OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 97011
Application S 228/93

Participants:

MICHAEL PAUL GODWIN
Applicant

QUEENSLAND POLICE SERVICE
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - witness statement obtained by police while investigating a complaint of assault lodged by the applicant - police subsequently deciding to take no formal action in respect of the applicant's complaint - whether witness statement comprises information communicated in confidence - whether disclosure would found an action for breach of confidence - whether disclosure could reasonably be expected to prejudice the future supply of such information - whether disclosure to the applicant would, on balance, be in the public interest - public interest in accountability of the Queensland Police Service to a complainant in respect of the investigation of his/her complaint - application of s.46(1)(a) and s.46(1)(b) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - whether disclosure of matter in issue would disclose information concerning the personal affairs of the maker of the statement - whether matter in issue comprises 'shared personal affairs' of the applicant and others - whether disclosure would, on balance, be in the public interest - application of s.44(1) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.25, s.42, s.44(1), s.44(2), s.46(1)(a), s.46(1)(b), s.46(2), s.46(2)(a), s.46(2)(b), s.51, s.78(2), s.81, s.87(2)(a)
Oaths Act 1867 Qld

"A" v Hayden (No. 2) (1984) 59 ALJR 6
Allied Mills Industries Pty Ltd v Trade Practices Commission (1981) 34 ALR 105
"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Butler v Board of Trade [1971] 1 Ch 680
Byrnes and The Public Trustee of Queensland, Re (Information Commissioner Qld,

Decision No. 96001, 23 February 1996, unreported)

DECISION

I vary the decision under review (which is identified in paragraph 4 of my accompanying reasons for decision) in so far as it relates to folios 6-8, by finding that -

(a) the following segments of folios 6-8 are exempt matter under s.44(1) of the *Freedom of Information Act 1992* Qld:

(i) the signature of the third party where it appears on folios 6, 7 and 8;

(ii) the third party's address, age and home phone number where they appear in boxes at the top of folio 6;

(iii) the first sentence of the body of the statement on folio 6; and

(iv) the address in the tenth line of the body of the statement on folio 6; but that

(b) the balance of the matter contained in folios 6-8 is not exempt from disclosure to the applicant under the *Freedom of Information Act 1992* Qld.

Date of decision: 11 July 1997

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INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse him access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to a written statement supplied to the respondent in the course of investigations it made into a complaint by the applicant that he had been assaulted by another person (whom I shall refer to as Mr A). The complaint related to an altercation involving the applicant and Mr A which occurred in a bar at the Coolangatta Surf Lifesaving Club late at night on 13 March 1992. The applicant lodged a formal complaint with the Queensland Police Service (the QPS) in March 1993, alleging that he had been assaulted by Mr A on the night of 13 March 1992, and that the assault had caused a significant permanent impairment to his left arm, plus continuing neck pain. The document in issue is a statement relevant to the incident given to an investigating police officer on
24 March 1993 by another person (whom I shall refer to as "the third party"). The outcome of the investigation was that no action was taken against any person. The QPS claims that the witness statement in issue is exempt matter under s.44(1) and s.46(1) of the FOI Act.

2. On 13 May 1993, Mr Godwin applied to the QPS for access under the FOI Act to the following documents:

> *Copies of statements by witnesses to an incident that occurred on the 13.3.92 (assault allegation).*

3. The initial decision in response to the application was made on 12 October 1993 by Senior Sergeant D A Wright, who identified 8 folios as falling within the terms of the applicant's FOI access application, and decided to -

(a) release four folios in full (being the applicant's own statement, which was given to police on the day he lodged his complaint, and a medical report, detailing the applicant's injuries, which was also given to police on that day);

(b) release a statement given to police by a witness to the incident (whom I shall refer to as Mr J) subject to the deletion of a small amount of matter determined to be exempt matter under s.44(1) of the FOI Act; and

(c) refuse access to the witness statement which remains in issue, on the basis that it comprised exempt matter under s.44(1) and s.46(1)(b) of the FOI Act.

4. Mr Godwin applied for internal review of that decision on 4 November 1993. That review was conducted by Acting Assistant Commissioner P J Freestone who, by letter dated 17 November 1993, affirmed the decision of Senior Sergeant Wright.

5. By letter dated 9 December 1993, Mr Godwin applied for review by the Information Commissioner, under Part 5 of the FOI Act, of Acting Assistant Commissioner Freestone's decision, stating his objections to the internal review decision as follows:

> *1. Whilst I fully realize that details such as marital status, financial records, religious background, etc should remain confidential, my request was for a copy of the written record of the recollections of the witness* [a name was then given, which I shall refer to as Mr B - see paragraph 8 below] *concerning the alleged assault at Coolangatta.*
> *This three page document must contain such relevant information of a non-personal, non-confidential nature.*
>
> *2. Should legal action be pursuant, the witness would be legally duty bound in terms of the law to disclose the same details, if not more detailed information, than that provided in his written statement of interview.*
>
> ...
>
> *4. It seems incongruous that the Freedom of Information Unit's decision was to release in part a copy of the statement by witness* [Mr J] *but refused in its entirety to publish the statement by witness* [Mr B]. *Theoretically, similar information would have been provided by him.*

6. It is worth noting at this point that the apparent discrepancy referred to in point 4 of Mr Godwin's external review application, concerning the treatment by the QPS of the two witness statements, arises from the fact that, after the author of each statement was consulted in accordance with s.51 of the FOI Act, the author of the statement in issue objected to disclosure of any part of his statement, while Mr J agreed to the disclosure of his statement, subject to the deletion of a small amount of personal information. The QPS acted in accordance with the expressed wishes of the authors of the statements, in determining that one could be released to the applicant subject to deletions, but that no part of the other should be disclosed to the applicant.

External review process

7. A copy of the statement in issue was obtained and examined. I contacted the third party, drawing the third party's attention to s.78(2) of the FOI Act, which provides that any person affected by a decision subject to review may apply to the Information Commissioner to participate in the review. The third party did not seek to become a participant in the review, but did provide evidence in the form of a statutory declaration made on 25 February 1994.
I also contacted Mr A (against whom the applicant's complaint of assault was made) and drew his attention to s.78(2) of the FOI Act. Mr A did not apply to become a participant in the review, but stated his objection to the disclosure of the third party's statement to
Mr Godwin, and briefly set out his reasons for objection (which I have taken into account in formulating my reasons for decision set out below).

8. During the course of the review, Mr Godwin confirmed that he did not seek access to the small amount of matter deleted from the statement of Mr J (folio 5) on the basis that it was exempt matter under s.44(1) of the FOI Act. That matter is no longer in issue in this review.
Mr Godwin has stated that he knows that the statement remaining in issue was given by
Mr B. Mr Godwin has stated that he had in fact provided to the QPS the names of Mr J and Mr B as the only possible witnesses. (I have confirmed that this is correct by examining the statement given to the police by Mr Godwin, and the QPS Criminal Offence Report completed by police in respect of Mr Godwin's complaint.) Mr Godwin has now obtained a copy of Mr J's statement and has indicated that, given that there were only four witnesses to the incident, including himself, and that he knew the statement in question was not made by Mr A, Mr J or himself, the only person who could possibly have provided the statement was Mr B. However, the QPS maintains that the identity of the author of the statement is exempt matter. Pursuant to s.87(2) of the FOI Act, I am obliged to refrain from identifying, in my reasons for decision, the author of the statement in issue. I have, therefore, in these reasons for decision, referred to the author of the statement in issue as "the third party". The person named by the applicant as the person whom the applicant believes made the statement in issue (and who may or may not be "the third party") is referred to as Mr B.

9. I invited the QPS to provide a submission and evidence in support of its claim that the document in issue is exempt matter under s.44(1) and s.46(1)(b) of the FOI Act, indicating that, by virtue of s.81 of the FOI Act, the onus lies on the QPS to establish that the decision under review was justified, or that I should give a decision adverse to the applicant. I also drew the attention of the QPS to the possible application of s.46(1)(a) of the FOI Act, and invited submissions from it in that regard.

10. The QPS lodged a written submission dated 16 November 1994, together with statutory declarations by Detective Senior Constable Haslam and Detective Constable Curran, and a copy of the Criminal Offence Report in respect of Mr Godwin's complaint. I provided
Mr Godwin with copies of that material (edited to remove references to information claimed by the QPS to be exempt matter) under cover of a letter dated 17 January 1995, which also contained a summary of the evidence obtained from the third party. In that letter, I invited Mr Godwin to lodge a submission and evidence in support of his case by 3 March 1995.
Notwithstanding a number of phone calls and letters to Mr Godwin and his solicitor, no submission or evidence has been lodged on behalf of Mr Godwin.

11. In raising issues as to the correct application of the provisions of the FOI Act to a document created in the course of an investigation by a law enforcement agency of a possible contravention of the law, this case ventures further into the territory explored in my recent decision in *Re McCann and Queensland Police Service* (Information Commissioner Qld, Decision No. 97010, 10 July 1997, unreported). Much of the general commentary in *Re McCann* (especially at paragraphs 20-24, and 33-62) is also relevant in the present case.
There are, however, some material differences between *Re McCann* and the present case. In *Re McCann*, the documents in issue concerned a police investigation into possible criminal offences or breaches of discipline by a serving police officer, and the applicant for access was the police officer who was the subject of the investigation. In the present case, the document in issue concerns a police investigation into a possible criminal offence alleged to have been committed by one citizen resulting in injury to another citizen, and the applicant for access is the citizen (claiming to have been injured) who lodged the complaint for investigation by police. Section 46(1)(b) of the FOI Act was invoked by the QPS as a ground of exemption in both *Re McCann* and the present case, but, in the present case, the QPS has also claimed reliance on s.46(1)(a) and s.44(1) of the FOI Act, two exemption provisions which were not relied upon by the QPS, or considered by me, in *Re McCann*.

Relevant exemption provisions

12. I have set out below the relevant parts of the exemption provisions relied upon by the QPS in the present case:

> ***44.(1)*** *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*
>
> ***(2)*** *Matter is not exempt under subsection (1) merely because it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to a document containing the matter is being made.*
>
> ***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(1) of the FOI Act

Difficulties in the application of s.46(1)(a) to information obtained for the purposes of law enforcement investigations

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

14. 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 third party to the QPS. 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 *Re "B"* at pp.303-304, paragraphs 60-63);

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

(c) the information in issue must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see *Re "B"* at pp.311-322, paragraphs 76-102);

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

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

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

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

    (b) that was communicated in confidence;

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

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

16. Subject to the qualification imposed by s.46(2) of the FOI Act (which does not arise for consideration in the circumstances of the present case, since the provider of the information in issue does not fall within s.46(2)(a) or (b) of the FOI Act), s.46(1)(a) of the FOI Act was intended to afford exemption to confidential information in the possession or control of a Minister or agency subject to the FOI Act, in circumstances where the supplier of the confidential information to the relevant Minister or agency would be able, in a legal action, to restrain disclosure of that information under the general law relating to breach of confidence.

17. In also enacting s.46(1)(b) of the FOI Act, the Queensland Parliament appears to have intended that some confidential information, communicated in confidence to an agency or Minister, which might not be afforded protection from disclosure by the general law in an action for breach of confidence, should nevertheless be capable of being protected from disclosure under the FOI Act, provided two further conditions are satisfied:

    (a) its disclosure could reasonably be expected to prejudice the future supply of like information; and

    (b) its disclosure would not, on balance, be in the public interest.

18. Condition (a) above is not an element that a plaintiff would have to establish to found an action for breach of confidence. Condition (b), however, can no longer be said to impose an element of the test for exemption under s.46(1)(b) that is without a counterpart in the test for exemption under s.46(1)(a). I note that, in an action for breach of confidence concerning information supplied to government, it has recently been established that Australian law will recognise a public interest exception (the precise scope of which is not yet clear), on the basis that an obligation of confidence claimed to apply in respect of information supplied to government will necessarily be subject to the public's legitimate interest in obtaining information about the affairs of government: see *Esso Australia Resources Ltd & Ors v Plowman & Ors* (1995) 183 CLR 10, *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* [1995] 36 NSWLR 662, and my comments on this development in *Re Cardwell Properties Pty Ltd & Williams and Department of the Premier, Economic and Trade Development* (Information Commissioner Qld, Decision No. 95019, 29 June 1995, unreported) at paragraphs 51-60.

19. The requirement that the information in issue must be confidential in nature is common to both s.46(1)(a) and s.46(1)(b). However, the second element of the test for exemption under s.46(1)(b), *viz*., that the confidential information was "communicated in confidence" (as to which, see *Re McCann* at paragraphs 33-34), will in many cases be easier to satisfy than the requirement, in an action for breach of confidence, to establish that the information in issue was communicated in such circumstances as to fix the recipient with an equitable obligation of conscience (or an express or implied contractual obligation of confidence) which a court would enforce so as to restrain the recipient from using the confidential information in a way that was not authorised by the confider of it.

20. There are a number of difficulties in establishing that a law enforcement agency is bound by an enforceable legal obligation not to use or disclose information that it has obtained for the purposes of a law enforcement investigation, in a way that is not authorised by the supplier of the information. Those difficulties will generally mean that it is easier for a law enforcement agency, wishing to claim exemption for information supplied to it on the understanding that the information would be treated in confidence, to establish a case under s.46(1)(b) of the FOI Act rather than s.46(1)(a).

21. I consider that the occasions would be comparatively rare in which it would be possible to establish, in respect of information supplied to a law enforcement agency relating to the possible commission of a criminal offence, that the law would impose an enforceable equitable obligation of confidence on the agency so as to restrain it from using or disclosing the information in a manner not authorised by the supplier, rather than leaving the agency free to use or disclose the information as the agency saw fit in the course of an investigation, or in the prosecution of charges laid as a result of an investigation. If enforceable legal obligations of that kind were too readily imposed on law enforcement agencies, it might unduly limit their ability to satisfactorily investigate, with due expedition and thoroughness, alleged breaches of the law.

22. Given the nature and objects of the tasks they perform, I consider that it would be an exceptional, rather than an ordinary, case in which investigators were willing to subject themselves and their agency to an enforceable legal obligation of confidence owed to a person who supplied information for the purposes of a law enforcement investigation. As
I said in *Re Prisoners' Legal Service Inc and Queensland Corrective Services Commission* (Information Commissioner Qld, Decision No. 97004, 27 March 1997, unreported) at paragraphs 58:

> *58. ... An investigator ordinarily needs to identify relevant witnesses and establish that they can give relevant and reliable evidence in any formal legal proceeding that may be in contemplation. An investigator who bound himself or herself to an obligation of confidence with respect to the information obtained from a particular source could not use or further disclose the information so obtained in a manner that was not authorised by the particular source. This might be considered worthwhile in some instances (e.g., promises of confidentiality may be given to secure the co-operation of a genuine informer) for the sake of obtaining crucial information that could lead to other sources of material evidence, which <u>could</u> be used in a formal legal proceeding.*
> *However, investigators would ordinarily be reluctant to be bound to such an obligation of confidence - they need the flexibility to put evidence*

> *obtained from one source to other sources in order to test the reliability of evidence, pursue fresh lines of inquiry,* et cetera*, and they must ultimately be able to confront an alleged wrongdoer with sufficient reliable evidence of the wrongdoing with which he or she is to be charged. ...*

23. There is evident in English and Australian law a reluctance by the judiciary to restrain, on the basis of an alleged entitlement to observance of a duty of confidence, the disclosure to, and use (including further disclosure) by, law enforcement agencies of information relevant to the investigation and prosecution of possible breaches of the law. This reluctance stems from a recognition of a substantial public interest in the enforcement of the criminal law and the administration of justice. In cases involving actions for breach of confidence, this is manifest in the recognition of a 'public interest defence' (sometimes referred to as the 'iniquity rule') by which a defendant may be relieved of liability for any breach of confidence involved in making disclosure, to a proper authority, of information concerning criminal conduct or other serious wrongdoing (see *Re "B"* at pp.330-334, paragraphs 120-131).

24. The approach of the courts is illustrated by *"A" v Hayden (No. 2)* (1984) 59 ALJR 6. The plaintiffs in that case were either training to be Australian Secret Intelligence Service (ASIS) officers or involved in the training of ASIS officers. They had obtained either written or oral assurances from the Commonwealth that their identities would not be disclosed to any person. A training exercise at the Sheraton Hotel in Melbourne miscarried, and there were allegations that the plaintiffs had committed breaches of the criminal law during the training exercises. The Chief Commissioner of the Victoria Police sought the names of the officers from the Commonwealth, and the Commonwealth wished to provide the names in order to facilitate the Victoria Police investigation. The plaintiffs commenced actions to restrain the Commonwealth from passing over the information, but the High Court held that there was no enforceable duty binding the Commonwealth to refrain from providing it. In their joint judgment, Wilson and Dawson JJ stated (at pp.22-23):

> *In our view, ... the only conclusion that is open in the present cases is that if the Court was to grant the plaintiffs the permanent injunction which they seek it would be elevating their private right to confidentiality above the interest of the community in the efficient investigation of alleged breaches of the law. The Commonwealth seeks to advance that interest, yet the injunctions would prevent it from doing so. The administration of justice, and in particular the enforcement of the criminal law, must always rank highly in any assessment of the public interest.*
>
> *As Lord Simon of Glaisdale said in* "D" v NSPCC *[1978] AC 171 at 231:*
>
> > "Thus it is clear that the administration of justice is a fundamental public interest. But it is also clear that it is not an exclusive public interest. It is an aspect (a crucially important one) of a broader public interest in the maintenance of social peace and order."

Statements to similar effect were made by Mason J (at p.13) and Deane J (at p.32).

25. A further example is provided by the decision of Sheppard J of the Federal Court of Australia in *Allied Mills Industries Pty Ltd v Trade Practices Commission* (1981) 34 ALR 105. In that case, Allied Mills Industries Pty Ltd, the respondent in proceedings commenced by the Trade Practices Commission, sought orders restraining the Commission from using or disclosing information and documents provided by an employee of Allied Mills (in alleged breach of a duty of confidence owed by the employee to Allied Mills), in the course of the Commission's action against Allied Mills. After a detailed examination of the history of the 'iniquity rule' and consideration of English authorities on use by police of evidence which was unlawfully obtained, Sheppard J. stated (at p.145):

> *It would seem surprising to me if the law were such as to compel a prosecutor in the position of the Commission here to return documents which might be evidence, or at least relevant to an issue in the prosecution of the person charged, prior to completion of the prosecution. That is particularly so where, as here, the purpose of the claimant is to recover the documents, not for the purpose of preventing their disclosure commercially to competitors or customers, but to hamper the prosecution which is being brought.*

26. In the same vein is the decision of Goff J in *Butler v Board of Trade* [1971] 1 Ch 680. In that case, the Board of Trade sought to put into evidence in criminal proceedings against the plaintiff a copy of a letter to the plaintiff from his solicitor, which had been inadvertently provided to the Board by the solicitor. Goff J held that the original letter was protected by legal professional privilege and that the iniquity rule did not apply to rob it of that privilege. In considering the copy of the document and whether the law or equity as to breach of confidence operated to give the plaintiff an equity to prevent the Board from tendering a copy of the letter in evidence, Goff J said (at pp.690-691):

> *... In the present case there was no impropriety on the part of the defendants in the way in which they received the copy, but that, in my judgment, is irrelevant because an innocent recipient of information conveyed in breach of confidence is liable to be restrained. I wish to make it clear that there is no suggestion of any kind of moral obliquity on the part of the solicitors, but the disclosure was in law a breach of confidence. Nevertheless,* Ashburton v Pape *does differ from the present case in an important particular, namely, that the defendants are a department of the Crown and intend to use the copy letter in a public prosecution brought by them.*
>
> *As far as I am aware, there is no case directly in point on the question whether that is merely an immaterial difference of fact or a valid distinction, but in my judgment it is the latter because in such a case there are two conflicting principles, the private right of the individual and the interest of the state to apprehend and prosecute criminals: see* per *Lord Denning MR in* Chic Fashion (West Wales) Ltd v Jones *[1968] 2 QB 299, 313 and in* Ghani v Jones *[1970] 1 QB 693, 708.*
>
> *In my judgment it would not be a right or permissible exercise of the equitable jurisdiction in confidence to make a declaration at the suit of the accused in a public prosecution in effect restraining the Crown from adducing admissible evidence relevant to the crime with which he is charged. It is not necessary for me to decide whether the same result would obtain in the case of a private prosecution, and I expressly leave that point open.*

> *My reasons for the conclusion I have reached are as follows: First, it is clear that if the copy letter were in the hands of a third party I would in restraining him have to except the power of the trial court to subpoena him to produce the letter and his obligation to comply with that order: see* per *Bankes LJ in* Weld-Blundell v Stephens *[1919] 1 KB 520, 527. It would be strange if the defendants could subpoena a witness to produce this document yet, having it themselves, not be allowed to tender it in evidence. Secondly, and even more compelling, is the effect of the conflict between the two principles to which I have already referred.*
> *In* Elias v Pasmore *[1934] 2 KB 164 it was held accordingly by Horridge J that the police were justified in retaining and using at the trial of Hannington documents belonging to Elias which they had seized irregularly when entering the premises to arrest Hannington. True it is that in* Ghani v Jones *[1970]*
> *1 QB 693, 706, Lord Denning MR criticised the dictum of Horridge J as being too wide in that he gave the police a right to use the documents in the trial of any person, but with that qualification Lord Denning accepted what Horridge J had said. Thus,* Elias v Pasmore *is authority for the proposition that the right and duty of the police to prosecute offenders prevails over the accused's right of ownership. He cannot demand his own goods back. By analogy it seems to me that the interest and duty of the defendants as a department of the state to prosecute offenders under the* Companies Act *must prevail over the offender's limited proprietary right in equity to restrain a breach of confidence, and here, of course, the doubt suggested by Lord Denning does not arise because the accused and the person entitled to the benefit of the confidence are one and the same.*

27. The above cases all raised the issue of whether an existing duty of confidence would be enforced so as to prevent disclosure to, or use by, a law enforcement agency of information relevant to possible offences. They demonstrate that there is a significant public interest in law enforcement agencies being able to use and disclose information relating to possible breaches of the law, which the courts will be slow to impinge upon by orders which would limit that use or disclosure.

28. Where information which discloses a possible offence, or which is relevant to the investigation of a possible offence, is disclosed to a law enforcement agency, I consider that it would be an exceptional case, rather than the ordinary case, in which a court would find that the law enforcement agency was bound by an equitable obligation of confidence owed to the supplier of the information. In *Re "B"* at p.319 (paragraphs 92-93), I said:

> 92. *Another principle of importance for government agencies was the Federal Court's acceptance in* Smith Kline & French *that it is a relevant factor in determining whether a duty of confidence should be imposed that the imposition of a duty of confidence would inhibit or interfere with a government agency's discharge of functions carried on for the benefit of the public. The Full Court in effect held that the restraint sought by the applicants on the Department's use of the applicant's confidential information would go well beyond any obligation which ought to be imposed on the Department, because it would amount to a substantial interference with vital functions of government in protecting the health and safety of the community. (This finding could also have followed from an application of Lord Denning's statement of principle set out at paragraph 85 above).*

> *93. Thus, when a confider purports to impart confidential information to a government agency, account must be taken of the uses to which the government agency must reasonably be expected to put that information, in order to discharge its functions. Information conveyed to a regulatory authority for instance may require an investigation to be commenced in which particulars of the confidential information must be put to relevant witnesses, and in which the confidential information may ultimately have to be exposed in a public report or perhaps in court proceedings.*

The significance of the functions of a government agency as a recipient of information has also been stressed in the recent High Court decision of *Esso Resources v Plowman* (for a discussion of which see paragraphs 51-60 of my decision in *Re Cardwell Properties Pty Ltd and Department of the Premier, Economic and Trade Development*).

29. There are many reasons why information provided to a law enforcement agency may need to be used or disclosed in the course of an investigation. It may be necessary to put information to other possible witnesses to jog their memory or to test their account of events. It may be necessary to put information to the subject of investigation in order to obtain a response. It may even be judged useful to put the identity of a source of information to the subject of investigation in order to influence responses to questions asked. These instances may not arise in every case, but in my view the possibility of disclosure as a useful tool in the course of an investigation would be present in most cases, and is something which equity would not readily foreclose.

30. It is possible that equity would enforce an obligation of confidence, subject to conditions or exceptions, provided the conditions or exceptions were clearly definable, and certain in their operation. I consider, however, that equity would probably baulk at recognising or enforcing an obligation of confidence which reserved a large measure of discretion to the confidant as to the use or disclosure which the confidant could make of the confidential information. However, a mutual understanding of confidence that was subject to significant conditions or exceptions could be accommodated under s.46(1)(b) of the FOI Act, in the manner explained in *Re McCann* at paragraphs 48-51 and 56-62.

31. I am aware of one reported authority, *G v Day* [1982] 1 NSWLR 24, in which a court has upheld an action in equity to restrain a breach of confidence in respect of information provided by a member of the public to a law enforcement agency. I should note, however, in view of the previous discussion, that the threatened breach of confidence which, in *G v Day*, the Supreme Court of New South Wales was prepared to restrain, was the proposed publication by a media organisation of confidential information obtained by the media organisation through an unauthorised breach of confidence (see p.35 of *G v Day*) rather than any use or disclosure by a law enforcement agency for the purposes of its investigation. The plaintiff in *G v Day* had made it quite clear to the two law enforcement agencies with which he dealt that he feared for his safety, and he sought and obtained express assurances that his identity would be protected from disclosure (both of which facts he insisted on recording in the statements or affidavits he supplied to the law enforcement agencies), before supplying information. As it turned out, the information supplied was mistaken (although honestly believed by the plaintiff), but the court did not regard this factor as disqualifying the plaintiff from seeking enforcement of an equitable obligation to preserve the confidentiality of his identity as the person who supplied the information to the law enforcement agencies. The court was prepared to restrain disclosure of the plaintiff's identity even though the information he supplied had become public knowledge (as he must have contemplated it would, if the authorities were prepared to act upon it). It is notable too that the judgment of the

Supreme Court contemplated that the plaintiff's identity might be disclosed in a future hearing in the Coroner's court, but the Supreme Court was prepared to make orders restraining disclosure of the plaintiff's identity, unless and until that occurred (with the court's orders conditioned accordingly: see p.41 of *G v Day*).

32. In my view, a court would be unlikely to find that a law enforcement agency was subject to an enforceable equitable obligation of confidence owed to a person who has supplied information relevant to a possible breach of the law, unless there were evidence of express assurances of confidentiality given by or on behalf of the law enforcement agency, which the court considered it proper in all the circumstances to enforce (*cf.* the considerations referred to in *A v Hayden (No. 2)*), or evidence of compelling circumstances attending the relevant disclosure of information which were (or should have been) evident to the law enforcement agency, such as a substantial threat to the safety or livelihood of the supplier of the information, which would warrant a finding that the law enforcement agency was bound by an equitable obligation of conscience not to use or disclose the information supplied, or the supplier's identity, in a way that was not authorised by the supplier.

33. In the absence of express assurances, or compelling circumstances of the kind referred to above, I consider that a law enforcement agency will be thrown back onto the less onerous test imposed by s.46(1)(b) of the FOI Act, if it seeks to protect from disclosure information claimed to have been supplied to the agency on the basis of an implicit mutual understanding that the information supplied, and/or the identity of the supplier, would be treated in confidence.

The evidence

34. The material parts of the evidence of Detective Senior Constable Haslam (DSC Haslam) are as follows:

> *I recall in March 1993, that I received a file for investigation at the Upper Mt Gravatt C.I.Branch. The file was relating to the complaint of M GODWIN and involved a complaint of Assault. I recall that after I received the file, I contacted* [the third party]. *This contact was made by telephone.*
>
> *I recall that I explained to* [the third party] *the nature of my enquiries regarding an assault complaint which had been made over an incident which had occurred at the Coolangatta Surf Lifesaving Club. I also asked* [the third party] *if* [the third party] *was willing to provide a statement to me in relation to the incident.*
>
> [The third party] *agreed to provide a statement and subsequently attended the Upper Mt Gravatt Police Station at about 9.00am on Wednesday 24 March 1993. ... After typing the statement,* [the third party] *read through the typed statement.*
>
> *After* [the third party] *had read through the statement,* [the third party] *signed the statement before a Justice of the Peace for The State of Queensland. This Justice of the Peace was employed at the Police Station.* [The third party] *then left the Police Station. I cannot recall the exact conversations that I had with* [the third party] *while ... at the Police Station on 24 March 1993, but when speaking with witnesses, I normally advise them that statements provided are used for Police purposes and may be produced at court proceedings.*

> *I then conducted other enquiries regarding the complaint. I recall that the matter was referred to other Police for further attention. I recall that I advised* [the third party] *of this matter, however I have no recollection of the exact conversation I had with* [the third party] *during this conversation.*
>
> *It is my belief that statements provided by witnesses to Police are confidential in nature, in that they are not made available to the public even though such statements provided to Police may be produced at Court proceedings. I would not provide a witness statement to a complainant or defendant in a criminal matter.*
>
> *I do not recall speaking with Mr GODWIN at any time.*

35. The material parts of the evidence of Detective Constable Curran are as follows:

> *I remember October 1993. At this time I completed an investigation in relation to a complaint made by Michael GODWIN. This complaint related to an assault matter at the Coolangatta Surf Life Saving Club. The investigation had been initially conducted by other Police and had then been forwarded to Camp Hill for further investigation.*
>
> *When I initially received the file in relation to this matter I remember that there were a number of statements attached from certain witnesses. I also ascertained that the complainant had nominated an alleged offender ...*
>
> *As a result of these statements and other inquiries conducted, it was established that there was insufficient evidence to prefer criminal charges in relation to this matter.*
>
> *I do recall that at one time during this investigation GODWIN requested copies of statements obtained by Police from the witnesses in this matter. I do not recall the exact conversation but I remember advising GODWIN that I would not supply him with copies of the statements as they were of a confidential nature.*

36. The material part of the evidence of the third party, which I am able to reproduce in this decision, is as follows:

> *I do not recall Haslam advising me as to whether or not the details I provided him, together with my identity as a witness, would remain confidential. However, I believed at the time that the information I was communicating to Haslam and which was recorded in* [the statement], *together with my identity as a witness, would remain confidential. I had, prior to providing my statement ..., no experience in giving witness statements to the police or evidence in court.*
> *However, on 24 March 1993 I left the Mt Gravatt Police Station with the expectation that my identity and* [the statement] *would remain confidential. Due to my inexperience with police investigations and witness statements, I do not believe I would have left the police station with that expectation if I had not been advised by Haslam that the information and my identity would remain confidential. I also believed at the time that, by virtue of my signing* [the statement] *under the* Oaths Act of 1867, *the provisions of that Act would mean*

that the information provided would remain confidential. However, I was also aware that at some time in the future I may have been required to give evidence in court about my recollections concerning the incident which occurred on 12 March 1992.

Application of s.46(1) to the matter in issue

37. The elements of the respective tests for exemption under s.46(1)(a) and s.46(1)(b) of the FOI Act are set out at paragraphs 14 and 15 above.

Matter in issue must be confidential in nature

38. It is an essential element of the tests for exemption under both s.46(1)(a) and s.46(1)(b) that the matter in issue must be confidential in nature. On the material before me, I am not satisfied that the identity of the third party possesses the necessary quality of confidence, *vis-à-vis* the applicant, to meet this requirement. (While some of the relevant facts appear elsewhere in this decision, I cannot explain my reasons for making this finding without contravening s.87(2)(a) of the FOI Act, which provides that I must not, in a decision on a review or in reasons for such a decision, include matter which is claimed to be exempt.) I am satisfied, however, on the material before me, that the contents of the third party's statement to police are not known to the applicant, and that the statement has a sufficient degree of secrecy/inaccessibility to satisfy this element of the tests for exemption under s.46(1)(a) and s.46(1)(b) of the FOI Act.

39. In practical terms, a statement given by a witness represents his or her recollection of relevant events, which may differ in perspective, emphasis or detail from the recollections of other persons involved in the relevant events. That is certainly the position in the present case, as between the statements given to police by the applicant and the third party in respect of the incident in which the applicant was injured, making it easier to find that the third party's statement is confidential information *vis-à-vis* the applicant. (I note, however, that in a situation where person A and person B have given statements to police which are identical, or almost identical, in their accounts as to what person B did and/or said in the presence of person A, it may be more difficult to find that that part of person A's statement comprises information of a confidential nature *vis-à-vis* person B).

Whether an equitable obligation of confidence exists/whether matter in issue was 'communicated in confidence'

40. The crucial element of the test for exemption under s.46(1)(a) of the FOI Act is whether the information in issue was communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see *Re "B"* at pp.311-322, paragraphs 76-102). Whether a legally enforceable duty of confidence is owed depends on an evaluation of the whole of the relevant circumstances including (but not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and the circumstances relating to its communication, such as those referred to by a Full Court of the Federal Court of Australia in *Smith Kline and French Laboratories (Aust) Limited and Ors v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at pp.302-303: see *Re "B"* at p.316 and pp.314-316, paragraphs 84 and 82.

41. The second element of the test for exemption under s.46(1)(b) of the FOI Act is whether the information in issue was communicated in confidence. As to the nature of the test inherent in the phrase 'communicated in confidence', see *Re McCann* at paragraphs 33-34. The test requires an authorised decision-maker under the FOI Act to be satisfied that a communication of confidential information has occurred in such a manner, and/or in such circumstances, that a need or desire, on the part of the supplier of the information, for confidential treatment (of the supplier's identity, or information supplied, or both) has been expressly or implicitly conveyed (or must otherwise have been apparent to the recipient) and has been understood and accepted by the recipient, thereby giving rise to an express or implicit mutual understanding that the relevant information would be treated in confidence.

42. Neither the third party, nor DSC Haslam who interviewed the third party and took his statement, was able to give evidence that any express assurance was sought or given to the effect that the third party's statement, or identity, would be treated in confidence, either generally, or as against the applicant, whose complaint was under investigation.

43. What, if anything, was said between DSC Haslam and the third party that might have formed the basis for a mutual understanding that the third party's identity and/or statement would be treated in confidence as against the applicant, is significant in this case. That is because, in assessing the relevant circumstances attending the communication of the information recorded in the statement in issue (see *Re McCann* at paragraphs 36-39), I can see no indications sufficient to support a finding that a need or desire, on the part of the third party, for his identity and/or the information he provided to be treated in confidence as against the applicant, must have been apparent, or implicitly conveyed, to DSC Haslam, and understood and accepted by DSC Haslam, so as to give rise to an implicit mutual understanding that the relevant information would be treated in confidence as against the applicant.

44. In that regard, I note firstly that the third party was not in a position analogous to that of an informer (*cf. Re McCann* at paragraphs 38-46). The third party was approached by police and asked to co-operate with their investigation, which the third party agreed to do. While the third party did not support the applicant's account that he had been injured as a result of criminal conduct on the part of Mr A, there was nothing in the third party's statement which was adverse to the applicant in the sense of indicating that the applicant had conducted himself in a way that warranted attention by the police for a possible breach of the law. In addition, the third party had informed DSC Haslam that he had had no contact with the applicant in the year that had elapsed since the incident in question. Thus, there was, in my opinion, no basis on which DSC Haslam might have understood that the third party desired or required that his statement and identity be kept confidential from the applicant because of any threat of recrimination, harassment,
et cetera, from the applicant. As to indications of what the third party ought reasonably to have understood in all the relevant circumstances, I note, in particular, that the final paragraph of the third party's statement indicates that DSC Haslam must have specifically put to the third party, for response, those parts of the applicant's prior statement to police which were inconsistent in material respects with the third party's account of the incident in which the applicant was injured.
In my opinion, the third party ought reasonably to have understood that the police may consider it appropriate, in the course of their investigation, to put to the applicant, for response, those parts of the third party's statement which were inconsistent, in material respects, with the applicant's account of the incident in which the applicant was injured.

45. In light of my remarks at paragraph 32 above, the factors referred to in paragraphs 42 and 44 above persuade me that the matter in issue does not qualify for exemption under s.46(1)(a) of the FOI Act. In the absence of any evidence that express assurances were sought by the third party and given on behalf of the QPS, to the effect that the third party's statement and identity would be treated in confidence, and in the absence of any compelling indications in the circumstances surrounding the disclosure of information by the third party (see paragraph 44 above) that would warrant a finding that the QPS was bound by an equitable obligation of conscience not to use or disclose the information supplied by the third party, or the third party's identity, in a way that was not authorised by the third party, I am not satisfied that the QPS was bound by an equitable obligation of confidence such that disclosure of the third party's statement or identity would found an action for breach of confidence. I therefore find that the matter in issue in folios 6-8 is not exempt matter under s.46(1)(a) of the FOI Act.

46. Turning to s.46(1)(b), I have already indicated at paragraphs 43-44 above that an assessment of the circumstances attending the relevant communication of information discloses no sufficient basis for a finding that there was an implicit mutual understanding between the third party and the QPS that the third party's statement and identity would be treated in confidence as against the applicant. The third party has stated, however, that he left the police station after giving his statement to DSC Haslam with the expectation that his statement and identity would remain confidential. The third party has stated his behalf that he must have formed that expectation on the basis of something said to him by DSC Haslam, even though he cannot recall any specific advice given by DSC Haslam in that regard, nor specify anything that was said or done that afforded a reasonable basis for his having that expectation. The only thing nominated by the third party as support for his expectation of confidential treatment, i.e., his signing of an endorsement under the *Oaths Act 1867* Qld (appended to the bottom of his statement), tends to point to the opposite conclusion, since it was the usual declaration for a statement that may be tendered in court, attesting that the statement is true and that the maker of the statement understands the penalties for perjury if the statement is admitted into evidence. The third party did state that he was aware that he might have been required to give evidence in court about his recollections of the incident in which the applicant was injured. That is a factor which tends to negative the existence of an understanding that the third party's identity, and the information he supplied, would be treated in confidence (see *Re Scholes and Australian Federal Police* (1996) 44 ALD 299, at pp.315-316 (paragraph 65) and pp.317-318 (paragraphs 70-71), and *Re McCann* at paragraphs 47).

47. DSC Haslam also could not recall any specifics of his conversations with the third party at the time of obtaining the third party's statement. He did state, however, that when speaking with witnesses, he normally advised them that statements provided are used for "police purposes" and may be produced at court hearings. The third party did not state that he would have specifically raised with DSC Haslam the issue of confidentiality as against the applicant, and, having regard to the relevant circumstances (see paragraph 44 above), I consider that DSC Haslam was not likely to have perceived anything in the circumstances warranting special attention to that issue. I can see no logical reason why DSC Haslam would have thought it necessary or desirable, at that early stage of the police investigation, to give assurances of confidential treatment that might have fettered the ability of police officers to put the identity of, or information obtained from, the third party to the applicant for response or comment, if that seemed to be a desirable course as the investigation progressed. On the material before me, I find, on the balance of probabilities, that DSC Haslam said nothing specific to the third party about treating the third party's statement and identity in confidence as against the applicant. On the balance of probabilities, I find that DSC Haslam followed his normal practice by advising the third party that witness statements are used for "police purposes" and may be produced at court hearings.

48. From this, the third party would certainly have understood that his statement might be produced, and he might be required as a witness, in court proceedings, in which case his identity and the contents of his statement would become information in the public domain, and would certainly become known to the applicant. On the other hand, the third party might reasonably have understood DSC Haslam's advice that his statement would be used for "police purposes" as an indication that it would only be disclosed for police purposes, and otherwise treated in confidence. On the material before me, an understanding in those terms would have been shared by DSC Haslam, and might form the basis for a finding that an express mutual understanding of confidence (rather than an enforceable legal obligation of confidence, as contemplated by s.46(1)(a) of the FOI Act) existed. However, I am not satisfied that the scope or extent (see *Re "B"* at p.339, paragraph 153; *Re McCann* at paragraph 30) of an understanding of confidence in those terms could have been properly understood as encompassing confidential treatment of the third party's statement and identity as against the applicant.

49. In my opinion, a mutual understanding of confidence in those terms must have been subject to the implicitly authorised exceptions which I stated in *Re McCann* at paragraph 58 (reproduced below at paragraph 51), and which I consider would be encompassed within the concept of use or disclosure for "police purposes" in any event. Thus, in my opinion, the third party ought reasonably to have understood that the information he conveyed to the police might be selectively disclosed to other witnesses (of whom the applicant was one, as the third party must have known, since elements of the applicant's statement to police were put to the third party for response) if it was thought that might assist the more effective conduct of the investigation. As I have stated at paragraph 44 above, the third party ought reasonably to have understood that the police may consider it appropriate to put to the applicant, for response, those parts of the third party's statement which were inconsistent, in material respects, with the applicant's account of the incident in which the applicant was injured. Also, in my opinion, the third party ought reasonably to have understood that the information he conveyed to police might be selectively disclosed to the person who lodged the complaint under investigation (i.e., the applicant) for the purpose of keeping him informed of the progress of the investigation, and, in the event that the investigation resulted in no formal action being taken by the police against Mr A, for the purpose of explaining the reasons for that outcome.

50. In summary, the third party's identity, and the information he provided to police, were liable to be disclosed to the applicant in the course of the police investigation (if the police saw fit to do so), and were liable to be disclosed to the applicant on either possible outcome of the investigation (i.e., whether charges were laid against Mr A, or whether the police decided to take no formal action in respect of the applicant's complaint). In those circumstances, I am not satisfied that the scope of any mutual understanding of confidence between the QPS and the third party, in the terms referred to above, could have been properly understood as extending to confidential treatment of the third party's statement and identity as against the applicant. On that basis, I find that folios 6-8 are not exempt from disclosure to the applicant under s.46(1)(b) of the FOI Act.

51. In *Re McCann* (at paragraphs 58-60), I said:

> *58. I consider that there are three main kinds of limited disclosure which, in the ordinary case, ought reasonably to be in the contemplation of parties to the communication of information for the purposes of an investigation relating to law enforcement. Unless excluded, or modified in their application, by express agreement or an implicit understanding based on circumstances similar to those referred to in the preceding paragraph, I consider that the*

following should ordinarily be regarded as implicitly authorised exceptions to any express or implicit mutual understanding that the identity of a source of information, and/or the information provided by the source, are to be treated in confidence so far as practicable (consistent with their use for the purpose for which the information was provided) -

(a) where selective disclosure is considered necessary for the more effective conduct of relevant investigations (I note that this could include selective disclosure to the public at large, as sometimes occurs when a public appeal is made for citizens who might have information, relevant to a particular police investigation, to bring it to the attention of the police);

(b) where the investigation results in the laying of charges, which are defended, and, in accordance with applicable rules of law or practice (see, for example, guidelines issued by the Director of Public Prosecutions, under s.11 of the Director of Public Prosecutions Act 1984 *Qld, as to disclosure to an accused person of evidence to be called in the prosecution case: Guidelines 2.1, 2.3, 7.4 and 7.7 published at pages 83, 86, 108 and 111, respectively, of the 1995/96 Annual Report of the Director of Public Prosecutions Qld), the prosecutor must disclose to the person charged the evidence relied upon to support the charges; and*

(c) where selective disclosure is considered necessary -

(i) for keeping a complainant, especially a victim of crime, informed of the progress of the investigation; and

(ii) where the investigation results in no formal action being taken, for giving an account of the investigation, and the reasons for its outcome, to a complainant, especially a victim of crime.

59. With respect to (c) above, I note that the work of law enforcement agencies is, in essence, a service for the benefit of the community, that is funded by taxes or imposts on the community, and that a need for direct accountability for service delivery applies most acutely in the case of complainants, especially victims of crime. The kinds of considerations which I consider warrant a finding that (c) above should ordinarily be regarded as an implicitly authorised exception to a mutual understanding that the identity of a source of information, and/or the information provided by the source, are to be treated in confidence, appear to have prompted the Queensland Parliament to enact s.15(1) of the Criminal Offence Victims Act 1995 *Qld which provides:*

Information about investigation and prosecution of offender

15.(1) A victim of a crime should, on request, be advised by a law enforcement officer of the following—

(a) the progress of investigations being conducted about the crime, unless disclosure is likely to jeopardise the investigation;

(b) the charges laid for the crime and details of the place and date of hearing of the proceeding for the charge;

(c) the name of the person charged;

(d) the reasons for anyone's decision not to proceed with the charge or to amend the charge or to accept a plea to a lesser charge;

(e) if the charged person is released on bail or otherwise before the proceeding on the charge is finished—the arrangements made for the release, including any condition and any application for variation of the condition that may affect the victim's safety or welfare;

(f) the outcome of any proceeding, including appeals.

60. A "victim" of crime is defined in s.5 of that Act, and is confined to persons who have suffered harm from violence committed against the person in a direct way (plus their dependents or family members, and persons who have suffered harm in intervening to help a victim of violent crime). Since the commencement of the Criminal Offence Victims Act 1995*, disclosure of information that is necessary to comply with s.15(1)(a) and (d) of that Act must, in my opinion, ordinarily be an implicitly authorised exception to any understanding that a law enforcement agency is to treat information obtained for the purposes of a law enforcement investigation in confidence.*

However, I consider that exception (c) set out in paragraph 58 above should also be recognised as generally applicable in respect of crimes against property, and other complaints alleging criminal conduct that are received and investigated by law enforcement agencies.

52. Whether or not the applicant is a victim of crime is a moot point. The applicant asserts that he is. Based on the statements obtained on investigation of the applicant's complaints, the QPS either does not accept that the applicant is a victim of crime, or at least does not consider that the available evidence supports the laying of charges against Mr A (the alleged perpetrator according to the applicant's complaint). Nevertheless, it is clear that the applicant was a complainant to the QPS, who had suffered injury in an altercation. Once the QPS had decided, after investigation, to take no formal action in respect of the applicant's complaint, I consider that the applicant was entitled to some form of explanation from the QPS, as a matter of sound administrative practice from a provider of publicly-funded services to the community, as to why it had been decided that no formal action would be taken. The extent of the detail that could be offered by way of explanation in such circumstances would necessarily vary from case to case, depending on the need to respect any applicable obligations or understandings of confidence, or applicable privacy considerations. Subject to any such constraints, I consider that there is a legitimate public interest in a complainant, especially a victim of crime, being given sufficient information to be satisfied that the QPS has conducted a thorough investigation (for instance, that the QPS has endeavoured to interview all relevant witnesses nominated by the complainant), and reached a fair and realistic decision about whether the available evidence was sufficient or insufficient to justify any formal action being taken in respect of the complaint.

53. In the present case, for example, it may not have been necessary to provide the applicant with a copy of the third party's statement, but I consider that, in accordance with the third implicit exception referred to in the passage quoted from *Re McCann* at paragraph 51 above, it would have been proper for the QPS to -

- inform the applicant that the third party had been interviewed;
- convey the substance of the evidence obtained from the third party (and from Mr J, whose statement is no longer in issue) which negatived the applicant's allegation that Mr A had criminally assaulted the applicant (and which is contained in the sixth-last, fifth-last, fourth-last and last paragraphs of the third party's statement); and
- explain that, in the context of a late-night altercation in a bar, where all involved admitted to having been drinking for many hours, and the other relevant witnesses described the occurrence of the applicant's injury in a way that afforded no grounds for laying charges of criminal assault against Mr A, there was no sufficient basis to warrant the police taking further action.

54. In a review under Part 5 of the FOI Act, my powers are limited to determining whether or not matter in issue is exempt matter under the FOI Act; they do not extend to offering explanations for decisions or conduct of the QPS. Nevertheless, in my opinion, the considerations I have outlined would warrant a finding that disclosure to the applicant of the third party's identity and at least the sixth-last, fifth-last, fourth-last and last paragraphs of the third party's statement was justified, either as an implicitly authorised exception to a mutual understanding of confidence, or on the basis that disclosure to the applicant would, on balance, be in the public interest (in accordance with the public interest balancing test incorporated in s.46(1)(b) of the FOI Act).

55. In *Re McCann*, and in earlier cases (e.g. *Re McEniery and the Medical Board of Queensland* (1994) 1 QAR 349 at pp.373-374 and *Re Byrnes and The Public Trustee of Queensland* (Information Commissioner Qld, Decision No. 96001, 23 February 1996, unreported) at paragraph 23), I have referred to the importance which English and Australian law attaches to safeguarding the flow of information from members of the public which is needed by law enforcement and regulatory authorities for the effective performance of their functions. However, a due sense of perspective needs to be kept. Safeguarding the flow of information to law enforcement and regulatory authorities is not an end in itself. It is intended to assist the more effective performance by such authorities of the functions they undertake for the service, and benefit, of the community. At appropriate points, law enforcement and regulatory authorities must account to the community they serve (and which funds their operations), and sometimes account directly to individual members of the community, for how effectively they are performing their functions. Use of information obtained in an investigation undertaken by the QPS for purposes of this kind is also use for legitimate "police purposes". The dual public interests in safeguarding the flow of information to law enforcement and regulatory authorities, and in ensuring an appropriate level of public scrutiny of their operations and an appropriate level of accountability for the effective performance of their functions (see, in this regard, *Re Scholes* at p.336, paragraphs 150-151, and at p.346, paragraph 191) must be balanced against each other in a way that accommodates their peaceful co-existence as much as possible, so as to best serve the overall public interest in maximising efficient and effective law enforcement services for the benefit of the community.

56. QPS investigators are publicly accountable on a regular basis for the thoroughness and quality of their investigations when formal charges are laid, and scrutiny occurs in court proceedings.
Avenues of accountability in respect of the thoroughness and quality of QPS investigations which

do not result in the laying of charges are fewer, and certainly less public (given the privacy considerations which attend an investigation of allegations of wrongdoing which do not result in the laying of charges). The FOI Act affords an additional avenue of accountability in that respect, within the constraints of the protection afforded to legitimate public interests by exemption provisions such as s.42, s.44, and s.46.

57. I should add that I do not accept the submissions made by the QPS which are contrary to the findings I have stated above. My comments in *Re McCann* at paragraphs 20-23 are equally applicable to the basis on which the QPS put its case in the present review. For instance, in its written submission, the QPS argued that: "*The entire police investigation process is reliant upon police providing real confidences to informants and by police treating any information as confidential*". This considerably overstates the true position. Police investigators frequently, and quite properly, disclose information obtained, and sometimes the sources of the information, for the more effective conduct of their investigations (for example, putting one witness's version of events to another witness, to the complainant, or to the subject of complaint, in order to test their story, or confront them with inconsistencies in their evidence). Examples of this can be seen in
Re Scholes at pp.318-319 (paragraph 73) and pp.320-321 (paragraphs 80-81), and in *Re McCann* at paragraph 31. I note too that DSC Haslam stated that he would not provide a witness statement to a complainant or defendant in a criminal matter, but that must surely amount merely to making a fine distinction between a witness statement and the information contained in it.

Prejudice to future supply of like information

58. The third element of the test for exemption under s.46(1)(b) of the FOI Act is that disclosure of the information in issue could reasonably be expected to prejudice the future supply of such information. I considered the correct approach to the interpretation and application of this element in *Re "B"* at pp.339-341 (paragraphs 154-161). This element will frequently be satisfied where a witness has supplied information adverse to a person subject to investigation by a law enforcement agency, and especially where the witness has some reasonable basis for expecting recrimination, harassment, *et cetera*, as a result of disclosure (see *Re McCann* at paragraph 73).
However, I am not satisfied that this element is established in respect of folios 6-8 in the present case. The third party was approached by police to provide a statement in respect of the applicant's complaint that Mr A had assaulted the applicant. The third party was willing (as was Mr J) to give a statement, exculpating Mr A. I do not think that disclosure of information of that kind could reasonably be expected to prejudice the future supply to the QPS of information from witnesses to an incident who believe that a person (particularly a friend or family member) has been wrongly or mistakenly accused of criminal conduct. (There may be exceptional cases where a witness has reasonable grounds for fearing recrimination, harassment, *et cetera*, from the maker of the wrong or mistaken accusation, but there is no indication on the material before me that this is such a case). I find that disclosure of the matter in issue could not reasonably be expected to prejudice the future supply of like information. This constitutes a further ground for finding that folios 6-8 do not qualify for exemption under s.46(1)(b) of the FOI Act.

Application of public interest balancing test in s.46(1)(b)

59. Section 46(1)(b) of the FOI Act is qualified by a public interest balancing test. It is not necessary for me to address the application of the public interest balancing test, given my previous findings.
However, the considerations addressed in paragraphs 51-56 above, would, in my view, have warranted a finding that disclosure to the applicant of the third party's identity, and at least the sixth-last, fifth-last, fourth-last and last paragraphs of the third party's statement, would, on balance, be in the public interest.

60. In summary, for the reasons given in paragraphs 45, 50 and 58 above, I find that folios 6-8 are not exempt from disclosure to the applicant under s.46(1)(a) or s.46(1)(b) of the FOI Act.

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

61. In its written submission lodged for the purposes of this review, the QPS contends that the following matter contained on folios 6, 7 and 8 is exempt matter under s.44(1) of the FOI Act: the name, signature, address, age, occupation, home phone number and marital status of the third party.

62. In applying s.44(1) of the FOI Act (the terms of which are set out at paragraph 12 above), one must first consider whether disclosure of the matter in issue would disclose information that is properly to be characterised as information concerning the personal affairs of a person. If that requirement is satisfied, a *prima facie* public interest favouring non-disclosure is established, and the matter in issue will be exempt, unless there exist public interest considerations favouring disclosure which outweigh all identifiable public interest considerations favouring non-disclosure, so as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.

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

- family and marital relationships;
- health or ill-health;
- relationships and emotional ties with other people;
- domestic responsibilities or financial obligations.

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

Whether identity of third party is exempt matter under s.44(1)

64. I consider that, at least so far as concerns a member of the public acting in a personal capacity, the fact that a person has (or, indeed, has not) been prepared to co-operate with an investigation by a law enforcement agency is properly to be characterised as information concerning that person's personal affairs. (The position would probably be different in respect of, for example, a police officer who was obliged, in his capacity as such, to answer questions put by an investigating police officer.) Matter which would disclose the information that an identifiable individual, acting in a personal capacity, has or has not co-operated with an investigation by a law enforcement agency would therefore, in my opinion, be *prima facie* exempt from disclosure under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.44(1).

65. I should add that, where information that an identifiable individual has or has not co-operated with an investigation by a law enforcement agency becomes a matter of public knowledge or public record (as would frequently occur when such information is disclosed through evidence given in court proceedings), the weight to be attributed to the privacy interest in protecting disclosure of that information would be significantly diminished, for the purposes of any balancing exercise that must be undertaken in the application of the public interest balancing test incorporated in s.44(1) of the FOI Act. That, however, has not occurred in respect of the third party in the present case, and the matter in issue which, if disclosed, would disclose that the third party has co-operated with the police investigation of the complaint lodged by the applicant, is *prima facie* exempt matter under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.44(1).

66. When lodging his complaint that he had been assaulted by Mr A, the applicant informed the QPS that two other persons had been present and witnessed the alleged assault. The applicant was able to provide the name and address of one of the nominated witnesses, Mr B, for whom the applicant had worked as a casual employee (prior to the alleged assault). The applicant was able to provide only a Christian name for the second witness, but informed the QPS that Mr B should be able to provide full contact details for the second witness. (These facts appear from the Criminal Offence Report prepared by the QPS in respect of the applicant's complaint of assault). As noted at paragraphs 3(b), 6 and 8 above, the second witness, Mr J, has consented to the disclosure to the applicant of Mr J's statement to police (except for some personal details). The investigating police officers could not have obtained a statement from Mr J without contacting Mr B and obtaining at least Mr J's full name and an address, telephone number, or place of work, in order to make contact with Mr J. The applicant therefore knows that Mr B was contacted by investigating police. The applicant also knows that there exists another statement obtained by police from a witness to the alleged assault, but the applicant has not obtained any official confirmation of the identity of the maker of the other statement (although the applicant has informed me that he believes that certain things said to him by investigating police confirm that Mr B is the maker of the other statement. I should note also that the applicant accepts that the terms of his relevant FOI access application would not encompass a statement made by Mr A, if indeed the QPS ever obtained a statement from Mr A). Given the circumstances of the incident, there are only two logical possibilities. One is that Mr B is the maker of the statement remaining in issue. The other is that the police obtained a statement from another relevant witness to the incident, of whose identity the applicant was unaware.

67. If the latter were the true position, the applicant would feel entitled to know why the QPS had decided to take no formal action on his complaint without obtaining information from a relevant witness nominated by the applicant (Mr B). If the former were the true position, I consider that the applicant should be permitted to have confirmation of the fact that a statement was obtained from a relevant witness nominated by the applicant, before a decision was made by the QPS to take no further action in respect of the applicant's complaint.

68. The public interest considerations that tell against disclosure of the identity of the maker of the statement which remains in issue are the public interest in the protection of privacy (which is inherent in the satisfaction of the test for *prima facie* exemption under s.44(1) of the FOI Act), and the public interest in safeguarding the flow of information from members of the public to law enforcement agencies, by not deterring co-operation by members of the public with law enforcement agencies. I note, however, that, in the particular circumstances of this case, the second of these is not a significant factor and, in my opinion, does not carry substantial weight, for the reasons noted at paragraph 58 above.

69. The public interest considerations that tell in favour of disclosure are those referred to in paragraphs 51-56 above, and that which I analysed in *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at pp.368-377 (paragraphs 164-193), *viz*., that there may be a public interest in a particular applicant having access to particular information because that applicant's involvement in, and concern with, the particular information is of such a nature or degree as to give rise to a justifiable 'need to know' which is more compelling than for other members of the public.

70. In the particular circumstances of this case, I consider that the public interest considerations favouring disclosure outweigh those which favour non-disclosure, and warrant a finding that disclosure to the applicant of the identity of the maker of the statement comprised in folios 6-8 would, on balance, be in the public interest.

Third party's occupation

71. I note that the other matter claimed by the QPS to be exempt matter under s.44(1) (i.e., the third party's signature, address, age, occupation, home phone number and marital status) is information the deletion of which from Mr J's statement the applicant did not wish to contest. In my opinion, a person's occupation is not a private aspect of a person's life, and cannot properly be characterised as information concerning a person's personal affairs, so as to attract the application of s.44(1) of the FOI Act. I note, however, that if I had been persuaded that the third party's identity was entitled to protection from disclosure under s.44(1) of the FOI Act, I would have endorsed the deletion of information concerning the third party's occupation on the basis that its disclosure would identify the third party to the applicant. That is probably also the basis on which the QPS has claimed that information concerning the third party's occupation is exempt matter under s.44(1). However, if the identity of the third party is to be disclosed to the applicant in accordance with my findings, no sufficient basis exists for finding that information concerning the third party's occupation is exempt matter under s.44(1) of the FOI Act.

Personal information of the third party

72. Otherwise, the third party's signature, home address, age, home phone number and marital status all comprise information which concerns the personal affairs of the third party, and which is therefore *prima facie* exempt under s.44(1) of the FOI Act. It cannot be said that its disclosure is warranted to serve the interests of accountability with respect to the police investigation of the applicant's complaint. I find that the following matter in issue is exempt matter under s.44(1) of the FOI Act:

- the signature of the third party where it appears on folios 6, 7 and 8;
- the third party's address, age and home phone number where they appear in boxes at the top of folio 6;
- the first sentence of the body of the statement on folio 6; and
- the address in the tenth line of the body of the statement in folio 6.

Balance of the third party's statement

73. Although the QPS has not claimed that the body of the third party's statement is exempt matter under s.44(1) of the FOI Act, I consider it appropriate to briefly address that issue and record my views. I consider that the first paragraph (with the exception of the first sentence) plus the balance of the third party's statement commencing from the words "I recall" in line 10, must properly be

characterised as information which concerns the shared personal affairs of the applicant and at least one or more (it varies from segment to segment of the statement) of the third party, Mr A and Mr J. The principles relevant to the application of s.44 of the FOI Act to information which concerns 'shared personal affairs' are those which I explained in *Re "B"* at pp.343-345 (paragraphs 172-178). Because the information concerning the personal affairs of the applicant is inextricably interwoven with information concerning the personal affairs of other individuals, the information is *prima facie* exempt from disclosure to the applicant according to the terms of s.44(1), subject to the application of the public interest balancing test incorporated in s.44(1).

74. Large segments of the statement refer to events or matters which are well known to the applicant because of his participation in them. The public interest considerations which tell against disclosure of this matter are those identified in paragraph 68 above, plus the privacy interest of Mr A whose name appears in connection with an allegation of wrongdoing which was investigated by police (though this information is obviously already known to the applicant who made the allegation which prompted the police investigation). The public interest considerations which favour disclosure of this matter to the applicant are those identified in paragraph 69 above, together with the additional assistance afforded by s.6 of the FOI Act, which provides:

> ***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.*

75. I consider that, in the particular circumstances of this case, the public interest considerations favouring disclosure to the applicant of those parts of the statement in issue referred to in paragraph 73 above (and which, as I have noted in paragraph 54 above, apply with particular force to the sixth-last, fifth-last, fourth-last and last paragraphs of the statement) outweigh the public interest considerations favouring non-disclosure, and in my view warrant a finding that disclosure to the applicant would, on balance, be in the public interest. I consider that those parts of the statement in issue do not qualify for exemption from disclosure to the applicant, under s.44(1) of the FOI Act.

Conclusion

76. For the foregoing reasons, I vary the decision under review, in so far as it relates to folios 6-8, by finding that -

(a) the following segments of folios 6-8 are exempt matter under s.44(1) of the FOI Act:

(i) the signature of the third party where it appears on folios 6, 7 and 8;

(ii) the third party's address, age and home phone number where they appear in boxes at the top of folio 6;

(iii) the first sentence of the body of the statement on folio 6; and

(iv) the address in the tenth line of the body of the statement on folio 6; but that

(b) the balance of the matter contained in folios 6-8 is not exempt from disclosure to the applicant under the FOI Act.

.....
F N ALBIETZ
INFORMATION COMMISSIONER