

Participants:

CHRISTOPHER PATRICK HAMILTON
Applicant

- and -

QUEENSLAND POLICE SERVICE
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - information relating to suitability of the applicant for recruitment as a police officer with the respondent - information adverse to the applicant supplied to the respondent on the basis of express assurances of confidence - statutory obligation requiring that appointments of police recruits are made in accordance with procedures that are fair - whether information received in circumstances in which an equitable obligation of confidence was imposed on the respondent - whether information is exempt matter under s.46(1)(a) of the *Freedom of Information Act 1992 Qld*.

Freedom of Information Act 1992 Qld s.25, s.41(1)(a), s.42(1)(b), s.44(1), s.46(1), s.46(1)(a), s.46(1)(b), s.46(2), s.46(2)(a), s.46(2)(b), s.52, s.76(2), s.78, s.87

Parliamentary Commissioner Act 1974 Qld s.22

Police Service Administration Act 1990 Qld s.5.2(1), s.5.2(2)

Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft, Re
(1986) 10 FCR 180; 64 ALR 97; 12 ALD 468

Attorney-General (NSW) v Quin (1990) 64 ALJR 327; 93 ALR 1

Attorney-General (UK) v Heinemann Publishers (1987) 10 NSWLR 86; 75 ALR 353

"B" and Brisbane North Regional Health Authority, Re (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported)

Cole v Cunningham (1983) 49 ALR 123

Dunford & Elliott Ltd v Johnson & Firth Brown Ltd [1978] FSR 143

G v Day [1982] 1 NSWLR 24

Kioa v West (1985) 159 CLR 550; 60 ALJR 113

McEniery and the Medical Board of Queensland, Re (Information Commissioner Qld, Decision No. 94002, 28 February 1994, unreported)

R v The Commissioner of Police, ex parte Boe [1987] 2 Qd R 76

Science Research Council v Nassé [1979] 3 WLR 762

Smith Kline & French Laboratories (Aust) Ltd and Others v Secretary, Department of Community Services & Health (1990) 22 FCR 73; 95 ALR 87

Smith Kline & French Laboratories (Aust) Ltd and Others v Secretary, Department of Community Services & Health (1991) 28 FCR 291; 99 ALR 679

DECISION

1. I vary that part of the decision under review (being the decision of Acting Assistant Commissioner L J Walker made on 26 March 1993) which relates to folios 4, 11, 12, 124, 131, 133, 134, 140 and 229 (as identified in paragraph 6 of my reasons for decision), as follows:
 - (a) the matter deleted from folios 4, 11, 124, 131, 133, 140 and 229 is exempt matter under s.46(1)(a) of the FOI Act;
 - (b) the matter deleted from folio 12 is exempt matter under s.46(1)(a) of the FOI Act, except for the following matter to which the applicant is entitled to have access:
 - the last five words on the eighth line of the final paragraph
 - the second, fifth and sixth words on the ninth line of the final paragraph
 - all words on the tenth and eleventh lines of the final paragraph.
 - (c) the matter deleted from folio 134 is exempt matter under s.46(1)(a) of the FOI Act, except for the following matter to which the applicant is entitled to have access:
 - the first five words and the last two words on the first line of the final paragraph
 - all words on the second, third, fourth and fifth lines of the final paragraph
 - the first word on the sixth line of the final paragraph.
2. I decide that the matter contained in the Additional Document (identified in paragraph 7 of my reasons for decision) is exempt matter under s.46(1)(a) of the FOI Act.

Date of Decision: 26 August 1994

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of a decision by the respondent, the Queensland Police Service (the QPS), to refuse him access to certain matter claimed by the respondent to be exempt matter under the provisions of the *Freedom of Information Act 1992 Qld* (the FOI Act).
2. By application dated 17 November 1992, Mr Hamilton applied for access to all documents and computer files relating to two applications which he made (in 1990 and 1992) to become a member of the QPS. By decision of Superintendent J B Doyle dated 22 February 1993, the applicant was granted access to the majority of the requested documents, but was refused access to a number of documents and parts of documents which were claimed to be exempt under one or more of s.41(1)(a), s.42(1)(b), s.44(1) and s.46(1) of the FOI Act. The applicant applied for review of Superintendent Doyle's decision by a more senior officer of the QPS, in accordance with s.52 of the FOI Act. In that application, Mr Hamilton also requested that certain documents be "taken off my files". This request was made on the basis of the applicant's contention that some of the matter contained in the documents was false.
3. By a decision dated 26 March 1993, Acting Assistant Commissioner L J Walker affirmed the initial decision of Superintendent Doyle, and also decided to refuse Mr Hamilton's request that certain documents be removed from the files of the QPS.
4. On 27 April 1993, Mr Hamilton applied for review of that decision by the Information Commissioner under Part 5 of the FOI Act.

The External Review Process

5. During the course of this review, negotiations were undertaken with the participants in accordance with s.80 of the FOI Act, as a result of which agreement was reached on narrowing the issues for formal determination in this review as follows:
 - (a) the applicant decided to pursue access only to folio 134 (which had been claimed by the QPS to be wholly exempt) and to the matter which had been deleted from folios 4, 11, 12, 124, 131, 133, 140 and 229; and
 - (b) the applicant agreed not to pursue the request he made in his internal review application for the removal of some of the documents held on the files of the QPS.

6. The matter remaining in issue relates to Mr Hamilton's two unsuccessful applications to join the QPS. In essence, it comprises information supplied by third parties to the QPS concerning Mr Hamilton, and information which might identify those third parties. It can be more particularly described as follows:

<u>FOLIO NO.</u>	<u>DESCRIPTION</u>
4	The first page of a letter dated 6 August 1992 from the Parliamentary Commissioner for Administrative Investigations (Ombudsman) to the Commissioner of Police, from which two phrases have been deleted from a quotation which appears in the third paragraph of that letter.
11	An inter-office memorandum signed by Sergeant Rory Hawkins and dated 27 July 1992, from which the second paragraph has been deleted.
12	An inter-office memorandum dated 30 June 1992 from Acting Inspector R D Lewis to the Manager - Personnel of the QPS, from which part of the final paragraph has been deleted.
124	A letter dated 6 March 1992 from Acting Inspector Lewis to the Personnel Branch of the Recruiting Section of the QPS, from which matter has been deleted in the second line of the address, and in the third, fourth and fifth paragraphs.
131	The first page of a letter dated 24 December 1991 from the Ombudsman to the Commissioner of Police, from which two phrases have been deleted from each of the second and third paragraphs of the folio.
133-134	<p>A report by an officer of the QPS (who will be referred to in these reasons for decision as Officer X, since the QPS contends that the disclosure of Officer X's identity would enable the identity of another individual to be ascertained and that the QPS is bound to observe confidentiality with respect to the identity of that other individual). The report of Officer X is addressed to Inspector Long of the Recruiting Section of the QPS and is dated 11 June 1990. All of the report is claimed to be exempt with the exception of the following words which appear at the beginning of the report:</p> <p style="text-align: center;"><i>11 June 1990</i></p> <p style="text-align: center;"><i>Insp. LONG</i></p> <p style="text-align: center;"><i>Recruiting Section</i></p> <p style="text-align: center;"><i>Information on Police Applicant - Christopher Patrick HAMILTON</i></p> <p>(A handwritten notation at the foot of folio 133, signed by Acting Inspector Lewis and dated 15 June 1990, was released to the applicant.)</p>
140	A letter dated 11 February 1991 from Acting Sergeant G P Wallace to the Inspector of Police - Recruiting Section, from which two phrases have been deleted from the fifth paragraph of the letter and two phrases have been deleted from a marginal notation signed by Inspector T D Long and dated 11 February 1991.

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A copy of folio 140, from which the same matter has been deleted, and on which there appears a further marginal notation signed by Acting Superintendent B A Johnson and dated 11 February 1991, from which notation one phrase has been deleted.

7. During the external review process, a further document which falls within the terms of the applicant's FOI access request was produced to me by the QPS. That document comprises an internal report by Sergeant R Hawkins of the QPS, together with two enclosures, and will be referred to in these reasons for decision as "the Additional Document". I am unable to disclose any further details of the Additional Document, as to do so would reveal matter which is claimed by the QPS to be exempt matter under the FOI Act (see s.76(2) and s.87 of the FOI Act).
8. Two persons who provided information to the QPS (and who will be referred to in these reasons for decision as Person 1 and Person 2 respectively) were contacted and invited to apply, in accordance with s.78 of the FOI Act, to be participants in the review proceedings, but did not take up that opportunity. Nevertheless, evidence was obtained from Persons 1 and 2, by way of statutory declarations, as to the material facts and circumstances surrounding their communications with Sergeant Hawkins of the QPS about the applicant.
9. In support of its case, the QPS lodged a written submission and the following evidence:
 - a statutory declaration of Officer X, executed on 26 November 1993
 - a statutory declaration of Sergeant Hawkins, executed on 12 January 1994
 - a statutory declaration of Acting Inspector Lewis, executed on 17 January 1994
 - a statutory declaration of Sergeant Hawkins, executed on 2 June 1994.

The written submission lodged by the QPS on 17 January 1994 contends that the matter remaining in issue is exempt matter under s.42(1)(b), s.44(1) and s.46(1) of the FOI Act. The evidence lodged by the QPS is discussed in detail below.

10. The evidence and written submission lodged by the QPS, edited where necessary so as to avoid disclosure of matter claimed to be exempt (as required by s.76(2) and s.87 of the FOI Act), were provided to the applicant. The extent of the editing required has significantly limited the applicant's access to the detail of the respondent's evidence and submission, and disadvantaged the applicant's presentation of his case. This is an inevitable consequence, however, of the need to prevent disclosure of the matter in issue during the course of a review. Likewise, I am unable to explain in full detail the reasons for my decision because of the requirement that I refrain from disclosing exempt matter.
11. By letter dated 28 April 1994, and a telephone conversation with a member of my staff on 6 July 1994, the applicant provided me with his submissions in relation to the matters in issue.

The Applicant's Submissions

12. A concise summary of the background to Mr Hamilton's FOI access application is contained in the first paragraph of his submission dated 28 April 1994:

This matter relates to an application to join the Queensland Police Service made by myself in 1990. I was given verbal acceptance to the service until an adverse report was received by police and subsequently my application was rejected. I sought clarification of the adverse report or an opportunity to put my side to it. I was given neither. I took the matter to the Ombudsman who investigated it to a point where it was determined I could reapply without recourse to the adverse report. My new

application was rejected and I was advised verbally by police that these matters just do not disappear and that I would not make a suitable police officer. The matter was returned to the Ombudsman where it was recommended I make application to the Freedom of Information [sic].

13. The main thrust of the applicant's submission was that the recruitment process undertaken by the QPS in his particular case was undertaken in such a manner that he was not afforded the opportunity to respond to certain allegations which were made about him, and which were considered by the QPS in refusing his application to join the QPS. In particular, the applicant stated that his application for external review was *"not a matter of sour grapes because I was not accepted into the Queensland Police Service, but an attempt by an ordinary person to seek fair play and justice"*. The applicant's particular concerns in this regard included:
- not having been given the opportunity to put his side of the story in respect of the information received by the QPS about him;
 - a belief that insufficient inquiries were undertaken by the QPS in respect of the information received, so as "to enable [the QPS] to have a fair and equal approach" to that information; and
 - the applicant's inability to refute the allegations made, without having been afforded the opportunity to know the source of the allegations and specific details of the allegations made.
14. Further, the applicant stated his view that the information supplied to the QPS concerning him was false and, in particular, he stated:

Police quote that it is in the public interest not to divulge the source of this information, what public interest? Can anyone give false information and not be made accountable or at least prepared to back up their comments. Every other government department and individual is made accountable for their actions, so why not on this occasion.

The Evidence

15. Details of the inquiries which are undertaken by the QPS in the course of the selection of police recruits were provided in the statutory declaration executed on 17 January 1994 by Acting Inspector Lewis (who has been the officer in charge of the Recruiting Section of the QPS for the last two years and has been attached to that section for 11 years):

The recruitment and selection process for entry to the Queensland Police Service for police recruits requires selected applicants undertaking a physical competency test, psychometric testing, selection panel interview and medical examination. Community background enquiries are then undertaken on applicants recommended by the selection panel.

The community background enquiries supplement internal checks conducted on criminal and traffic records held by the [QPS] and the Department of Transport. Community background enquiries are made by police officers with previous employers and at current and former places of residence. Additionally, enquiries are made from referees nominated by the applicants. These enquiries are made by local police officers on behalf of the Recruiting Section at locations where the applicants have been previously employed or where they previously or currently reside. On some occasions enquiries are undertaken by staff at the Recruiting Section to follow up other police enquiries to ensure the integrity of applicants.

Clearly there is a need for the most thorough community background enquiries to be made in respect of potential members of the Queensland Police Service to provide a clear picture of the applicant for police employment. It is imperative that in community background enquiry searches the [QPS] establishes that the applicant is of impeccable character. Further that comments and information supplied in respect of applicants for police employment must be as candid and comprehensive as possible. The Queensland Police Service must keep information received about potential members of the [QPS] confidential to ensure frank and open candour from members of the community who provide this information.

In November 1991 the Chairman of the Criminal Justice Commission wrote to the Commissioner of the Queensland Police Service concerning the integrity of police applicants. The Chairman advised that the Criminal Justice Commission was acutely interested in ensuring that checks into the background of police officers are made in order to ensure that all those who succeed in being accepted by the [QPS] have a record which is without blemish and that no question as to their personal integrity may later arise.

During my period of duty at the Recruiting Section, community background enquiries have always played a paramount role in determining the suitability of applicants to be appointed as police officers. This fact was made clear to me upon my arrival at the Recruiting Section in early 1982 and the importance of community background enquiries was a very high consideration when appointments were made by the Commissioner of future police officers. Over the years, the importance of these enquiries to determine the suitability of future police officers has remained a very high consideration.

Prior to my appointment to the Recruiting Section, I performed over 17 years of operational policing duties with a very high proportion of the duties in the city and suburban areas. Over this period, I carried out numerous community background enquiries on behalf of the Recruiting Section on police applicants by interviewing referees, former employers and neighbours at former and current residential addresses. These enquiries were always carried out on a strictly confidential basis with numerous people inquiring as to the confidential nature of the information supplied to me concerning applicants for the [QPS].

During my entire period at the Recruiting Section the community background enquiries on police applicants have been treated on a strictly confidential basis and the files have always remained in the possession of recruiting staff with access only provided to senior officers of the Personnel Branch. No applicant or any other person has been provided with any information concerning the community background enquiries or information which would identify the informant of such information.

I strongly believe that the Queensland Police Service has a duty to the people of Queensland to appoint as police officers only the most suitable applicants in terms of education, life and work experience and integrity. Clearly the applicants' integrity can only be determined through exhaustive community background enquiries with the support of members of the community to willingly provide information about future police officers.

16. In a statutory declaration executed on 26 November 1993, Officer X gave evidence concerning communications with one of the individuals who provided information to the QPS (and who will be referred to in these reasons for decision as Person 3). As a result of Officer X's communications with Person 3, Officer X wrote the report dated 11 June 1990 to Inspector Long of the Recruiting Section of the QPS which comprises folios 133-134, as referred to at paragraph 6 above. Officer X's statutory declaration includes details of that officer's contact with Person 3 concerning the applicant. I am unable to reproduce most of that evidence, as to do so would enable the identity of Person 3 to be ascertained. However, the following evidence of Officer X may be quoted:

At this point I assured [Person 3] that the source of information would remain strictly confidential and that the minimum number of people possible would be aware of the source.

17. Towards the end of the statutory declaration, Officer X stated:

I also feel that the release of this information would damage my reputation professionally as a Police Officer if it was revealed that I assured [an individual like Person 3] of confidentiality in relation to information and this information was subsequently released ...

18. Person 3 also had communications with Sergeant Hawkins, who has been stationed at the Recruiting Section of the QPS for the last three years. In his statutory declaration executed on 12 January 1994, Sergeant Hawkins provided evidence of his communications with Person 3. Sergeant Hawkins was requested in June 1992 to undertake further community background checks in respect of Mr Hamilton, having regard to Mr Hamilton's second application for employment by the QPS. As part of the inquiries undertaken by Sergeant Hawkins, he communicated with Person 3. Again, I am unable to reproduce much of the evidence supplied by Sergeant Hawkins in his statutory declaration, as to do so would enable the identity of Person 3 to be ascertained. However, I am able to reproduce the following statement of Sergeant Hawkins in relation to his communications with Person 3:

I assured [Person 3] that any information would be of a highly confidential nature and that it is not the Police Service's policy to advise applicants where we gained our information. Our inquiries were to remain confidential so that we could establish the suitability of persons wishing to become police officers. We therefore could not break these bounds of confidentiality or members of the community would not supply us with the necessary information. These reassurances were made on a number of occasions for [Person 3] to continue providing information to me.

19. Sergeant Hawkins also gave evidence of his communications with Person 1, Person 2 and another individual who provided information to the QPS (and who will be referred to in these reasons for decision as Person 4) during his conduct of community background checks concerning the applicant.
20. In the course of the conduct of the community background checks, Sergeant Hawkins contacted Person 1 seeking information concerning the applicant. In his statutory declaration executed on 12 January 1994, Sergeant Hawkins provided evidence of his communications with Person 1. For the reasons previously discussed, I am unable to reproduce most of Sergeant Hawkins' evidence concerning Person 1. However, I am able to say that Sergeant Hawkins stated that Person 1 was "advised that any information forthcoming would be confidential and for use only by the Queensland Police Service". During his communications with Person 1, Sergeant Hawkins was supplied with certain information concerning the applicant's background.
21. Evidence was also obtained from Person 1 concerning that individual's contact with Sergeant

Hawkins. In Person 1's statutory declaration executed on 10 November 1993, Person 1 stated as follows:

I recall Hawkins advising me that the information I provided him would be used to assess Hamilton's suitability to become a member of the QPS. I recall Hawkins advising me that the information I provided him and my identity as the source of that information would remain confidential. I recall Hawkins volunteering that to me early in the conversation. I believe he said that to me early in the conversation as a means of encouraging me to speak freely about Hamilton. As a result, I acted under the expectation that the matters raised ... together with my identity as the source of that information, would remain confidential.

22. Person 1 has advised a member of my staff that Person 1 objects to the release to the applicant of that individual's identity, together with the information supplied by Person 1 to Sergeant Hawkins.
23. In his statutory declaration executed on 12 January 1994, Sergeant Hawkins provided evidence of his communications with Person 2 concerning Sergeant Hawkins' request for information about the applicant. For the reasons previously stated, I am unable to reproduce most of Sergeant Hawkins' evidence concerning Person 2. Sergeant Hawkins stated that he advised Person 2 "that any information forthcoming would be confidential and for use only by the Queensland Police Service".
24. Evidence was also obtained from Person 2 in relation to that individual's communications with Sergeant Hawkins. In particular, Person 2 stated as follows:

I do not recall discussing with Hawkins to what use the information I provided him ... on 26 June 1992 would be put. I do recall Hawkins said that he was undertaking an investigation in relation to Hamilton. It was my expectation that my identity as the source of that information would remain confidential.

25. Person 2 went on to give reasons for holding that expectation, which reasons I am unable to reproduce here as they may enable the identity of Person 2 to be ascertained.
26. In his further statutory declaration executed on 2 June 1994, Sergeant Hawkins gave evidence of his communications with Person 4. For the reasons previously stated, I am unable to reproduce most of Sergeant Hawkins' evidence concerning Person 4. However, I am able to record that Sergeant Hawkins stated as follows:

The circumstances of my being provided with [Person 4's] name, address and telephone number was on the basis that the information was provided in confidence. ... The only reason that I was provided with information was on the basis that it would remain confidential.

Applicable Legislative Provisions

27. In his decision of 26 March 1993, Acting Assistant Commissioner L J Walker relied on s.41(1)(a), s.42(1)(b), s.44(1) and s.46(1)(b) of the FOI Act in determining that the relevant matter was exempt. During the course of the external review, the QPS indicated that it no longer wished to rely on s.41(1)(a) in relation to the matter still in issue. In my opinion, s.46(1)(a) of the FOI Act is also relevant.
28. Section 42(1)(b) of the FOI Act provides as follows:

42.(1) Matter is exempt matter if its disclosure could reasonably be expected to -

...

- (b) *enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained;*

29. Subsections 44(1) and (2) of the FOI Act provide as follows:

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.

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

46.(1) Matter is exempt if -

- (a) *its disclosure would found an action for breach of confidence; or*
- (b) *it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*

(2) Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless its disclosure would found an action for breach of confidence owed to a person or body other than -

- (a) *a person in the capacity of -*
 - (i) *a Minister; or*
 - (ii) *a member of the staff of, or a consultant to, a Minister; or*
 - (iii) *an officer of an agency; or*
- (b) *the State or an agency.*

Section 46(1)(a) of the FOI Act

31. In *Re "B" and Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported), I considered in detail the elements which must be established in order for matter to qualify for exemption under s.46(1)(a) of the FOI Act. The test of exemption is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency or Minister faced with an application under s.25 of the FOI Act, for access to the information in issue (see paragraph 44 in *Re "B"*). I am satisfied that, in the circumstances of this application, there are identifiable plaintiffs (Persons 1, 2, 3 and 4) who would have standing to bring actions for a breach of confidence.
32. There is no suggestion in the present case of a contractual obligation of confidence arising in the circumstances of the communication of information in issue from Persons 1, 2, 3 and 4 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.
33. Where the hypothetical legal action by which the test of exemption is to be evaluated must, in the circumstances of a particular case, be an action in equity for breach of confidence there are five criteria which must be established:
- (a) it must be possible to specifically identify the information in issue, in order to establish that it is secret, rather than generally available information (see paragraphs 60-63 in *Re "B"*);
 - (b) the information in issue must possess "the necessary quality of confidence"; i.e. the information must not be trivial or useless information, and it must possess a degree of secrecy sufficient for it to be the subject of an obligation of conscience, arising from the circumstances in or through which the information was communicated or obtained (see paragraphs 64-75 in *Re "B"*);
 - (c) the information in issue must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see paragraphs 76-102 in *Re "B"*);
 - (d) it must be established that disclosure to the applicant for access under the FOI Act would constitute a misuse, or unauthorised use, of the confidential information in issue (see paragraphs 103-106 in *Re "B"*); and
 - (e) it must be established that detriment is likely to be occasioned to the original confider of the confidential information in issue if that information were to be disclosed (see paragraphs 107-118 in *Re "B"*).
34. With respect to the first criterion set out in the preceding paragraph, I am satisfied that the information supplied by each of Persons 1, 2, 3 and 4, which is claimed to be confidential information (as recorded in the documents in issue), can be identified with specificity.
35. With regard to the second criterion, Mr Hamilton has received some information in relation to the contents of the matter in issue. He has been told that information relating to him has been sought from members of the public. He is also aware that at least some of the matter consists of adverse comments, and is aware of the general nature of those adverse comments. However, the details of the information supplied by each of Persons 1, 2, 3 and 4, and their identities, are unknown to Mr Hamilton.
36. It appears that at least some of the information contained within the matter for which exemption is

claimed has been passed on to the Office of the Parliamentary Commissioner for Administrative Investigations (the Ombudsman) as part of an investigation commenced at the behest of Mr Hamilton. The very existence of folios 4 and 131 confirms this.

37. As noted in points (b) and (c) of paragraph 71 of my reasons for decision in *Re "B"*, publication of confidential information to a limited number of persons on a confidential basis will not of itself destroy the confidential nature of the information (see in this regard *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180). The provision of some or all of the information in issue by the QPS to the Ombudsman would not, in my opinion, detract from its confidential nature. The information which was provided to the Ombudsman was provided for the limited purpose of assisting the Ombudsman's investigation of Mr Hamilton's complaint. The Ombudsman was under a statutory duty to use the information only for the purposes of discharging the Ombudsman's functions under the *Parliamentary Commissioner Act 1974 Qld* (see s.22 of that Act). There is no evidence that any of the information was disclosed to Mr Hamilton during the course of the Ombudsman's investigations.
38. In each case, I find that the information recorded in the matter in issue (except for part of the matter contained in folios 12 and 134, further discussed at paragraphs 61 and 62 below) is not trivial and has the requisite degree of secrecy to invest it with the "necessary quality of confidence", so as to satisfy the second criterion referred to in paragraph 33 above. The matter in issue includes information which would reveal the identity of each of Persons 1, 2, 3, and 4. This information is also, in my opinion, eligible for protection as confidential information under s.46(1)(a) of the FOI Act, given the circumstances of this case. Those circumstances are, in material respects, similar to those encountered in *G v Day* [1982] 1 NSWLR 24, which is authority for the proposition that although a person's identity is ordinarily not information which is confidential in quality, the connection of a person's identity with the imparting of confidential information can itself be secret information capable of protection in equity (see paragraph 137 of my decision in *Re "B"*).
39. I now turn to the third criterion referred to in paragraph 33 above, i.e. the determination in each case of whether the information was communicated in circumstances importing an obligation of confidence on the recipient. As I stated at paragraph 84 in my decision in *Re "B"*, this determination requires an evaluation of the whole of the relevant circumstances. In evaluating the relevant circumstances surrounding the communication of information in each case, I have had regard to the evidence referred to above (including the evidence of express assurances of confidentiality given on behalf of the QPS), the circumstances surrounding the seeking and imparting of the information in issue, the purposes for which that information was sought and given, the sensitivity of the information, and how substantial the detriment to the confiders would be if the information were disclosed.
40. In respect of Persons 1 and 2, I find that express assurances were given on behalf of the QPS that any information given, and in particular any information which would be likely to reveal their identities, would be kept confidential. I further find that an express assurance to like effect was given to Person 3 in relation to confidentiality of identity and to most of the information supplied by that person. As to the remainder of the information supplied by Person 3 and the information supplied by Person 4, there was no express assurance given that the information would be kept confidential, but it can readily be inferred from the surrounding circumstances that there was a common implicit understanding on the part of Persons 3 and 4, and of the QPS, that the relevant information was imparted in confidence, and that their identities would remain confidential.

41. In paragraph 139 of my decision in *Re "B"*, I stated as follows:

139. There will be cases where the seeking and giving of an express assurance as to confidentiality will not be sufficient to constitute a binding obligation, for example if the stipulation for confidentiality is unreasonable in the circumstances, or, having regard to all of the circumstances equity would not bind the recipient's conscience with an enforceable obligation of confidence (see paragraphs 84 and 85 above). ...

42. In paragraph 85 of *Re "B"*, I had referred in particular to Lord Denning MR's statement in *Dunford & Elliott Ltd v Johnson & Firth Brown Ltd* [1978] FSR 143 at p.148, which bears repeating in this context:

If the stipulation for confidence was unreasonable at the time of making it; or if it was reasonable at the beginning, but afterwards, in the course of subsequent happenings, it becomes unreasonable that it should be enforced; then the courts will decline to enforce it; just as in the case of a covenant in restraint of trade.

I remarked in *Re "B"* that, despite the different wording, this dictum probably equates in substance, and in practical effect, to the emphasis in the judgments of the Federal Court of Australia in *Smith Kline & French Laboratories (Aust) Ltd and Others v Secretary, Department of Community Services & Health* (1990) 22 FCR 73 (Gummow J), (1991) 28 FCR 291 (Full Court), that the whole of the relevant circumstances must be taken into account before a court determines that a defendant should be fixed with an enforceable obligation of confidence.

43. I also referred in *Re "B"* (at paragraph 83) to the suggestion by McHugh JA in *Attorney-General (UK) v Heinemann Publishers* (1987) 75 ALR 353 at p.454 that special considerations apply where persons outside government seek to repose confidences in a government agency:

... when ... a question arises as to whether a government or one of its departments or agencies owes an obligation of confidentiality to a citizen or employee, the equitable rules worked out in cases concerned with private relationships must be used with caution. ...

44. An illustration of this is afforded by the result in *Smith Kline & French* where Gummow J refused to find that the first respondent was bound by an equitable obligation not to use confidential information in a particular way, because the imposition of such an obligation on the first respondent would or might clash with, or restrict, the performance of the first respondent's functions under a relevant legislative scheme. (The relevant passages are set out at paragraphs 80 and 81 of *Re "B"*, and see also my remarks at paragraph 92 of *Re "B"*.)

45. Another illustration of this principle, in my opinion, is the fact that government officials empowered to make decisions which may adversely affect the rights, interests or legitimate expectations of citizens are ordinarily subject to the common law duty to act fairly, in the sense of according procedural fairness, in the exercise of such decision-making powers (see, for example, *Kioa v West* (1985) 159 CLR 550; 60 ALJR 113, relevant extracts from which are reproduced at paragraph 28 of my reasons for decision in *Re McEniery and the Medical Board of Queensland* (Information Commissioner Qld, Decision No. 94002, 28 February 1994, unreported)). Circumstances may be encountered where the duty to accord procedural fairness clashes with an apparent duty to respect the confidentiality of information obtained in confidence, for example, where a government decision-maker proposes to make a decision which is adverse to the rights or interests of a citizen, on the basis of information obtained in confidence from a third party. This seems to me to be precisely the situation in which the QPS found itself when it proposed to refuse Mr Hamilton's

applications to join the QPS, after having regard to confidential information obtained from confidential sources.

46. Ordinarily, I do not think that decisions relating to the initial recruitment of persons as employees of government agencies would attract the application of a legal duty to accord procedural fairness (unless special circumstances were present) before an application for employment is refused (see *R v The Commissioner of Police, ex parte Boe* [1987] 2 Qd R 76, especially per Macrossan J at p.100; *Attorney-General (NSW) v Quin* (1990) 64 ALJR 327 per Dawson J at p.352; *Cole v Cunningham* (1983) 49 ALR 123 at p.128). On a common sense view, the practicalities and the resource implications, when scores (or even hundreds) of applications may be received for an advertised vacancy, tell against such a requirement. (There is ample precedent, however, to indicate that a duty to accord procedural fairness ordinarily applies to decisions relating to promotion, transfer, or termination of employment, of persons who have previously gained appointment as public officials; although the required procedure may vary according to the dictates of fairness in the particular case.) The Queensland Parliament, however, saw fit to make specific provision in the *Police Service Administration Act 1990 Qld* with respect to the making of appointments to positions in the QPS, or appointments as police recruits. At the time of Mr Hamilton's applications for recruitment into the QPS, s.5.2(1) and (2) of the *Police Service Administration Act 1990* provided as follows:

(1) *An appointment -*

- *to any position in the Police Service held, or to be held, by an officer;*
- *as a police recruit;*
 - (a) *must be made on the basis of merit of the applicants;*
 - (b) *must be made in accordance with procedures that -*
 - (i) *are fair and equitable; and*
 - (ii) *preclude patronage, favouritism and unjust discrimination.*

(2) *For the purposes of this section merit of an officer comprises -*

- (a) *the integrity, diligence and good conduct of the officer; and*
- (b) *the potential of the officer to discharge the duties of the position in question; and*
- (c) *the industry shown by the officer in performance of the duties of office in the course of the officer's career; and*
- (d) *the physical and mental fitness of the officer to perform the duties of the position in question.*

47. The specific statutory reference to appointments being made in accordance with procedures that are fair, indicates, in my opinion, a clear statutory intention that procedural fairness is to be accorded to persons who like, Mr Hamilton, make application to join the QPS. The existence of that duty must, in my opinion, be a relevant factor in determining whether equity would impose on the QPS an enforceable obligation of confidence with respect to information supplied to the QPS by Persons 1, 2, 3 and 4, and if so the precise extent of that obligation of confidence.

48. There is, of course, a degree of flexibility about what the obligation to accord procedural fairness may require in a particular context. In *Kioa*, Mason J said (at ALJR p.127):

... the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, that is, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations

49. In *Re McEniery I* said (at paragraph 31):

31. *What constitutes the observance of fair procedures will vary according to the exigencies of particular cases, but ordinarily the duty to act fairly requires that a person be given an effective opportunity to know the substance of the case against the person, including in particular the critical issues or factors on which the case is likely to turn (cf. Kioa per Mason J at p.128-9) so that the person is given an effective opportunity of dealing with the case against him or her.*

50. Although a statutory obligation to accord procedural fairness is applicable, I do not think that fairness requires that every unsuccessful applicant for a position as a police recruit is entitled to know the basis on which an adverse decision is proposed to be made and to be given an opportunity to address it. However, in the situation where an applicant otherwise meets all criteria for selection as a police recruit, and it is proposed to refuse the application on the basis of adverse material obtained from a third party, I think the better view is that procedural fairness requires that the applicant be informed of the substance of the adverse material and be given an opportunity to answer it.

51. In the present case, however, express assurances of confidentiality have been given on behalf of the QPS in respect of most of the information in issue. In approaching this apparent clash of legal obligations, I consider that some assistance can be obtained from the approach adopted by the courts when considering whether disclosure should be ordered, for the purposes of litigation, of confidential information which is relevant and discoverable. Court procedures have of course been designed to accord the maximum degree of procedural fairness to both parties to a dispute in the presentation of their cases for adjudication (whereas in other contexts, the requirements of procedural fairness may be less onerous). In *Science Research Council v Nassé* [1979] 3 WLR 762, the House of Lords considered whether confidential information, which was relevant to the issues requiring determination in a dispute between the parties, must be discovered. The House of Lords restated the well-established proposition that confidentiality alone is not a ground for avoiding discovery, or disclosure in court, of relevant information. Lord Wilberforce observed at pp.770-771:

English law as to discovery is extremely far-reaching: parties can be compelled to produce their private diaries; confidences, except between lawyer and client, may have to be broken however intimate they may be. But there are many examples of cases where the courts have recognised that confidences, particularly those of third persons, ought, if possible in the interests of justice, to be respected ... This principle was accepted by this House in D v National Society for the Prevention of Cruelty to Children [1978] AC 171. Employment cases, and indeed all cases involving selection, involve a wide dimension of confidentiality, affecting other candidates or applicants, who may be numerous, and a number of reporting officers and selection bodies. No court attempting to administer these Acts can fail to give weight to this, though it is not, as above stated, the only element. It is sometimes

said that in taking this element into account, the court has to perform a balancing process. The metaphor is one well worn in the law, but I doubt if it is more than a rough metaphor. Balancing can only take place between commensurables. But here the process is to consider fairly the strength and value of the interest in preserving confidentiality and the damage which may be caused by breaking it; then to consider whether the objective - to dispose fairly of the case - can be achieved without doing so and only in a last resort to order discovery, subject if need be to protective measures. This is a more complex process than merely using the scales. It is an exercise in judicial judgment.

52. In the circumstances of this case, I consider that, notwithstanding any unqualified assurances given on behalf of the QPS, the extent of the obligation of confidence that equity would impose on the QPS must be tempered by reference to the clear statutory obligation imposed on the QPS to accord procedural fairness in the making of appointments of police recruits. Ordinarily, in a situation such as Mr Hamilton's, procedural fairness would require that the substance of allegations adverse to Mr Hamilton (received from third parties), on the basis of which the QPS proposed to make a decision adverse to Mr Hamilton's interests, should be disclosed to Mr Hamilton. However, it is also proper to consider the strength and value of the interest in preserving confidentiality and the damage which may be caused by breaking it. The latter factors, in particular, persuade me, in the circumstances of this case, that the bare substance of the adverse material concerning Mr Hamilton was all that needed to be disclosed to him, and in particular, the identity of the sources of information, and any other information supplied in confidence which would enable their identities to be ascertained, should remain the subject of confidence. I consider that the proper scope of the obligation that equity would impose on the QPS, in the circumstances of this case, is an obligation to respect the confidentiality of the information in issue supplied by Persons 1, 2, 3 and 4, except to the extent that the bare substance of the allegations adverse to Mr Hamilton should be disclosed to him, as required by the statutory duty imposed on the QPS to observe fair procedures.
53. I note that Mr Hamilton considers that the QPS has not given him an opportunity to respond to the allegations which were made about him in the course of his job applications. I have indicated my view that, given the terms of s.5.2(1) of the *Police Service Administration Act*, procedural fairness probably required that Mr Hamilton be given an opportunity to respond to the substance of the adverse allegations made by third parties.
54. However, it is no part of my jurisdiction as Information Commissioner to order that the QPS give Mr Hamilton a reasonable opportunity to respond to the allegations. My consideration of s.5.2(1) of the *Police Service Administration Act* has been solely for the purpose of determining (in the context of applying s.46(1)(a) of the FOI Act) whether the information in issue was communicated in circumstances that imported equitable obligations of confidence binding on the QPS.
55. Whether or not he was unfairly treated at the time of rejection of his applications to join the QPS, Mr Hamilton has now been provided with documents under the FOI Act which disclose the bare substance of the adverse material taken into account in refusing those applications for employment. It is, for example, contained in one of the paragraphs of folio 229 to which he has been allowed access. The substance of the adverse material is no longer, therefore, information of a confidential nature. The balance of the information comprising the matter in issue in this case is, in my opinion, subject to equitable obligations of confidence binding on the QPS, for the purposes of the third criterion which must be established to found an action in equity for breach of confidence (see paragraph 33 above).
56. Dealing with the fourth criterion set out at paragraph 33 above, I find that disclosure of the information in issue under the FOI Act would constitute unauthorised use of that information. Persons 1, 2, 3 and 4 had the expectation that the information in issue would be used by the QPS

only for the limited purpose of considering Mr Hamilton's applications for appointment to the QPS or, in the case of some of the information provided by Person 3, for the limited purpose of responding to specific requests by Person 3. In each case there was an expectation that the information would not be conveyed to any other person, except for those limited purposes. In the circumstances, I find that the fourth criterion set out in paragraph 33 above is satisfied.

57. I am also satisfied that disclosure to the applicant of the information in issue would, in the case of each of Persons 1, 2, 3 and 4, cause detriment to them (see the fifth criterion set out at paragraph 33 above). In paragraph 111 of my decision in *Re "B"*, I stated that it was not necessary to establish that a threatened disclosure of the matter in issue would cause detriment in a financial sense, but that detriment could also include embarrassment, a loss of privacy, fear, or an indirect detriment, for example, that disclosure of the information may injure some relation or friend. I am satisfied that disclosure to the applicant of the information in issue in each case would cause detriment to Persons 1, 2, 3 and 4 of one or more of the kinds mentioned above.
58. In the circumstances of the present case, no occasion arises to consider the application of any of the defences to an equitable action for breach of confidence discussed in my decision in *Re "B"* at paragraphs 119-134.
59. I am satisfied that s.46(2) of the FOI Act does not apply in the circumstances of this case, because none of Persons 1, 2, 3 and 4 comes within the terms of paragraph (a) or (b) of s.46(2). As I have found that disclosure would found actions for breach of confidence owed to Persons 1, 2, 3 and 4, s.46(2) does not apply, even if the matter in issue were matter of a kind mentioned in s.41(1)(a) of the FOI Act.
60. I am satisfied that disclosure of the information in issue (with the exception of the passages referred to in paragraphs 61 and 62 below) would found an action for breach of confidence, and that it is therefore exempt matter under s.46(1)(a) of the FOI Act.
61. Part of the matter contained in folio 12 recites the substance of the allegations made against Mr Hamilton. As Mr Hamilton has already been made aware of the substance of the allegations made against him, I find that this part of folio 12 does not have the necessary quality of confidence and is therefore not exempt matter under s.46(1)(a) of the FOI Act. The part of folio 12 to which I refer is contained in the final paragraph and consists of:
- the last five words on the eighth line of that paragraph
 - the second, fifth and sixth words on the ninth line of that paragraph
 - all words on the tenth and eleventh line of that paragraph.
62. Part of folio 134 also sets out the substance of allegations made against Mr Hamilton of which he has already been made aware. That part of folio 134 lacks the necessary quality of confidence and is therefore not exempt matter under s.46(1)(a). The matter to which I refer is contained in the final paragraph of folio 134 and consists of:
- the first five words and the last two words on the first line of that paragraph
 - all words on the second, third, fourth and fifth lines of that paragraph
 - the first word on the sixth line of that paragraph.

Other Possible Bases for Exemption

63. In paragraph 9 above, I indicated that the QPS based its claims for exemption to the matter in issue on other possible grounds of exemption. Having found that s.46(1)(a) applies to almost the whole of the matter in issue, I do not propose to consider whether that matter is also exempt under other

exemption provisions. With regard to the matter which I have found not to be exempt under s.46(1)(a), I find that it is not exempt under any of the other exemption provisions. Section 42(1)(b) enables exemption to be claimed in respect of information which, if disclosed, could reasonably be expected to identify confidential sources of information in respect of the enforcement or administration of the law. The information referred to in paragraphs 61 and 62, however, has already been released to Mr Hamilton in another form, and I do not think there can be any reasonable expectation of prejudicial effects from its release in the form recorded on folios 12 and 134. Section 44(1) protects personal affairs information. The fact that the information relates to Mr Hamilton's personal affairs does not form a basis for a claim of exemption in response to Mr Hamilton's own application (see s.44(2) of the FOI Act). The information to be released is in such a form that it cannot be linked to any other person's personal affairs. The provisions of s.46(1)(b) require the information to be of a confidential nature. As I indicated at paragraphs 61 and 62, I have found that this information does not have the necessary quality of confidence. I therefore find that it is not exempt under any of the provisions claimed by the QPS.

Conclusion

64. For the reasons given above, I vary that part of the decision of Acting Assistant Commissioner L J Walker made on 26 March 1993 which relates to folios 4, 11, 12, 124, 131, 133, 134, 140 and 229, as follows:
- (a) the matter deleted from folios 4, 11, 124, 131, 133, 140 and 229 is exempt matter under s.46(1)(a) of the FOI Act;
 - (b) the matter deleted from folio 12 is exempt matter under s.46(1)(a) of the FOI Act, except for the following matter to which the applicant is entitled to have access:
 - the last five words on the eighth line of the final paragraph
 - the second, fifth and sixth words on the ninth line of the final paragraph
 - all words on the tenth and eleventh lines of the final paragraph.
 - (c) the matter deleted from folio 134 is exempt matter under s.46(1)(a) of the FOI Act, except for the following matter to which the applicant is entitled to have access:
 - the first five words and the last two words on the first line of the final paragraph
 - all words on the second, third, fourth and fifth lines of the final paragraph
 - the first word on the sixth line of the final paragraph.

I also decide that the matter contained in the Additional Document is exempt matter under s.46(1)(a) of the FOI Act.

.....
 F N ALBIETZ
INFORMATION COMMISSIONER