the series of landmark decisions in relation to discovery of documents in litigation. It is called a "multi-faceted concept": see* Re Heaney and Public Service Board (1984) 6 ALD 310. *But I am sure that it is a concept which should be seen as embodying public concern for the rights of an individual.*

177. In *Re Burns and Australian National University (No. 2)* (1985) 7 ALD 425, at p.439, Deputy President Todd dealt with an argument critical of the passage quoted above:

> [Counsel for the respondent] *submitted, at a hearing after my previous reasons were handed down, that the Tribunal should not find that the interest of an individual in obtaining information about himself is a public interest. Such an interest remained, he said, a private interest and the limit of the public interest was in knowing that some particular action or decision had been properly taken. It logically followed that an individual, for the purposes of the FOI Act, could have no higher interest than the community itself, and the test should be the same, whether the applicant seeks information about himself or seeks information as a member of the community.*

178. Deputy President Todd, however, adhered to his previously stated position, and commented that his conclusion was reinforced by reference to the judgment of Jacobs J of the High Court of Australia in *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473. The relevant part of Jacobs J's judgment (at p.487) was as follows:

> *The words "public interest" are so wide that they comprehend the whole field of objection* [to the grant of a mining lease] *other than objection founded on deficiencies in the application and in the required marking out of the land applied for. For instance, the public interest may tell against the grant of a mining lease even though the particular interests of an individual are the only interests primarily affected. It may thus be in the public interest that the interests of that individual be not overborne.*

179. Deputy President Todd's approach was approved and applied by Deputy President Hall of the Commonwealth AAT in *Re James and Ors and Australian National University* (1984) 6 ALD 687, at p.701. In *Re Mann and Australian Tax Office* (1985) 7 ALD 698, at p.700, Deputy President Todd further explained the approach he had developed, being careful to state that it was not intended to contradict one of the basic tenets of FOI legislation, i.e. that an applicant for access does not have to establish any special interest, or need to know, in order to obtain access to particular government information:

> *... it is not necessary for an applicant to establish a particular "need to know" in order to establish a right to access. Nor does it even strengthen an applicant's case, save where a question of public interest arises and an applicant is able to demonstrate that his personal involvement in the matter may cause an element of public interest in his "need to know" to arise (*see Re Peters ... and Re Burns ...), *to demonstrate some special interest in the documents sought.*

180. In a case with some interesting parallels to Dr Pemberton's circumstances, *Re Scrivanich and Public Service Board* (1984) 6 ALD 98, the applicant, a Commonwealth public servant, sought access to statements provided by her supervisors in the context of a grievance appeal concerning discrimination in promotion. The Tribunal found (at p.107) that disclosure of the documents in issue would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of personnel. However, in applying the public interest balancing test in s.40 of the Commonwealth FOI Act, the Tribunal held (at p.111):

> *A public interest exists in giving the applicant access to these records for the reasons given in evidence by Mr Christopher* [to the effect that the applicant's public sector union was of the view that if an agency held reports on a public servant which could be used for the purpose of making judgments affecting that public servant, the public servant should be given access to that information] *and so that she may exercise her rights under the Act. I see it as greater than any public interest in a procedure which allows reporting officers the right to make comments on their subordinates being considered for promotion without the need to justify to the*

subordinate the fairness of what they say. I am of the opinion that the balance of the public interest lies in the disclosure to the applicant of these documents ...

181. The Tribunal was here clearly placing determinative weight on a public interest in the particular applicant having access to the particular documents in issue. The respondent appealed from the Tribunal's decision to the Federal Court of Australia, where Keely J found no legal error in the Tribunal's approach to this aspect of the decision: see *Public Service Board v Scrivanich* (1985) 8 ALD 44.

182. At almost the same time, a similar approach emerged in the case law under the Victorian FOI Act. In *O'Connor v State Superannuation Board of Victoria* (County Court, Dixon J, 27 August 1984, unreported), the applicant challenged a decision refusing her access to confidential medical reports about her, supplied to the respondent by medical specialists following medical examinations of the applicant for superannuation purposes. The Court had to consider the application of s.30 and s.35 of the Victorian FOI Act, each of which required consideration of whether disclosure of the documents in issue would be contrary to the public interest. Dixon J's approach to the issue is disclosed in the following extracts from pp.29-30, 33 and 44 of his reasons for judgment:

The tendency of the disclosure of information to dry up the source of information is a negative aspect of the public interest. One positive aspect of the public interest is the public's right to know, as enshrined in s.3 of the Freedom of Information Act. Such a right includes the right of a citizen to know why he has been treated by an agency in a particular way. Thus, although an applicant for information does not have to show any particular locus standi *in making an application under the Act, his right to know why he is affected by a particular decision is one aspect of the public interest, and it is not a private interest as was argued by Mr Uren.*

As to the suggestion that that would be a private interest, it could be argued that an individual's right not to be treated unfairly by the State in relation to criminal investigations is a private interest. But, Bunning v. Cross (1978) 52 ALJR 561, demonstrated that this is not so. In that case in the High Court, their Honours Justices Stephen and Aiken said at p.568:

> On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand is the protection of the individual from unlawful and unfair treatment.

... [Dixon J then recited the respondent's submissions as to why disclosure of the documents in issue would be contrary to the public interest].

In regard to the submissions it should be remembered that the public interest criterion operates in the consideration of both ss.30 and 35, and considerations in favour of disclosure must be taken into account in each case.

The main consideration to be taken into account in favour of disclosure is the general right of the public to know about the administration of governmental matters, as provided by the Act; but in relation to persons whose interests are vitally affected, it includes a right to know why an adverse decision is made, so that the matter can be tested if advisable. I am quite sure that with the growth of the bureaucracy, making in many cases decisions which vitally affect the interests of citizens, the Freedom of Information Act was intended to ensure not only that justice be done, in the field of administrative law, but that it be seen to be done.

...

> *If it were shown to be probable that one or two medical specialists of the Board's choice would be reluctant to give reports in the face of likely disclosure to the examinees, once must weigh against that possibility the public interest in the disclosure to persons affected by the reports of the reasons for their classification.*

183. An appeal against Dixon J's judgment was heard by a Full Court of the Supreme Court of Victoria, together with another case raising like issues, and is reported under the title *Ryder & Anor v Booth; State Superannuation Board v O'Connor* [1985] VR 869. The Full Court dismissed the appeal against Dixon J's reasons for judgment. In the process, Gray J expressed the following views (at p.879):

> *... to obtain exemption, the applicant must prove that the disclosure of the reports would be "contrary to the public interest" within the meaning of s.30(1)(b).*
>
> *As was pointed out in argument, there is always difficulty in identifying what is in the public interest in a particular situation. In the present context, I consider that there are only two aspects of the public interest which fall to be considered. One is the public interest in persons having access to documents, including confidential documents, which concern them but which are in the hands of an agency. Second is the public interest in the efficient and economical conduct of a government agency ...*
>
> ...
>
> *In other words, I am not satisfied that the risk of adverse consequences to the Board's operations outweighs the public interest expressed by the Act in giving a person access to a document concerning him.*

184. This approach has been followed in subsequent decisions of the Victorian AAT. Although not explicitly acknowledged, it clearly underlies the finding of Rowlands J in *Re Lawless and Secretary to Law Department* (1985) 1 VAR 42, that the public interest supported a fairly generous access to the applicant (who had conducted a long campaign for exoneration following his conviction for murder some twelve years previously) to documents relating to his treatment under the processes of criminal justice.

185. In *Re Young and State Insurance Office* (1986) 1 VAR 267, the applicant had been sued for damages for personal injuries arising out of a motor vehicle accident in which he was driving an uninsured vehicle. The defence of the claim was handled by the Incorporated Nominal Defendant, which settled the claim, without reference to the applicant. The Incorporated Nominal Defendant was entitled to seek recovery of moneys from the applicant under s.50(3) of the *Motor Car Act 1958 Vic*. In determining whether disclosure of documents on the respondent's file relating to the case would be contrary to the public interest, the Tribunal clearly took into account (at p.272, p.275 and p.277) not only the general public interest in access to the documents in issue, but the public interest in the particular applicant (who was "vitally concerned" with the subject matter of the documents in issue) obtaining access to the documents in issue.

186. This approach has continued to be applied by the Commonwealth AAT in appropriate cases. For example, in *Re Saunders*, the applicant sought access to documents relating to his own tax affairs, in particular concerning a decision by the respondent to assess him as liable to pay tax on income received more than six years previously (something only permitted under the relevant legislation where fraud or evasion has occurred). Deputy President Jennings QC found (at p.762) that:

> *The public interest requires that a person who is proceeded against in respect of*

> *income earnt more than six years after original assessment is entitled to be told which statutory basis has been chosen to enable such a claim to be made.*

187. This case affords a useful illustration of how an absurd result could be produced by inflexible adherence to the orthodox approach that in applying exemption provisions which turn on the prejudicial effects of disclosure, the effect of disclosure should be assessed on the basis that disclosure could be to any person entitled to apply under the Act, without regard to the particular position or interests of the particular applicant for access. In *Re Saunders* the respondent raised grounds as to why the disclosure of the documents in issue would be contrary to the public interest, which basically revolved around prejudice to the respondent's case in any legal challenge by the applicant to the relevant tax assessment. The Tribunal did not consider that the grounds raised by the respondent justified withholding the documents in issue from the applicant. If the Tribunal had been obliged to strictly apply the exemption provision by reference to the effects of disclosure to any person who might apply for the documents in issue, it must have found that it would be contrary to the public interest to disclose, to any person who might apply for them, documents relating to the tax affairs of a particular individual. This would of course be an absurd result, especially since if any other person did actually apply for the documents relating to the applicant's tax affairs, access would almost certainly have been denied by other exemption provisions (such as s.38 or s.41 of the Commonwealth FOI Act), which could not have been claimed against the person whose tax affairs were involved.

188. The continuing vitality and relevance of the approach, the development of which I have been tracing, has been reaffirmed comparatively recently by the Presidents of the Commonwealth AAT and the Australian Capital Territory Administrative Appeals Tribunal (the ACT AAT), respectively. In *Re Kamminga*, the Commonwealth AAT, chaired by O'Connor J (President) said (at p.300):

> *Deciding whether disclosure is contrary to the public interest requires a balancing of competing interests including the public interest in the applicant's right to know* [citing re Peters and Department of Prime Minister and Cabinet (No.2) (1984) 5 ALN N306 and Re Burns and Australian National University (No.1)], *which is a different thing to the applicant's personal interest in knowing.*

Comments to like effect appear in O'Connor J's decision in *Re Cleary and Department of Treasury* (1993) 31 ALD 214 at p.216.

189. In *Re B and Medical Board of the ACT* (1993) 33 ALD 295, Professor Curtis (President) of the ACT AAT, after reviewing some of the Commonwealth decisions outlined above, said (at pp.303-4):

> *In those cases where considerations of public interest enter into the scope of the exemption, whether by way of being part of the definition of the exemption, as in ss.36 and 44, or by way of cutting down the scope of an exemption, as in ss.39 and 40, the public interest in a person having access to what is recorded about him or her is to be taken into account in determining the scope of the public interests involved. In the case of other exemptions, which do not involve an inquiry into the public interest, there is no scope to introduce that specific public interest into determining whether or not a document is exempt.*

190. The kind of public interest consideration dealt with in the above cases is closely related to, but is potentially wider in scope than, the public interest consideration which I identified in *Re Eccleston* at paragraph 55, i.e., the public interest in individuals receiving fair treatment in accordance with the law in their dealings with government. This was based on the recognition by the courts that: "*The public interest necessarily comprehends an element of justice to the individual*" (per Mason C J in

Attorney-General (NSW) v Quin (1989-90) 170 CLR 1 at 18; to similar effect see the remarks of Jacobs J from *Sinclair v Mining Warden at Maryborough* quoted at paragraph 178 above). It is also self-evident from the development by the courts of common law of a set of principles for judicial review of the legality and procedural fairness of administrative action taken by governments, that compliance with the law by those acting under statutory powers is itself a matter of public interest (see *Ratepayers and Residents Action Association Inc v Auckland City Council* [1986] 1 NZLR 746 at p.750). The public interest in the fair treatment of persons and corporations in accordance with the law in their dealings with government agencies is, in my opinion, a legitimate category of public interest. It is an interest common to all members of the community, and for their benefit. In an appropriate case, it means that a particular applicant's interest in obtaining access to particular documents is capable of being recognised as a facet of the public interest, which may justify giving a particular applicant access to documents that will enable the applicant to assess whether or not fair treatment has been received and, if not, to pursue any available means of redress, including any available legal remedy.

191. The legislative history of s.6 of the FOI Act (see Electoral and Administrative Review Commission, Report on Freedom of Information, Serial No. 90/R6, December 1990, at paragraphs 7.51 to 7.59) indicates that its development was influenced by the issues discussed at paragraphs 164 to 172 above. Section 6 of the FOI Act provides as follows:

> ***Matter relating to personal affairs of applicant***
>
> ***6.*** *If an application for access to a document is made under this Act, the fact that the document contains matter relating to the personal affairs of the applicant is an element to be taken into account in deciding -*
>
> *(a) whether it is in the public interest to grant access to the applicant; and*
>
> *(b) the effect that the disclosure of the matter might have.*

192. Interestingly, the terms of s.6(a) indicate that Parliament contemplated that there may be a public interest in granting access to information to a particular applicant (and not just to any member of the public), and s.6 requires that the fact that the document in issue contains matter relating to the personal affairs of the particular applicant is to be taken into account in deciding that question.

193. The obvious limitation of s.6 is that it applies only where the matter in issue relates to the personal affairs of the applicant. Since the phrase "personal affairs" has a fairly narrow scope (see *Re Stewart*), s.6 does not extend as far as the cases outlined above, which would permit, in an appropriate case, account to the taken of the public interest in a particular applicant having access to information about the applicant's affairs, which need not be confined to personal affairs. I have already noted at paragraph 1514 above that s.6 has no application to the documents in issue in the present case because they do not contain matter relating to the personal affairs of Dr Pemberton. There is no doubt, however, that the documents in issue contain information about Dr Pemberton and that the information is of particular interest or concern to him. That raises the issue of whether this is an appropriate case for the application of the principle that an applicant's involvement in, and concern with, particular information is of such a nature that it is capable of being taken into account as a public interest consideration when applying the public interest balancing test in s.40 and s.41 of the FOI Act.

194. In *Re Barkhordar and Australian Capital Territory Schools Authority* (1987) 12 ALD 332 the applicant had applied unsuccessfully for promotion to a senior position with the respondent. She had been permitted access to relevant assessments made of herself, including referee reports, but was denied access to similar documents relating to other applicants for promotion. Deputy

President Todd found that disclosure of the documents in issue would have a substantial adverse effect in terms of s.40(c) of the Commonwealth FOI Act. It is worth referring briefly to his reasons for that finding since they tend to support my own findings at paragraphs 152-153 above that disclosure of referee reports on candidates for promotion to persons other than the candidate for promotion could reasonably be expected to have a substantial adverse effect on the management or assessment by the University of its personnel. Deputy President Todd said (at p.336):

> *The special characteristics of the teaching service in the public sector include the fact that teachers are very much in the eye of at least a section of the public, namely the parental public. They are not "faceless". They have duties to children, to parents and to the service which employs them, and probably also to the general public. Uncontrolled publication of details of their performance as assessed by peers, selection panels and appeal boards could have most disruptive consequences. It is not really open to predict precisely what consequences might flow from the disclosure of the documents in question. But in terms of assessing the reasonable expectation of which s.40(1) speaks, I agree with the submission made on behalf of the Authority that:*
>
> > *the morale of participants would be damaged;*
> > *criticism or adverse comments, whilst constructive when used within the system, could undermine the position of teachers in their relationships with pupils and parents of pupils;*
> > *candour and frankness of referees, Advisory Selection Panels and Promotions Appeal Boards could be inhibited;*
> > *an unwillingness on the part of teachers to provide referees' reports and to serve on Advisory Selection Panels and Promotions Appeal Boards could result;*
> > *bad relationships between participants in the promotions system could arise;*
> > *undue stress on participants could ensue.*
>
> *Such consequences will be likely to lead to a breakdown in the system thereby adversely affecting to a serious degree the capacity of the respondent to ensure that the most efficient officers are promoted, and could lead to disputation within the* [Commonwealth Teaching Service] *and with the teachers' union. This would be clearly contrary to the public interest in having an efficient school system.*

195. In dealing with the public interest balancing test under s.40 of the Commonwealth FOI Act, Deputy President Todd said (at pp.336-7):

> *It seems to me that the Authority has permitted quite generous provision of such material to teachers involved in such processes. This occurs in controlled circumstances ... . What is asked for here, however, is release under the FOI Act, for which purpose the present applicant has in my opinion no greater or lesser right than a member of the general public. The only qualification in this regard would be in a limited area. In* Re Burns and Australian National University ... [I said]: *"But what is important is that His Honour clearly considered that there was a public interest in a citizen having such access in an appropriate case, so that if the citizen's "need to know" should in a particular case be large, the public interest in his being permitted to know would be commensurately enlarged."*
>
> *I do not consider that this is such a case. The above-quoted passage has been cited to me in a number of cases. In my view, it remains as a correct expression of view, but it is likely to have a very limited application.* Re Burns *itself was a case involving deprivation of office. I do not see failure to obtain promotion, in an area wherein promotion is difficult to attain, as likely to attract the stated principle.*

196. The position of the applicant in *Re Barkhordar* was materially different from the position of Dr Pemberton. Ms Barkhordar had obtained access to relevant reports on herself, and was seeking access to reports on other candidates for promotion. I think Deputy President Todd was correct to say that her right to know the contents of those documents was no greater than any member of the public, and that, in respect of those documents, her concern at her failure to obtain promotion was not sufficient to elevate her interest into a legitimate public interest. Dr Pemberton, on the other hand, seeks access to reports relating only to himself and though he too is concerned at his failure to obtain promotion, the relevant interests are, in my opinion, considerably wider than that.

197. The particular promotion processes within the University that are now under consideration do not involve the selection of the best candidate from a field of applicants for a particular vacancy. Rather they involve a value judgment as to whether a particular candidate has achieved a standard of excellence in his or her contribution to the University, and to his or her academic discipline, that warrants recognition by the University with the reward of personal promotion. I accept what is said in paragraph 4 of Professor Wilson's statutory declaration (set out at paragraph 63 above) to the effect that personnel assessment practices must ensure that those academic staff who are contributing most to the fulfilment of the University's Mission are promoted, so that the University is able to retain them, and so that others will be encouraged to emulate their achievement. However, it seems to me that a promotion process of this kind ought to place at least equal emphasis on affording guidance to those who aspire to promotion, but are unsuccessful, as to how they need to improve their performance so as to make a contribution of sufficient distinction to warrant recognition through personal promotion. Assisting and guiding academic staff towards achieving their full potential in that regard is likely to reap benefits not only for individual academics but for the wider community. If the judgment can properly be made that disclosure of the contents of a particular report by a Head of Department, Dean of Faculty or Pro-Vice-Chancellor should be made to an unsuccessful candidate for promotion in the interests of providing guidance of this type (which I find to be the case in respect of disclosure to Dr Pemberton of documents 18, 19 and 20) then I think there will be a legitimate public interest in disclosure of the report to the subject of the report. A public interest consideration of this kind may be reduced in weight if the unsuccessful candidate has received sufficiently detailed feedback through counselling following the selection process, but I am satisfied that that did not occur in respect of Dr Pemberton and the selection processes for which documents 1, 18, 19 and 20 were created.

198. Dr Pemberton is a researcher (and teacher) in a field of science (molecular microbial genetics) where progressive research is capable of producing significant benefits for the wider community. His duties include supervising research undertaken by graduate students in his specialist field. If senior academics, of Professorial calibre, hold opinions to the effect that Dr Pemberton's work on behalf of the University (and indirectly on behalf of the wider community) has shortcomings, or needs to be redirected or improved in some way in order for him to be assessed as having made a sufficiently distinguished contribution to the University, and his academic discipline, as to make him worthy of promotion to Professor, then I consider it to be not only in Dr Pemberton's personal interest, but in the wider public interest, that those opinions be conveyed to Dr Pemberton. Significant sums of public money are contributed to fund research of the kind in which Dr Pemberton is engaged, and to fund the employment of academics generally. It is in the public interest that academics and researchers direct their efforts in a way that optimises the benefit to the wider community from the investment it makes in the tertiary education sector and in scientific research.

199. Dr Pemberton has stated (at p.9 of his submission), and I accept, that he received no feedback of any description on his promotion application to which document 1 relates, and why that promotion application failed. In respect of his 1992 application for promotion to Professor, Dr Pemberton states (at p.14 of his submission) that he had a follow-up interview, but the feedback was of a

general nature and provided no details whatsoever. I accept that the interview would not have conveyed any details of comments in confidential referee reports, in accordance with the University's policy in that regard, as then in force.

200. Dr Pemberton also stated in his submission (p.15), and I accept, that the contents of reports released to him under the FOI Act (with the consent of the authors) would have been of great benefit to him if released to him shortly after the promotion process for which they were obtained.

201. The assessments of Dr Pemberton contained in documents 18, 19 and 20 were prepared shortly before the University's staff appraisal scheme was fully implemented, and before the University adopted the policy of conveying adverse comments in written reports to candidates for promotion. The considerations which supported the introduction of these new policies (see also paragraph 29 of Professor Wilson's statutory declaration set out at paragraph 63 above) in my opinion, afford support for the disclosure of documents 18, 19 and 20 to Dr Pemberton. In my opinion, it is in the public interest that Dr Pemberton have access to the assessments contained in documents 18, 19 and 20 so that he has the opportunity to take account of the opinions conveyed in them in making his own decisions as to how to best direct his work efforts to maximise his contribution to the mission and goals of the University so as to establish that he is worthy of promotion to Professor.

202. Document 1 is primarily of historical interest at this stage, and any public interest in its disclosure to Dr Pemberton for the reasons canvassed in the preceding paragraph is not strong. Contrary to Dr Pemberton's suspicions, document 1 is generally supportive of Dr Pemberton's claims for promotion from lecturer to senior lecturer in 1979, and I can see little benefit in its disclosure to Dr Pemberton apart from satisfying his own understandable curiosity. I am not satisfied that there are public interest considerations favouring disclosure to Dr Pemberton of document 1, which are of sufficient weight to overcome the public interest favouring non-disclosure which is inherent in the satisfaction of the test for *prima facie* exemption under s.40(c). I find document 1 to be an exempt document under s.40(c) of the FOI Act.

203. I am satisfied that there are public interest considerations of substantial weight which favour disclosure of documents 18, 19 and 20 to Dr Pemberton (though not to any other persons who might apply for them), not only because of Dr Pemberton's personal interest in having access to the documents, but because of a legitimate public interest in a person in Dr Pemberton's position having access to information that may assist him or her to fully realise his or her potential in performing work that contributes to the benefit of the wider community. There is also the general public interest in accountability (i.e., in ensuring that promotions are not only made fairly, but are seen to be made fairly) which would be served to some extent (see paragraph 160 above) by disclosure of documents 18, 19 and 20 to Dr Pemberton. After weighing these considerations against the public interest in non-disclosure which is inherent in the satisfaction of the test for *prima facie* exemption under s.40(c) of the FOI Act, I am satisfied that disclosure of documents 18, 19 and 20 to Dr Pemberton would, on balance, be in the public interest. I would have been inclined to the same conclusion in respect of another document in issue, document 22, but document 22 is exempt under s.46(1)(a), an exemption provision which is not qualified by a public interest balancing test.

204. One reservation needs to be made in respect of the last three sentences of document 19, wherein the author of document 19 suggests the names of other referees who may be approached to comment on Dr Pemberton's work. One of those nominated was the author of document 22. That author's identity is exempt matter under s.46(1)(a). It would not be in the public interest to disclose this matter to Dr Pemberton, and I find it to be exempt matter under s.40(c). I make the same finding in respect of the last three sentences in the final paragraph of document 18 (the last two pages of which comprise a duplicate of document 19).

Consideration of s.41(1)

205. Turning to s.41(1) of the FOI Act, I have already found (at paragraph 70 above) that the contents of referee reports submitted for the purpose of use in selection processes for appointment or promotion of staff comprise matter which falls within s.41(1)(a) of the FOI Act. Whether documents 1, 18, 19 and 20 are exempt under s.41(1) will depend on whether I am satisfied that their disclosure would, on balance, be contrary to the public interest (see s.41(1)(b) of the FOI Act).

206. The relevant public interest considerations are essentially identical to those considered in respect of s.40(c), with the four claimed adverse effects on the University's management or assessment of its personnel to be treated, to the extent that I have found them to be of substance, as public interest considerations favouring non-disclosure. I consider that disclosure of documents 1, 18, 19 and 20 to persons other than Dr Pemberton (or more generally, the disclosure of reports on a candidate for promotion to persons other than that candidate for promotion) would be contrary to the public interest in the effective functioning of the University's promotion processes for the reasons explained at paragraphs 152-154 above. For the reasons given at paragraph 202 above, I am not satisfied that there are public interest considerations of substantial weight favouring disclosure of document 1 to Dr Pemberton, and I find document 1 to be exempt under s.41(1) of the FOI Act.

207. However, I consider that there are public considerations favouring disclosure of documents 18, 19 and 20 to Dr Pemberton, of the kind explained at paragraphs 197-201 and 203 above, that are of such weight that I am satisfied that disclosure to Dr Pemberton of documents 18, 19 and 20 would not, on balance, be contrary to the public interest. Consistently with paragraph 204 above, I make the reservation that disclosure of the last three sentences in the final paragraph of documents 18 and 19 would be contrary to the public interest, and I find that matter to be exempt matter under s.41(1) of the FOI Act.

208. In the decision under review, Mr Porter found that documents 18, 19 and 20 were exempt under s.44(1) of the FOI Act (as well as s.40(c), s.41(1) and s.46(1)). No argument was offered, in the University's submission on external review, in support of this aspect of Mr Porter's decision. I believe this was because the University accepts that this aspect of Mr Porter's decision was mistaken. The information in these reports concerns the work capacity and performance of Dr Pemberton, not the personal affairs of any person. Moreover, the reports were written by their authors in their capacities as officers of the University of Queensland, rather than in a personal capacity. My decision on external review will also, therefore, vary this aspect of Mr Porter's decision.

Conclusion

209. I affirm that part of the decision under review by which it was determined that the matter withheld from the applicant, as contained in documents 2, 3, 5, 6, 7, 8, 10, 11, 12, 13, 14, 16(a), 16(b), 21, 22 and 24 is exempt matter under s.46(1)(a) of the FOI Act.

210. I affirm that part of the decision under review by which it was determined that document 1 is exempt matter under s.40(c) and s.41(1) of the FOI Act.

211. I vary the decision under review to the extent that I find that documents 18, 19 and 20 -

(a) are not exempt documents under s.46(1)(a) of the FOI Act; and

(b) are not exempt from disclosure to Dr Pemberton under s.40(c), s.41(1) or s.44(1) of the FOI Act (except for the last three sentences in the final paragraph of documents 18 and 19, which are exempt matter under s.40(c) and s.41(1)).

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F N ALBIETZ
INFORMATION COMMISSIONER