

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 01/2006
Application 185/04

Participants:

MR LAWRENCE SPRINGBORG MP
Applicant

CRIME & MISCONDUCT COMMISSION
Respondent

'RZ'
Third Party

'BX'
Fourth Party

DIRECTOR-GENERAL OF THE DEPARTMENT OF JUSTICE AND
ATTORNEY-GENERAL
Fifth Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – application of s.42(3A) of the *Freedom of Information Act 1992* – whether matter in issue comprised information obtained, used or prepared for an investigation by the CMC in performance of the prescribed functions of the CMC under the *Crime and Misconduct Act 2001*

Crime and Misconduct Act 2001 Qld – ss.25, 33, 35, 36, 38, 45, 46, Sch 2

Freedom of Information Act 1992 Qld – ss. 42(3A)-(3C), 42(5), 43, 44, 78, 87(3), 114(2)

Freedom of Information and Other Legislation Amendment Act 2005 Qld – s.24(2)-(3)

DECISION

I set aside the decision under review (being the decision made by Mr Stewart on behalf of the CMC on 15 March 2004). In substitution for it, I decide that the matter remaining in issue (identified in paragraph 22 of my reasons for decision) qualifies for exemption from disclosure under s.42(3A) of the *Freedom of Information Act 1992* Qld.

Date of decision: 28 April 2006

.....
R. Rangihaeata
Assistant Information Commissioner

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REASONS FOR DECISION

1. The applicant, Mr Lawrence Springborg MP, seeks review of the Crime and Misconduct Commission's (the CMC) decision to refuse access to documents concerning allegations made about the conduct of the Fourth Party, 'BX', at a social gathering of Government officers and others ('the Party') in December 2002. The CMC claims that the documents qualify for exemption from disclosure under the *Freedom of Information Act 1992* Qld (the FOI Act).
2. The Third and Fourth Parties were amongst the attendees at the Party. Following the Party it appears that a discussion arose between various Government officers as to events alleged to have taken place at the Party (the allegations). This information came to the attention of the Director of Public Prosecutions, Ms Clare, who made some preliminary inquiries of the relevant officers and these were recorded in several internal documents.
3. In July 2003, the-then Director-General of the Department of Justice & Attorney-General Dr Levy, became aware of the allegations. Dr Levy sought advice from the Crown-Solicitor, Mr Lohe, as to his obligations in relation to the allegations, which was subsequently provided. Dr Levy then referred the allegations, together with a number of relevant documents including those created as a consequence of Ms Clare's initial inquiries, to the Premier, Mr Beattie MP, who in turn contacted Mr Butler SC, then Chairman of the Crime and Misconduct Commission (CMC). The Premier, by letter dated 22 July 2003, provided the allegations and relevant material originally received from Dr Levy to Mr Butler SC. The CMC scrutinised the material, and interviewed the Third Party, as the officer central to the allegations. By letter dated 25 July 2003, Mr Butler wrote to the Premier advising, "no further action on the part of the CMC is warranted in relation to this matter."

4. The applicant made an FOI access application in a letter to the CMC dated 6 January 2004, and sought access to all documents concerning or related to the conduct of the Fourth Party at the Party.
5. Mr Kenzler, FOI Coordinator, CMC made the initial decision in response to the applicant's FOI access application on 12 February 2004. Mr Kenzler decided to grant the applicant access to 4 documents in full and 4 documents in part, and refused access to 2 other documents. Refusal of access to documents in part or full was done on the basis that such matter was exempt from disclosure under sections 43(1) and 44(1) of the FOI Act.
6. By letter dated 1 March 2004, the applicant applied for internal review of Mr Kenzler's decision. By letter dated 15 March 2004, Mr Stewart, Acting Official Solicitor, CMC advised the applicant that he had conducted an internal review and decided to vary Mr Kenzler's initial decision, disclosing to the applicant several additional documents, but still finding that certain documents were exempt under the FOI Act.
7. By letter dated 29 March 2004, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Mr Stewart's decision.

Steps taken in the external review process

8. Copies of the documents in issue were obtained and examined.
9. In accordance with s.78 of the FOI Act, various third parties referred to in the matter in issue (comprising the Third Party, the Fourth Party and other Government officers involved in, or were likely to have knowledge of, the allegations) were consulted, in order to advise those parties of this review, and to ascertain whether or not they objected to disclosure of the items of information in issue which concerned them. If they objected to disclosure, those persons were invited to apply to become participants in this review. Of those persons who were consulted, all but one applied for, and were granted, status as participants in this review. The current Director-General of the Department of Justice and Attorney-General also applied for and was granted status as a participant in this review.
10. By mid-May 2005, all third parties had provided submissions to this office in support of their objections to the disclosure of the matter in issue. These submissions relied on various exemption provisions in the FOI Act. By letter dated 24 May 2005, this office provided a copy of all third party submissions (or summaries of those submissions) to the applicant for his consideration and response.
11. On 31 May 2005, the *Freedom of Information and Other Legislation Amendment Act 2005* (the 2005 Amendment Act) received assent and came into force. The 2005 Amendment Act included an amendment to the FOI Act to insert a new subsection 42(3A) (set out in full at paragraph 23).
12. By letter dated 6 June 2005, the applicant wrote to this office, requesting additional time in which to prepare its response to the material enclosed with the letter from this office dated 24 May 2005, and "...to consider and possibly seek further advice with respect to the implications of the [2005 Amendment Act]."
13. By letter dated 14 June 2005, this office wrote to the CMC noting the enactment of the 2005 Amendment Act and requesting the CMC to advise whether it intended to rely upon the new s.42(3A) in support of its case that the documents in issue qualified for exemption under the FOI Act. However, before a formal response was received from the CMC, a letter dated 12 July 2005 was received from the applicant. Anticipating reliance by the CMC on the new s.42(3A), the applicant stated as follows (as far as is relevant):

Further to my letter of 6 June 2005 in relation to your review of the [CMC] decision regarding this application, we have come to the conclusion that there is

little point addressing the submissions prepared by third parties objecting to release until the issues arising from the Beattie Government's recent amendments to the [FOI Act] are resolved.

...

In the event you accept the government's anticipated position that its new provisions exempt the matter in issue, regardless of the clear public interest in disclosure, our further arguments would serve no useful purpose with respect to the functions of your office.

...

In the event you accept our submission that the new provisions do not apply in this particular instance, we would then proceed to state our case in some detail with respect to the various other exemptions claimed by third parties, where there is a public interest test attached.

14. The applicant then went on to detail submissions disputing the applicability of s.42(3A) to the documents in issue.
15. A copy of the applicant's letter dated 12 July 2005 was referred to the CMC for its consideration and response, together with a further request that it formally advise as to whether it intended to rely upon s.42(3A). By letter dated 10 August 2005, the CMC replied, submitting that "...s.42(3A) of the FOI Act applies to the documents remaining in issue in this application and therefore they are exempt from access to the applicant."
16. Copies of both the applicant's submissions dated 12 July 2005 and the CMC's response dated 10 August 2005 were then forwarded to each of the third party participants in this review, inviting them to consider the arguments raised as to the applicability of s.42(3A) of the FOI Act, and respond. Responses were received from the Fourth and Fifth Parties and the representatives of a Government officer at that time still a participant in this review, which in turn were all forwarded to the applicant under cover of a letter dated 23 September 2005. (I note that the Third Party did not lodge a submission in relation to the operation of s.42(3A.)) In a telephone conversation with a member of the staff of this office on 23 January 2006, a member of the applicant's staff confirmed that the applicant did not wish to lodge any further material in relation to the application of s.42(3A).
17. Further negotiations with the applicant also clarified that he did not wish to seek access to matter comprising particulars identifying persons identified in one of the documents in issue, document '2(d)', (described in paragraph 23 below). Those persons have therefore ceased to be participants in this review. Accordingly, only the Third, Fourth and Fifth parties remain as third party participants in this review.
18. Should s.42(3A) be found to apply, it will result in the exemption from disclosure of the documents in issue and it will not be necessary to consider the application of other exemption provisions to the matter in issue. The applicant has, therefore, requested that a determination be made, as noted above, as to the application of this provision, which will either finally resolve this matter, or require the review to proceed to a determination as to whether the matter qualifies for exemption under one or more of the balance of the exemption provisions relied upon.
19. Accordingly, in order to expedite the resolution of this matter, I have in this decision limited my consideration to the application of s.42(3A) of the FOI Act. I have therefore taken into account those submissions from participants relevantly addressing the operation of that provision. I have therefore taken into account the following material in making my decision in this review:

- the contents of the matter in issue;
- the applicant's FOI access application dated 6 January 2004, application for internal review dated 1 March 2004, and application for external review dated 29 March 2004;
- the CMC's initial and internal review decisions, dated 12 February 2004 and 15 March 2004, respectively;
- submissions from the applicant dated 6 June 2005 and 12 July 2005;
- submission from the CMC dated 10 August 2005;
- submission from the Fifth Party dated 9 September 2005; and
- submission from the Fourth Party dated 16 September 2005.

Matter in issue

20. In the application for external review dated 29 March 2004, the applicant stated that he did not seek review of the decision of the CMC to exempt matter under s.43 of the FOI Act, and that *“the only remaining documents in issue are those for which exemption is claimed on the basis of s.44(1), dealing with the disclosure of personal affairs”*.
21. During the course of this review, the applicant has further reduced the scope of the matter in issue in this review. As noted above, the applicant has advised this office that he no longer wishes to pursue access to matter identifying the Government officers named in document 2(d). Further, the applicant also advised that he had obtained access to certain documents outside the FOI process and therefore no longer pursued access to such documents.
22. The matter remaining in issue in this review therefore comprises (adopting the numbering used by Mr Stewart in his internal review decision):

Document No.	Date	Description
2(d)	24 February 2003	Internal ODPP file note prepared by Ms Leanne Clare, Director of Public Prosecutions (an enclosure to the letter dated 22 July 2003 from the Premier, Hon. Peter Beattie MP to Brendan Butler SC, itself disclosed to the applicant by the CMC in full)
4	24 July 2003	Parts of an internal CMC case file note
6	24 July 2003	Transcript of an interview by CMC officers of the Third Party, together with cassette tape recordings of that interview
7	25 July 2003	Internal CMC memorandum
10	25 July 2003	Letter from the CMC to the Third Party
11	24 July 2003	Part of an Activity Register Report

Application of s.42(3A) of the FOI Act

23. Section 42(3A) of the FOI Act provides as follows:

Matter is also exempt matter if it consists of information obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in the performance of the prescribed functions of the prescribed crime body.

Retrospective operation of s.42(3A)

24. Section 114(2) of the FOI Act provides that s.42(3A) operates retrospectively:

114 Application of amendments to existing applications

...

- (2) *However, section 42, as amended by section 24(2) and (3) of the amending Act (the **section 24 amendment**), applies in relation to an access application received before the commencement of the section 24 amendment.*

25. (Section 24(2) and (3) of the 2005 Amendment Act inserted the new subsection 42(3A)-(3C) and 42(5) of the FOI Act respectively.) Section 114(2) therefore gives the amended s.42(3A) retrospective operation, so that it applies to the FOI access application lodged by the applicant. Accordingly, I am required to consider the application of s.42(3A) of the FOI Act, as raised by the CMC, to the documents in issue in this review.

Requirements for exemption under s.42(3A)

26. Matter will qualify for exemption under s.42(3A) of the FOI Act if it consists of information obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in performance of the former's prescribed functions. In this case, s.42(5) of the FOI Act clearly provides that the CMC is a prescribed crime body.
27. The applicant does not dispute that the matter in issue consists of information "obtained, used or prepared" by the CMC. Furthermore, I consider (and the applicant does not argue to the contrary) that this "obtaining, use or preparation" occurred for the purposes of the CMC's appraisal of the possible misconduct implications of the allegations. It is clear that much of the matter in issue was "prepared" by the CMC, as that word is ordinarily defined: "compose and write out, draw up (a text or document) ... produce or form ... manufacture, make" (The New Shorter Oxford English Dictionary (NSOED), 1993). The tapes and records of the interview with the Third Party, and other internal CMC documents were all "composed, drawn up, produced" or "made" by the CMC, and therefore "prepared" by that agency.
28. As for the documents supplied by the Premier under cover of his letter dated 22 July 2003, I consider that these documents (and the internal documents prepared by the CMC) were "used", as that term is ordinarily defined ("employ ...; ... make use of" (NSOED, 1993)) by the CMC, in the course of and thus for the purposes of its inquiries. From the material before me it appears the relevant documents were considered, assessed and analysed by the CMC after their receipt from the Premier, and prior to it communicating the outcomes of its inquiries, actions well within the broad ordinary meaning of the term "use".
29. The applicant argues, however, that in obtaining, using or preparing the matter in issue, the CMC was not performing its prescribed functions, nor was it conducting an "investigation" for the purposes of s.42(3A). By letter dated 12 July 2005, the applicant submitted:

... s.42(3A)...makes it clear that [the documents] must be obtained, used or prepared for "an investigation...in the performance of the prescribed functions" of the prescribed crime body. In our view, the documents in issue fail to satisfy this second half of the test on both counts.

Firstly, we would submit that the CMC's limited activity with respect to this matter could not reasonably be said to have amounted to an investigation. Secondly, it is our view that this limited activity, however categorised, could not reasonably be said to have been conducted in the performance of the prescribed functions, because the CMC's jurisdiction was not enlivened.

Was the CMC performing a "prescribed function"?

30. The CMC's "prescribed functions" for the purposes of s.42(3A) are defined in s.42(5) of the FOI Act as "*the crime function, and the misconduct function, as defined in the Crime and Misconduct Act 2001*". Sections 25 and 33 of the *Crime and Misconduct Act 2001* (the CM Act) in turn define the CMC's crime and misconduct functions respectively:

25 Commission's major crime function

*The commission has a function (its **crime function**) to investigate major crime referred to it by the reference committee.*

33 Commission's misconduct functions

*The commission has the following functions for misconduct (its **misconduct functions**)—*

- (a) to raise standards of integrity and conduct in units of public administration;*
- (b) to ensure a complaint about, or information or matter involving, misconduct is dealt with in an appropriate way, having regard to the principles set out in section 34.*

31. There is no argument before me that the matter in issue contains information relating to "major crime.". Further, the applicant concedes, in submissions dated 12 July 2005, the allegations were not a matter that was referred to the CMC by its reference committee. Therefore, the CMC must be seen to have been acting in performance of its misconduct functions in obtaining, using and/or preparing the matter in issue in order for that matter to qualify for exemption under s.42(3A) of the FOI Act.

Participants' submissions

32. In the submission dated 12 July 2005, the applicant argues:

...it seems clear that s.33(a) [of the CM Act] does not apply in this instance...

In relation to s.33(b), we submit that there was no "complaint about, or information or matter involving, misconduct". The key word in this context is 'misconduct'...as defined by the [CM Act] for the express purpose of this and related provisions.

In the absence of a complaint, information or matter involving misconduct, we submit that the CMC's prescribed function in this regard could not be enlivened and that, consequently, any activity which occurred with respect to the events in question could not be said to have been conducted in the performance of the CMC's prescribed functions.

33. The applicant goes on to argue that, in effect, there was no objective basis for the Premier as the relevant public official in possession of the documents containing the information comprising the allegations (and which now comprise part of the matter in issue in this review) to have formed a suspicion that that information involved or may have involved official misconduct:

..the Premier did refer Dr Levy's concerns to the CMC...the most likely motivation for pursuing this course was to secure a fast, meaningless clearance for [the Fourth Party] in terms of official misconduct.

...the actual wording of the Premier's letter clearly implied an acceptance ...that the CMC's jurisdiction would not be enlivened and ultimate responsibility for dealing with [the Fourth Party] resided with the Premier, as follows:

Given the contents of the letter and attached documents, I would be grateful if you would review the matter in detail and advise me in due course of your recommendation as to any action which should be taken by me, as Premier, or by the Government.

34. (In support of this argument, the applicant relies on the legal advice provided by the Crown Solicitor to Dr Levy originally, and subsequently provided to the Premier. This advice was originally (and remains) subject to a claim by the CMC for exemption under s.43(1) of the FOI Act, as a legally privileged communication between solicitor and client. The applicant, however, has obtained a copy of this document outside of the provisions of the FOI Act. I am constrained from including in my reasons for decision such information (see s.87(3) of the FOI Act), and I am therefore unable to set out the detail of those parts of the applicant's submissions which recite or repeat the contents of the legal advice comprising document 2(c). Accordingly I have only extracted a limited portion of the applicant's submissions on this point above. Nevertheless, I have taken all of the relevant submissions into account in considering the applicant's arguments for disclosure.)
35. The duty of a public official to notify the CMC in relation to official misconduct is set out in section 38 of the CM Act:

38 Duty to notify commission of official misconduct

*(1) This section applies if a public official suspects that a complaint, or information or matter (also a **complaint**), involves, or may involve, official misconduct.*

(2) The public official must notify the commission of the complaint, subject to section 40.

36. The applicant's submissions further trace the CMC's dealing with the material referred by the Premier, focussing particularly on the CMC's apparent focus not on the actual events comprising the allegations and whether those events themselves comprised misconduct, but on possible subsequent reprisal action, before concluding:

Even if the CMC's assessment process in this particular case could reasonably be categorised as an investigation for the purposes of s.42(3A) of the FOI Act, we submit that it could not be said to have been conducted in performance of the CMC's prescribed functions.

...s.33(b) of the [CM Act] requires that there be a "complaint about, or information or matter involving, misconduct" to invoke the prescribed misconduct function. The only potential for official misconduct in this case resided in the CMC's highly tenuous and speculative inference drawn from material of an entirely different hue.

There was certainly no complaint that the [Fourth Party] had threatened the alleged victim of [his or her] attentions at the staff party and the CMC's own assessment process found that there was no information, or presumably matter, which would give rise to a suspicion in that regard.

In the absence of any 'complaint, or information or matter involving, misconduct', we submit that the CMC's prescribed misconduct function was never invoked in this case. From that it would follow that whatever was done in connection with this matter did not fall within the ambit of s.42(3A) of the FOI Act.

37. The CMC's submissions, by letter dated 10 August 2005, simply assert, in relation to this issue:

The CMC was performing its misconduct functions when it investigated the matter referred to it by the Premier. This is clear from the wording of s.33(b) of the [CM Act].

38. The Fourth Party's submissions do not address this issue. The Fifth Party's submissions on the point largely mirror the CMC's submission. In submissions dated 9 September 2005, the Fifth Party stated:

...11. The Premier forwarded information and documentation to the CMC...related to the alleged conduct attributed to the [the Fourth Party] during the course of the ... party.... The information and documentation was forwarded pursuant to s.36 of the CM Act.

12. The CMC was performing its misconduct functions within the meaning of s.33(b) of the CM Act when it dealt with the matter referred to it by the Premier.

13. Section 33(b) of the CM Act provides that the CMC has, as part of its misconduct functions, "to ensure a complaint about, or information or matter involving, misconduct is dealt with in an appropriate way..."

14. The CMC when dealing with the matter, was performing its misconduct functions within the meaning of s.33(b) of the CM Act.

Analysis

39. I understand the applicant's argument to be that if there is no identifiable and compelling form of misconduct clearly contained in material referred to the CMC on which a public official referring that matter could objectively base a suspicion for such misconduct, then the CMC in receiving and acting on any such referral would not be discharging its misconduct functions and the requirements under s.33(b). The applicant apparently argues that the Premier had no basis for forming a reasonable suspicion of misconduct. The applicant, as I understand, further reinforces that claim by pointing to the fact that the possible act of misconduct actually assessed by the CMC (the possibility of reprisal action) was one not alluded to by the Premier in his letter of reference, but one identified independently by the CMC after receipt of the referral and supporting material, and that therefore the Premier must himself have harboured no suspicion of any misconduct.
40. Thus, the applicant submits that the letter and accompanying material forwarded by the Premier did not comprise a "complaint about, or information or matter involving, misconduct", as it cannot be said that there was evidence of or reasonable suspicion of "misconduct" in the Premier's mind arising from that material.
41. Section 22 of the CM Act expressly provides that "reference to misconduct includes, in the context of a complaint or a misconduct investigation, *suspected* misconduct" (my emphasis). It would appear such reference to "suspected misconduct" is necessary to avoid a manifestly absurd result when considering provisions such as sections 33(b) of the CM Act - to require a complainant or referring informer to have actually determined that an act of misconduct exists prior to referring it to the CMC, the body charged with assessing and determining that very issue, would be to pre-empt the CMC's functions. Accordingly, and appropriately, it is not the case that a public official is required to analyse relevant material and satisfy themselves that there exists a clear and demonstrated example of misconduct. They are merely to be satisfied that relevant information or matter *may involve*, official misconduct (see s.38 of the CM Act set out at paragraph 35 above), at which point they are under a duty to refer the relevant *suspected* misconduct to the CMC.

42. In this case the Premier became aware of allegations concerning the Fourth Party. As the applicant notes, he also had access to the advice from the Crown Solicitor to Dr Levy. Whatever the tenor of that advice, it was, in the end, simply that: advice, that may be taken into account by a public official but not determinative of the issue of whether the public official suspected the existence of misconduct or otherwise. The Premier had still to reach his own conclusion as to whether the obligation imposed by s.38 of the CM Act applied in the circumstances.
43. The threshold triggering the obligation to notify is low: it simply requires suspicion that a complaint, information or matter may involve official misconduct. Forming such a suspicion is an inherently subjective exercise, and it is neither possible nor appropriate for me to enquire into the Premier's state of mind and level of suspicion at the time he composed his letter to Mr Butler and referred the relevant matter to the CMC for consideration. Thus, while arguably not of itself a "complaint about", the Premier's letter and accompanying material in my view certainly comprised "information or matter" involving possible or suspected misconduct and is therefore within the terms of s.33(b) of the CM Act.
44. Once such "information or matter" is received by the CMC, s.33(b) of the CM Act provides that the CMC has, as part of its misconduct functions, "*to ensure a complaint about or matter involving, [suspected] misconduct is dealt with in an appropriate way...*". Thus, it is my view that, once the CMC receives a complaint, or information or matter about, suspected misconduct, its obligation to deal with that matter under s.33(b) of the CM Act is triggered, and it is therefore performing its misconduct functions. It is not required to satisfy itself of the legitimacy or otherwise of the basis of the referring official's suspicion before its duty under s.33(b) is invoked and it therefore commences its misconduct functions; any inquiry as to the credibility of the suspected misconduct follows the receipt of the complaint or other matter, and forms a *part of* the process of "dealing with" the complaint, and, in turn, the performance by the CMC of its misconduct functions. It may well be that, the CMC determines that no further action is warranted, or, alternatively, that a different form of misconduct other than that possibly identified by a complainant potentially exists, and requires investigation accordingly. That is, however, the misconduct function the CMC is required to perform.
45. The CMC scrutinised the material received from the Premier and interviewed the officer at the centre of the relevant allegations. The CMC was clearly assessing the merits of the material forwarded by the Premier, in contemplation as to whether it should take additional steps. Section 35 of the CM Act provides as follows:

35 How commission performs its misconduct functions

(1) *Without limiting how the commission may perform its misconduct functions, it performs its misconduct functions by doing 1 or more of the following—*

(a) *expeditiously assessing complaints about, or information or matters (also **complaints**) involving, misconduct made or notified to it;*

(my underlining)

46. As can be seen, section 35 broadly defines "complaint" to include "information or matters involving misconduct". This expanded definition within the section is in my view broad enough to encompass the information forwarded by the Premier to the CMC. Secondly, s.35(1)(a) expressly provides that the assessment of a complaint comprises performance by the CMC of its misconduct functions. The CMC received and scrutinised the material from the Premier, conducted an interview with the Third Party, and formed the view that there was no further action warranted. It subsequently communicated this view to the Premier. Clearly, then, the CMC conducted an assessment of the Premier's complaint.
47. I am satisfied therefore, that, once in possession of the material forwarded by the Premier, the CMC's obligation under s.33(b) was triggered, and that its misconduct functions were thus

invoked. It then proceeded to assess that material, and accordingly it was then pursuing its misconduct functions as prescribed by s.35 of the CM Act. Accordingly, I find that the CMC was, in obtaining, using or preparing the matter in issue in this review, performing its misconduct functions within the meaning of s.33(b) of the CM Act.

Was the CMC conducting an "investigation"?

Relevant statutory provisions

48. Section 45 of the CM Act provides that the CMC has primary responsibility for "dealing with" complaints about, or information or matter involving official misconduct:

45 Responsibility of commission

- (1) *The commission has primary responsibility for dealing with complaints about, or information or matter involving, official misconduct....*

49. Section 46 goes on to identify the manner in which the CMC is to deal with misconduct complaints:

46 Dealing with complaints – commission

- (1) *The commission deals with a complaint about, or information or matter (also a **complaint**) involving misconduct by –*
- (a) *expeditiously assessing each complaint about misconduct made notified to it, or otherwise coming to its attention; and*
- (b) *taking the action the commission considers the most appropriate in the circumstances having regard to the principles set out in section 34.*

...

50. The phrase "deal with" and term "investigate" as used in these provisions and elsewhere within the CM Act are defined in Schedule 2 to that Act:

deal with, a complaint about misconduct or information or matter involving misconduct, includes—

- (a) *investigate the complaint, information or matter; and*

- (b) *gather evidence for—*

- (i) *prosecutions for offences; or*
 (ii) *disciplinary proceedings; and*

- (c) *refer the complaint, information or matter to an appropriate authority to start a prosecution or disciplinary proceeding; and*

- (d) *start a disciplinary proceeding; and*

- (e) *take other action, including managerial action, to address the complaint in an appropriate way.*

...

investigate includes *examine and consider.*

Participants' submissions

51. The applicant's argument is, effectively, that the CMC merely conducted an appraisal or "assessment" of the Premier's complaint, and did not proceed to an actual investigation of that complaint. Accordingly, the applicant submits that one of the key requirements of s.42(3A) as set out at paragraph 23 above, is not satisfied. In his submissions dated 12 July 2005, the applicant stated:

In our view, the activity documented in connection with this matter cannot reasonably be said to have amounted to 'an investigation' and as far as can be ascertained from the CMC records released to date, it was never described as such by those directly involved at the time.

The CMC itself routinely referred to this process as 'an assessment' and that terminology also appears to have been used by the Premier and the [the Fourth Party] in their discussions with Mr Butler, as recorded in his various file notes. This description seems entirely appropriate given that the purpose of the exercise was to assess whether there was a suspicion of misconduct.

Had the CMC concluded there was such a suspicion, its jurisdiction would have been enlivened and an investigation might well have eventuated. As it happened, the CMC did not discover any information giving rise to a suspicion of misconduct, so its jurisdiction was not enlivened and no investigation ensued.

Again, in case there is any confusion on this point, the assessment process related only to the CMC's highly tenuous inference in relation to s.415 of the Criminal Code, because it never had any credible claim to jurisdiction in relation to the core allegations ... arising directly from the witness accounts of the [Fourth Party's] behaviour at the ... party...

This has been confirmed by the CMC which last year informed our office as follows:

When conducting their inquiries, Agency officers were concerned to establish whether the Agency had the necessary jurisdiction. In the circumstances of this case, the Agency would only have jurisdiction if there was any evidence (or even information) that there was any criminal behaviour on the part of the [Fourth Party]. They were not concerned, nor should they have been, whether the [Fourth Party's] conduct may have been in breach of any of the non-criminal provisions of the Anti-Discrimination Act 1991.

In brief, the CMC did not investigate the core allegations regarding the [Fourth Party's] behaviour at the ... party because it did not have the jurisdiction to do so, and it did not investigate a possible breach of s.415 [of the Criminal Code] because its assessment process indicated there was no suspicion such a breach had occurred. In other words, we submit that there was no investigation of anything.

52. In its submission dated 10 August 2005, the CMC stated as follows (as far as is relevant):

The CMC is obliged to assess every matter it receives. In accordance with s.35 of the [CM Act] there are a number of ways the CMC may perform its misconduct functions. Section 35 (1) of the [CM Act] is prefaced by the words, 'Without limiting how the commission may perform its functions...'. These words grant to the CMC a wide discretion as to how it performs its misconduct functions and is not restricted by the matters set out in paras (a) to (h) [of s.35(1) of the CM Act].

The CMC may assess a matter as frivolous or vexatious or not within its jurisdiction or otherwise not warranting further action by the CMC, on the basis of the material provided to it. The basis for this assessment may be that no further action is warranted by any agency or that another agency can deal with the matter adequately ('an assessment simpliciter'). All other steps the CMC undertakes (including conducting interviews, requesting further documents, making inquiries) form part of "an investigation by the CMC", and any documents generated in that process are exempt from access under section 42(3A) of the FOI Act, subject to s.42(3B).

While in correspondence the CMC may have referred to the course it took in this case as 'an assessment', this does not prevent it being categorised as 'an investigation' for the purposes of s.42(3A) of the FOI Act. CMC officers interviewed a person prior to concluding that the conduct of the [Fourth Party] did not amount to official misconduct. In doing so, the CMC did something further than 'an assessment simpliciter', the interview being part of an investigation of the matter. The definition of 'investigate' in schedule 2 of the [CM Act] is broad: 'investigate includes examine and consider' and would include the further step taken by the CMC to interview a relevant person.

53. The Fourth Party, in submissions dated 16 September 2005, advised that they agreed generally with the CMC's submissions, noting, among other things, that the *"fact the CMC commenced interviewing persons in relation to the matters referred by the Premier meant that it had commenced an investigation..."*.
54. The Fifth Party lodged extensive submissions in relation to this issue that, in general terms, largely accord with those lodged by the CMC. The Fifth Party argued that the term "investigate" was used and defined broadly in the CM Act, and that, under s.35 of the CM Act, the CMC was entrusted with a "wide discretion as to the means by which misconduct functions are to be performed." The Fifth Party went on to analyse s.46 of the CM Act, arguing:
20. *In the present case, consistently with the terms of s.46(1)(a) of the CM Act, the CMC initiated an inquisitorial process by which an assessment of a matter was made. This assessment involved the conduct of an interview "with the [Third Party] referred to in the material", after which a conclusion was reached that the alleged conduct attributed to the [Fourth Party] did not amount to official misconduct and that no further action on the part of the CMC was warranted.*
21. *The only proper construction which can be placed on these events is that the CMC was involved in an investigation of possible misconduct arising from information referred to it by the Premier. The circumstances fall clearly within the definition of investigation as comprehended in Schedule 2 to the CM Act and illustrate the normal and unexceptionable processes of the CMC in dealing with complaints in terms of s.46 of the CM Act.*
- ...
26. *There can be no doubt that the assessment undertaken by the CMC here constituted an "investigation" of the matter in the performance of the CMC's misconduct functions. The CMC examined and considered the matter referred to it by the Premier. On any reasonable view, the actions of the CMC in this case may be characterised as an "investigation".*

Analysis

55. The cumulative effect of the relevant provisions of the CM Act is, in my view, such as to create a statutorily mandated process by which the CMC receives a complaint (as broadly defined), and is then obliged to "deal with" that complaint. The process of "dealing with" the relevant complaint as required by s.45(1) of the CM Act encompasses a broad range of activity and involves, initially, an assessment of the complaint – see s.46(1)(a). Assessment action therefore by definition comprises part of the process of "dealing with" a complaint or referral. The definition of "deal with" as contained in Schedule 2 also expressly incorporates the possibility of "investigation", an action which itself is broadly defined to include the steps of merely examining or considering the relevant complaint.
56. Accordingly, it is my view that assessing a complaint is part of the broad process of "dealing with" that complaint, a process which the CM Act expressly recognises as including a process of investigation, even if that investigation is merely comprised of "examining or considering" the complaint (actions which of themselves would appear to be integral to any process of initial assessment). "Investigation" and "assessment" within the meaning of the CM Act are therefore not mutually exclusive processes or concepts, but complementary or integrated steps that may be taken in the course of "dealing with" a complaint.
57. The CMC received the material alleging possible misconduct on the part of the Fourth Party from the Premier. It was from that time obliged to "deal with" the material, and accordingly initiated an assessment process, consistent with and in discharge of the obligations imposed by s.46 of the CM Act. Part of that process undoubtedly involved "examination or consideration" by the CMC of the material forwarded by the Premier – action evidenced in the various internal minutes and records of action disclosed by the CMC to the applicant – and thus involved action falling within the definition of "investigation" contained in Schedule 2 to the CM Act which, as noted above, does not necessarily follow the process of initial assessment, but can form an integral part of that process. In this case, the CMC went further still, including in their assessment process an interview by CMC officers of the Third Party, the officer central to the allegations involving the Fourth Party. Subsequently, the CMC concluded that, on the officer's account, there was insufficient material to constitute official misconduct on the part of the Fourth Party, and that the matter did not warrant *further* investigation.
58. It is my view that the CMC's actions in this regard are clearly within the meaning of "investigation" as defined in Schedule 2 to the CM Act. The CMC on receiving a complaint, conducts an initial assessment of that complaint to determine whether jurisdiction exists for a fuller inquiry to be conducted, and, if so, the manner and nature of that inquiry. That initial assessment process is, as noted, recognised by the CM Act itself and it is specifically referred to in the letter from Mr Butler SC to the Premier dated 25 July 2003. Nevertheless, it is a process that of itself fulfils the obligation to "deal with" a complaint, which, as the definition of "deal with" set out above shows, is a course of action that, as I have noted, may include investigatory activity. In turn, the definition of "investigate" clearly and logically anticipates a broad range of activity – "examining" or "considering" a complaint are both encompassed within the meaning of investigate, and are also basic steps fundamental to the process of assessment.
59. Certainly, it is my view that in scrutinising the material supplied by the Premier, and conducting a formal interview with the Third Party (the tapes and transcripts of which, as noted, comprise part of the matter in issue in this review), the CMC was taking action squarely within the definition of "investigation" as contained in Schedule 2. I find, therefore, that in "dealing with" and "assessing" the allegations contained in the material referred by the Premier, the CMC was conducting an investigation within the meaning of the CM Act. Accordingly, I am satisfied that the matter in issue in this review comprises information obtained, used or prepared for an investigation by the CMC, in the performance of the prescribed functions of the CMC, and therefore qualifies for exemption from disclosure under s.42(3A) of the FOI Act.

Conclusion

60. As my findings are based on an exemption provision that had not been enacted at the time of the making of the decision under review, I consider it appropriate to set aside the decision under review. In substitution for it, I find that the matter remaining in issue is exempt matter under s.42(3A) of the FOI Act, as matter which consists of information obtained, used or prepared for an investigation by a prescribed crime body in the performance of its prescribed functions. As noted at paragraph 18, this finding concludes this external review.

DECISION

61. I set aside the decision under review (being the decision made by Mr Stewart on behalf of the CMC on 15 March 2004). In substitution for it, I decide that the matter remaining in issue (identified in paragraph 22 of my reasons for decision) qualifies for exemption from disclosure under s.42(3A) of the FOI Act.
62. I have made this decision as a delegate of the Information Commissioner's powers, under s.90 of the FOI Act.

.....

R. Rangihaeata

Assistant Information Commissioner

28 April 2006