OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 97010
Application S 174/93

Participants:

KEITH DOUGLAS McCANN
Applicant

QUEENSLAND POLICE SERVICE
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - information supplied for the purposes of an investigation into possible misconduct or breach of discipline by a police officer - whether the identities of sources of information, and the information supplied, comprise confidential information - whether communicated on the basis of an implicit mutual understanding that such information would be treated in confidence - whether there were implicitly authorised exceptions to any implicit mutual understanding of confidence - whether disclosure could reasonably be expected to prejudice the future supply of like information - whether disclosure to the applicant would, on balance, be in the public interest - application of s.46(1)(b) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - information supplied by police officers, and civilian employees of the Queensland Police Service, for the purposes of an investigation into possible misconduct or breach of discipline by a police officer - whether disclosure of the identities of sources of information, and the information supplied, could reasonably be expected to have a substantial adverse effect on the management or assessment by the Queensland Police Service of its personnel - whether disclosure to the applicant would, on balance, be in the public interest - application of s.40(c) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - conclusions and recommendations of investigator following an investigation into possible misconduct or breach of discipline by a police officer - whether disclosure could reasonably be expected to have a substantial adverse effect on the management or assessment by the Queensland Police Service of its personnel - application of s.40(c) of the *Freedom of Information Act 1992* Qld - whether disclosure of this 'deliberative process matter' would be contrary to the public interest - application of s.41(1) of the *Freedom of Information Act 1992* Qld - whether disclosure could reasonably

be expected to prejudice a lawful method or procedure for dealing with a possible contravention of the law - application of s.42(1)(e) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.40(c), s.41(1), s.41(1)(a), s.41(1)(b), s.42(1)(a), s.42(1)(b), s.42(1)(e), s.46(1)(b), s.46(2),
Freedom of Information Act 1982 Vic s.35(1)(b)
Freedom of Information Act 1982 Cth s.37(1)(b)
Criminal Offence Victims Act 1995 Qld s.5, s.15(1)
Director of Public Prosecutions Act 1984 Qld s.11
Penalties and Sentences Act 1992 Qld s.12
Police Service Administration Act 1990 Qld s.4.9, s.7.2
Police Service (Discipline) Regulation 1990 Qld s.9(c), s.9(d)
Whistleblowers Protection Act 1994 Qld s.55

Attorney-General v Briant (1890) 153 ER 808
"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Beer v McCann [1993] 1 Qd R 25
Byrnes and the Public Trustee of Queensland, Re (Information Commissioner Qld, Decision No. 96001, 23 February 1996, unreported)
Cairns Port Authority and Department of Lands, Re (1994) 1 QAR 663
Cannon and Australian Quality Egg Farms Limited, Re (1994) 1 QAR 491
Corfmat and Victoria Police, Re (Victorian AAT, No. 1990/13485, Strong J, 27 July 1990, unreported)
Department of Health v Jephcott (1985) 62 ALR 421
Easdown and Director of Public Prosecutions and Ors, Re (1987) 2 VAR 102
Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (1993) 1 QAR 60
G v Day [1982] 1 NSWLR 24
Low and Department of Defence, Re (1984) 2 AAR 142
McEniery and Medical Board of Queensland, Re (1994) 1 QAR 349
McMahon and Department of Consumer Affairs, Re (1994) 1 QAR 377
Meissner, Re (1994) 76 A Crim R 81
National Companies and Securities Commission v News Corporation Ltd (1984) 58 ALJR 308
Pemberton and The University of Queensland, Re (1994) 2 QAR 293
R v Demir [1990] 2 Qd R 433
R v Rankine [1986] 2 All ER 566
Scholes and Australian Federal Police, Re (1996) 44 ALD 299
Shaw and The University of Queensland, Re (Information Commissioner Qld, Decision No. 95032, 18 December 1995, unreported)
Shepherd and Department of Housing, Local Government & Planning, Re (1994) 1 QAR 464
Smith and Administrative Services Department, Re (1993) 1 QAR 22
Tipene v Apperley [1978] 1 NZLR 761
Trustees of De La Salle Brothers and Queensland Corrective Services Commission, Re (Information Commissioner Qld, Decision No. 96004, 4 April 1996, unreported)

DECISION

I vary the decision under review (which is identified in paragraph 5 of my accompanying reasons for decision) by finding that -

(a) the matter in issue, which is identified in the findings stated in paragraphs 81, 82, 84, 86 and 90 of my accompanying reasons for decision, is exempt matter under s.46(1)(b) of the *Freedom of Information Act 1992* Qld;

(b) the matter in issue, which is identified in the findings stated in paragraph 98 of my accompanying reasons for decision, is exempt matter under s.40(c) of the *Freedom of Information Act 1992* Qld; and

(c) the matter in issue, which is identified in the findings stated in paragraphs 83, 85, 87, 89 and 105 of my accompanying reasons for decision, is not exempt from disclosure to the applicant under the *Freedom of Information Act 1992* Qld.

Date of decision: 10 July 1997

.....
F N ALBIETZ
INFORMATION COMMISSIONER

TABLE OF CONTENTS

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 97010
Application S 174/93

Participants:

KEITH DOUGLAS McCANN
Applicant

QUEENSLAND POLICE SERVICE
Respondent

REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse him access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to certain matter which relates to the respondent's investigations into a number of incidents concerning the applicant which occurred while he was the Sergeant-in-Charge of the Duaringa Police Station in Central Queensland.

2. The applicant's FOI access application, dated 31 December 1992, is too lengthy to set out in detail. In it, the applicant sought access to 34 categories of documents, principally investigative statements and reports, concerning incidents at Duaringa in which the applicant was involved.

3. On 17 June 1993, a decision in response to the applicant's FOI access application was made by Superintendent J B Doyle of the Queensland Police Service (the QPS) FOI Unit. Superintendent Doyle decided that -

   (a) in respect of several items in the applicant's FOI access application, the QPS held no responsive documents;

   (b) 11 pages could be disclosed to the applicant in their entirety;

   (c) 38 pages could be disclosed to the applicant subject to deletion of matter that was exempt matter under s.41(1), s.42(1)(b), s.42(1)(e), s.44(1) and s.46(1)(b) of the FOI Act; and

(d) access would be refused to the remainder of the documents identified as falling within the terms of the applicant's FOI access application, because they comprised exempt matter under s.41(1), s.42(1)(b), s.42(1)(e), s.44(1) and s.46(1)(b) of the FOI Act.

4. By letter dated 12 July 1993, the applicant sought internal review of Superintendent Doyle's decision, challenging the basis for the claims for exemption raised by Superintendent Doyle, and raising a 'sufficiency of search' issue (i.e., the applicant contended that there must be additional documents in the possession or control of the QPS which fell within the terms of his FOI access application, but which had not been dealt with in Superintendent Doyle's decision).

5. The internal review was undertaken by (then) Chief Superintendent A B Honor, who, by letter dated 30 July 1993, informed the applicant that he had decided to affirm Superintendent Doyle's decision.

6. By letter dated 3 September 1993, the applicant applied to me for review, under Part 5 of the FOI Act, of Chief Superintendent Honor's decision. In it, the applicant raised several grounds of challenge to the exemption claims made by the QPS, and again raised the 'sufficiency of search' issue that had been raised in his application for internal review.

External review process

7. Copies of the documents in issue were obtained from the QPS and examined. It appeared from those documents that the applicant came to the attention of his superior officers in the Rockhampton headquarters of the Central Police Region in January 1990, when a complaint was made to them by a citizen of Duaringa about the applicant's conduct. Inspector Ross Beer (who has given evidence by way of a statutory declaration filed on behalf of the QPS in this review) was instructed by the Commander of the Central Police Region to investigate the policing activities of the applicant. Inspector Beer has given evidence that his investigations commenced in 1990 and continued (apparently on an intermittent basis) into 1991, and involved interviewing and taking statements from numerous residents of the Duaringa Shire.
Several incidents were investigated, but, so far as is apparent from the material before me, only one resulted in the laying of charges. The applicant was prosecuted in the Magistrates Court at Rockhampton on charges of assault and unlawful discharge of a firearm. The Magistrate found that the charge of assault was proved, but, owing to the trivial nature of the assault, decided to discharge the applicant without conviction under the former s.657A of the *Criminal Code* (a provision since repealed by the *Penalties and Sentences Act 1992* Qld, and effectively replaced by s.12 of that Act). The applicant was convicted on the charge of unlawfully discharging a firearm. The applicant appealed against both findings of the Magistrate, but was unsuccessful. The appeal proceedings are reported in *Beer v McCann* [1993] 1 Qd R 25.

8. This background is relevant to the cogent arguments made in the applicant's letter to me dated 3 September 1993 to the effect that documents relevant to the charges against the applicant that were dealt with in open court could not qualify for exemption from disclosure on the grounds claimed by the QPS. Following a conference convened by my office in March 1994, involving representatives of the QPS (including Inspector Beer), the QPS agreed to disclose to the applicant statements by witnesses concerning the incident that resulted in charges against the applicant, and I authorised disclosure accordingly. Those documents and parts of documents are no longer in issue in this review.

9. During the course of my review, it was noted that a report by Inspector Beer to the District Officer, Rockhampton District, dated 18 September 1991 (comprising folios 45-51, as numbered by the QPS FOI Unit) referred to the applicant being interviewed by Inspector Beer on a number of occasions, with the interviews being tape-recorded. I requested those tape-recordings from the QPS. The tape-recordings disclosed that some of the matter remaining in issue at that stage, and claimed to be exempt on grounds including its confidentiality (i.e., under s.42(1)(b) and s.46(1)(b) of the FOI Act) had been put to the applicant by Inspector Beer, during the course of Inspector Beer's investigations. This was pointed out to the QPS, which subsequently indicated that it was prepared to agree to disclose some of that matter to the applicant, but maintained that other parts of that matter were exempt. I again authorised the disclosure to the applicant of the documents or parts of documents which the QPS agreed to release.

10. During the course of this external review, each participant was given the opportunity to lodge evidence and written submissions in support of their respective cases. The QPS lodged a written submission dated 18 October 1994, and a statutory declaration by Inspector Beer, made on 24 May 1994. The applicant has chosen not to lodge any further submission or evidence, in addition to the arguments made in his application for external review. Each participant has, however, responded to a number of specific inquiries put to them by me or my officers, during the course of this review. The material put before me by the participants will be referred to in these reasons for decision where relevant.

'Sufficiency of search' issue

11. On page 3 of his application for external review, the applicant said: "*It is also noted with some concern that documents relating to the ABELL investigation cannot be located by the Freedom of Information Unit*". The matter described by the applicant as the "Abell investigation" refers to Inspector Beer's investigation of an incident which occurred at the Duaringa Police Station concerning the issuing by a constable of a motor vehicle licence to a person named Abell. It is clear, from the tape-recordings of interviews conducted by Inspector Beer with the applicant, that the applicant is aware that Inspector Beer investigated this incident.

12. During the course of this external review, my staff made further inquiries as to the existence of additional documents concerning the Abell investigation, and questioned Inspector Beer on this issue. In a letter dated 9 June 1994, I conveyed to the applicant my preliminary view that no other documents exist in relation to the "Abell investigation" apart from documents located by the QPS and included in the schedule of exempt documents attached to Superintendent Doyle's decision. I pointed out to the applicant that a number of documents included in that schedule were not described in a very full or meaningful way because of the nature of the exemption claims made in respect of those documents (for example, under s.42(1)(b) of the FOI Act, that disclosure would identify confidential sources of information).
I invited the applicant to lodge evidence in support of any contention he wished to pursue that the respondent had not located and dealt with all documents falling within the terms of his FOI access application. The applicant has not pursued that issue.

13. However, during the course of examination of the documents in issue in this external review, references were noted to interviews concerning the "Abell incident" conducted by Inspector Beer with three witnesses, in respect of which no transcript or tape was included among the documents in issue. Further inquiries were made of the QPS, which subsequently forwarded to me tape-recordings of those interviews. The QPS advised that no transcripts of the

tape-recordings could be located. A tape-recording is itself a "document" for the purposes of the FOI Act. The three tape-recordings have been supplied to me by the QPS, and have been treated as documents in issue in this review.

14. The QPS submitted, in a letter to me dated 5 July 1995, that one of those tape-recordings was outside the scope of the applicant's FOI access application, referring to the terms of the only item in the applicant's FOI access application which might cover it. I am not able to set out, or specify this item, since to do so would disclose matter claimed by the QPS to be exempt matter. In my opinion, the question of whether that tape-recording is covered by the terms of the relevant item in the applicant's FOI access application depends on the intended scope of the words "in relation to" which are used in that item (as well as many other items in the applicant's FOI access application). The words "in relation to" are capable, according to the context in which they are used, of being words of very wide import, and I think that the better view is that the tape-recording does fall within the terms of the applicant's FOI access application. I am fortified in this view by the fact that a segment of matter in folio 049, which paraphrases the relevant interview, has been treated by Inspector Beer as relevant to his investigation of the "Abell incident". (I am precluded from taking the otherwise logical step of seeking clarification direct from the applicant as to whether he intended to seek access to the tape of this interview (*cf. Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at p.498, paragraph 10) because it would be impossible to do so without disclosing matter claimed by the QPS to be exempt.)

15. I have previously considered my jurisdiction, and powers on review, in respect of 'sufficiency of search' issues in *Re Smith and Administrative Services Department* (1993) 1 QAR 22 and in *Re Shepherd and Department of Housing, Local Government & Planning* (1994) 1 QAR 464. As I said in *Re Shepherd* at pp.469-470 (paragraphs 18-19), in respect of a 'sufficiency of search' issue, there are two questions which I must answer:

    (a) whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency (as that term is defined in s.7 of the FOI Act);

        and if so,

    (b) whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.

16. I find that the documents sought by the applicant in relation to the "Abell investigation" have now been located and dealt with by the QPS, either in its response to the applicant's FOI access application, or in response to further inquiries by my staff during the course of this review. They are amongst the documents in issue in this review listed below. The QPS had described those documents in very general terms, so as to avoid disclosing matter claimed to be exempt on grounds of confidentiality, and it is perhaps not surprising that the applicant would not have appreciated the nature of the documents so described. I am satisfied that no other documents concerning the "Abell investigation" exist in the possession or control of the QPS, other than those which are among the documents remaining in issue in this review.

Documents in issue

17. The documents remaining in issue in this external review (employing the folio numbers used, for purposes of identification, in the QPS decisions) are as follows:

- folios 001-002, and 006 - report by a police officer
- folios 007-015 - records of interview
- folios 042-044 - report and statement
- folios 045-057 - reports by Inspector Beer
- folios 079-132 - records of interview
- folio 137 - interim report by Inspector Beer
- folios 142-145 - diary notes of Inspector Beer
- three tape-recordings of interviews between Inspector Beer and witnesses.

The respondent's case for exemption

18. The QPS's case for exemption relies principally on s.42(1)(b), s.42(1)(e) and s.46(1)(b) of the FOI Act, with s.40(c) also being relied upon in respect of some of the matter in issue. Those exemption provisions (together with s.41(1) which is also referred to in my reasons for decision) are reproduced below:

> ***40.*** *Matter is exempt matter if its disclosure could reasonably be expected to—*
>
> *...*
>
> *(c) have a substantial adverse effect on the management or assessment by an agency of the agency's personnel;...*
>
> *...*
>
> *unless its disclosure would, on balance, be in the public interest.*
>
> ***41.(1)*** *Matter is exempt matter if its disclosure—*
>
> *(a) would disclose—*
>
> *(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or*
>
> *(ii) a consultation or deliberation that has taken place;*
>
> *in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and*
>
> *(b) would, on balance, be contrary to the public interest.*
>
> ***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; or*
>
> *...*

> *(e) prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law); ...*
>
> ***46.(1)*** *Matter is exempt if—*
>
> *...*
>
> *(b) it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*
>
> ***(2)*** *Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless its disclosure would found an action for breach of confidence owed to a person or body other than—*
>
> *(a) a person in the capacity of—*
>
> *(i) a Minister; or*
>
> *(ii) a member of the staff of, or a consultant to, a Minister; or*
>
> *(iii) an officer of an agency; or*
>
> *(b) the State or an agency.*

19. Section 42(1)(b) and s.46(1)(b) deal, respectively, with confidential sources of information, and confidential information communicated in confidence. Section 40(c) deals with prejudice to the management by an agency of its personnel, but, as I understand its case, the apprehended prejudice asserted by the QPS would be attributable to breach of an understanding of confidence. Section 42(1)(e) deals with prejudice to the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law. However, the QPS has not put its case under s.42(1)(e) on the basis of prejudice through disclosure of methods or procedures that depend for their effectiveness on secrecy, but rather on the basis that there would be prejudice to the effectiveness of the routine methods and procedures of investigation by which the matter in issue was gathered if the QPS cannot keep confidential the identities of sources of information, and the information which they supply. (I have some doubts as to whether s.42(1)(e) was intended to apply on such a basis, but I need not explore that issue here.) In other words, the QPS has, in essence, treated the exemptions relied upon as interchangeable or overlapping exemption provisions, so far as the matter in issue is concerned. Thus, the QPS was able to conclude its primary written submission by identifying a common rationale for the exemptions claimed:

Overall rationale regarding release of information concerning police disciplinary matters

It would not be possible to successfully investigate breaches of discipline if they were not reported or if people refused to assist in the investigation.
Likewise, it would not be possible to successfully investigate future breaches of discipline if it was known by any person who was interviewed or provided information that their names and information which they provide will be provided to the person under investigation. Failure to protect these sources of information would severely undermine the entire internal investigation process.

The QPS accepts that not all information provided to the QPS can remain confidential. There has always been a view that confidentiality, either implied or expressed, will attach to both the giver and the information given to the QPS unless the processes of the law dictate that the confidences cannot be maintained.

The public expect all breaches of police discipline, including misconduct, to be investigated fully and without fear or favour. The person being interviewed must have faith in the process and, similarly, the person providing any information must also have faith that the information, including any subsequent release of it, will not unduly cause them hardship.

20. In my opinion, the respondent's approach (particularly as evidenced in the second sentence of the second paragraph quoted in the above extract from its submission) proceeds on the incorrect footing that exemption provisions like s.42(1)(b) and s.46(1)(b) will apply merely because the QPS has adopted a practice or policy of according confidential treatment, so far as suits its purposes, to the identities of sources of information, and the information they supply, until disclosure is required by due process of law (*cf. Re Low and Department of Defence* (1984) 2 AAR 142 at p.149; *Re McEniery and Medical Board of Queensland* (1994) 1 QAR 349 at pp.358-360 (paragraphs 20 and 22-25), and the cases there cited).
Approaches developed prior to the commencement of the FOI Act, which have continued to operate after its commencement, should not necessarily be seen as being based on a mutual understanding of confidence. They may rather be the result of officers of the QPS acting in a manner which they perceive best suits the interests of justice and the QPS, or indeed which they perceive accords with the wishes of the majority of persons who supply information to the QPS. However, the practices which police voluntarily adopt (i.e., in the absence of legal requirement) with respect to disclosure of information obtained from sources who assist police investigations, will not of themselves be sufficient to establish that information of that kind must not be disclosed when it is requested by an applicant for access under the FOI Act.
Information must be disclosed on request under the FOI Act, unless it is established that it is exempt matter according to the legal tests imposed by the terms of relevant exemption provisions in the FOI Act itself.

21. Section 42(1)(b) and s.46(1)(b) of the FOI Act are primarily intended to protect the interests of third parties who have supplied information to government on the basis that their identity, and/or the information they have supplied, will be treated in confidence. The provisions are no doubt also intended to secure the benefit to government of not inhibiting the supply of information which it is proper for the government to accept upon conditions of confidentiality. Nevertheless, the burden of an obligation or understanding of confidence is imposed on a recipient of information because of a need or desire, on the part of the supplier

of the information, for confidential treatment (of identity, or information provided, or both) which the recipient of the information expressly or implicitly agrees to accept and observe.
(I note, however, that in some circumstances a legally binding obligation of confidence may be imposed on the recipient, under principles of equity, even though the recipient honestly believed that no confidence was intended: see *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at p.313 and p.318). In other words, an obligation or understanding of confidence does not arise where there is no reasonable indication that a supplier of information required one from the recipient.

22. To paraphrase the remarks made by Forster J (in respect of the Commonwealth Department of Health) in *Department of Health v Jephcott* (1985) 62 ALR 421 at p.425, all information given to the QPS cannot be 'confidential information' or 'given in confidence' or come from a 'confidential source', so that the mere giving of information, without more, cannot make the giver a confidential source, or (I might add) make the information given confidential information. To take a straightforward example, a person who gives alibi evidence for, or other information exculpatory of, a family member or close friend who is subject to investigation by the police, is not ordinarily likely to keep that information confidential from the subject of investigation, or to require the QPS to keep that information confidential from the subject of investigation. On the other hand, a person who gives information to police that tends to implicate a family member in criminal conduct, may be so vulnerable to recrimination or other form of detriment that it may be implicitly understood (and accepted by the police) that the source of information requires that both his or her identity, and the information supplied, be treated in confidence so far as possible.

23. Where no express assurance of confidentiality is sought by the supplier and given by the recipient, the relevant circumstances attending the communication of information must be examined to ascertain whether they evidence a need, desire or requirement, on the part of the supplier of information, for confidential treatment (of the supplier's identity, or information supplied, or both) which, in all the relevant circumstances, the supplier could reasonably expect of the recipient, and which was understood and accepted by the recipient, thereby giving rise to an implicit mutual understanding that confidentiality would be observed.

24. Moreover, since an obligation or understanding of confidence is ordinarily owed by the recipient of the information for the benefit of the supplier of the information, it is ordinarily the supplier's prerogative to waive the benefit of the obligation or understanding of confidence, including waiver by conduct of the supplier that is inconsistent with a continued expectation of confidential treatment on the part of the recipient.

25. Even where s.42(1)(e) is relied upon, it would not usually be possible to say that disclosure of information in a statement obtained by an investigator from a source of information could reasonably be expected to prejudice that method or procedure for investigating a possible contravention of the law, where there is no reasonable indication that the source of information desires or requires that his or her identity, or information supplied, be treated in confidence.

26. The matter remaining in issue is of a kind that would probably qualify for exemption under s.42(1)(a) of the FOI Act, while the investigations to which it relates were still current (provided the QPS could demonstrate a reasonable basis for expecting that its disclosure could prejudice the investigation of a contravention or possible contravention of the law in a particular case). On the other hand, much of the matter remaining in issue would probably have had to be disclosed to the applicant, in accordance with the requirements of procedural fairness, if the QPS had laid disciplinary charges against the applicant in respect of the other incidents investigated, and the

applicant had chosen to defend the charges. It is in situations where a person knows that he or she has been the subject of investigation, but no formal action has been taken as a result of the investigation (or perhaps, also, where the person has pleaded guilty to charges, without contesting them or seeking disclosure of the evidence on which they are based), and the subject of investigation subsequently forms a desire to examine the material obtained in the investigation, through an application for access under the FOI Act, that provisions like s.42(1)(b) and s.46(1)(b) are most likely to be invoked by law enforcement agencies.

27. As I said above, the QPS appears to have treated the claimed exemptions as interchangeable, or at least overlapping, so far as concerns the matter remaining in issue in this review.
Section 42(1)(b) exempts matter which could reasonably be expected to identify a confidential source of information, in relation to the enforcement or administration of the law. Identifying details, in respect of a confidential source, are the primary focus of this exemption provision (although its wording is apt to extend exemption to information provided by the confidential source, so long as it is proper to find, in all the relevant circumstances, that disclosure of information provided by the confidential source could reasonably be expected to enable the identity of the confidential source to be ascertained).
A source can be a confidential source of information, even though the information supplied by the source was not, or no longer remains, confidential information.

28. In general, however, the QPS asserts that not only the identities of sources who assisted Inspector Beer's investigations, but also the information provided by the sources, are confidential, and exempt from disclosure under the FOI Act. I therefore consider that s.46(1)(b) is the most appropriate starting point (among the exemption provisions invoked by the QPS) for testing the exemption claims made by the QPS. The connection of a person's identity with the imparting of confidential information can itself be secret information capable of protection from disclosure under equitable principles: see *G v Day* [1982] 1 NSWLR 24; *Re "B"* at pp.335-36 (paragraph 137); *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at pp.344-345 (paragraphs 108-110). The connection of a person's identity with the imparting of confidential information may likewise, therefore, be capable of satisfying the tests for exemption under s.46(1)(b) of the FOI Act.

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

29. In *Re "B"* (at pp.337-341; paragraphs 144-161), I considered in detail the elements which must be established in order for matter to qualify for exemption under s.46(1)(b) of the FOI Act. In order to satisfy the test for *prima facie* exemption under s.46(1)(b), three cumulative requirements must be established:

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

(b) that was communicated in confidence; and

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

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

Information of a confidential nature

30. To satisfy the first element of the test for *prima facie* exemption under s.46(1)(b), it must be established that the matter in issue is not known to the applicant, and has the requisite degree of relative secrecy/inaccessibility: see *Re "B"* at pp.337-338, paragraph 148, and at pp.304-310, paragraphs 64-73.

31. Among the documents in issue are reports by Inspector Beer on the investigations he conducted. The reports refer to Inspector Beer having interviewed the applicant on several occasions. Tape-recordings of those interviews were obtained from the QPS during the course of my review. I am satisfied that some of the matter remaining in issue, including the identities of some sources of information, was specifically put to the applicant by Inspector Beer, during his interviews with the applicant, for legitimate purposes in furtherance of the objects of Inspector Beer's investigations. The information that was put to the applicant cannot qualify for exemption from disclosure to the applicant, under s.46(1)(b) of the FOI Act, because it is not confidential information *vis-à-vis* the applicant. In so far as the identities of persons who had supplied information to Inspector Beer were put to the applicant in interview, that information as to identity cannot qualify for exemption under s.42(1)(b) of the FOI Act: see *Re McEniery* at p.357 (paragraphs 17 and 18); *Re Scholes and Australian Federal Police* (1996) 44 ALD 299 at pp.318-319 (paragraph 73) and at pp.320-321 (paragraphs 80-81). Nor could the information put to the applicant be exempt under s.42(1)(e) or s.40(c) of the FOI Act. There can ordinarily be no reasonable basis (and there is none in the present case) for expecting -

- prejudice to the effectiveness of a lawful method or procedure for investigating, *et cetera*, a possible contravention of the law (s.42(1)(e) of the FOI Act); or
- a substantial adverse effect on the management or assessment by an agency of the agency's personnel (s.40(c) of the FOI Act);

through disclosure to an applicant for access under the FOI Act, of information that has previously been made known to the applicant, for legitimate purposes, through an official channel.

32. The matter which I find cannot qualify for exemption under the FOI Act, for the reasons given above, is identified at paragraphs 83, 85, 87 and 89 below (where I relate my findings to the matter in issue). I am satisfied that the balance of the matter in issue has not been made known to the applicant through any official channel of the QPS, and that it has the requisite degree of secrecy/inaccessibility to satisfy the first element of the test for *prima facie* exemption under s.46(1)(b) of the FOI Act.

Whether information "communicated in confidence", within the terms of s.46(1)(b)

General approach to the test imposed by the second element of s.46(1)(b)

33. I considered the second element of the test for *prima facie* exemption under s.46(1)(b) in *Re "B"* at pp.338-339 (paragraphs 149-153):

> *149. ... I think the words "communicated in confidence" set up their own criterion which is to be satisfied without any necessity to consider whether legal obligations of confidence would attend the communication in issue. ...*

150. *The words "communicated in confidence" in s.35(1) of the Victorian FOI Act were briefly considered by two members of a Full Court of the Supreme Court of Victoria in* Ryder v Booth *[1985] VR 869. Gray J (at p.878) looked at the terms of the document in issue, the nature of the information, the purpose for which the information was provided and the circumstances in which it was provided before concluding that the communication in question fell within the ordinary meaning of a communication made in confidence. King J (at p.883) said that whether information is communicated in confidence is a question of fact and it is not necessary to consider whether legal obligations of confidence are set up by the communications in question. King J held that undisputed evidence that the information in question was regarded and treated as confidential as between the supplier and the recipient agency suffices to prove that the information was communicated in confidence within the meaning of s.35(1) of the Victorian FOI Act.*

151. *I consider that s.46(1)(b) contemplates the situation described by the Commonwealth AAT (Davies J presiding) in* Re Low and Department of Defence *(1984) 2 AAR 142, where the Tribunal said of the former s.45 of the Commonwealth FOI Act (at p.48):*

> "... [it] is concerned with information which would not have been disclosed but for the existence of a confidential relationship. Such a situation is readily seen when a person dealing with an agency conveys to the agency information that the person is not bound to disclose and does so on the understanding on both sides that such information will be kept confidential."

152. *I consider that the phrase "communicated in confidence" is used in this context to convey a requirement that there be mutual expectations that the information is to be treated in confidence. One is looking then for evidence of any express consensus between the confider and confidant as to preserving the confidentiality of the information imparted; or alternatively for evidence to be found in an analysis of all the relevant circumstances that would justify a finding that there was a common implicit understanding as to preserving the confidentiality of the information imparted.*

153. *The matters discussed at paragraphs 103 and 104 above concerning the scope or extent of an obligation of confidence will also be relevant to the extent of the mutual understanding as to confidence for the purposes of s.46(1)(b), i.e. it is a question of fact whether in the circumstances it was or must have been the intention of the parties that the recipient should be at liberty to divulge the information to a limited class of persons* [see *Re "B"* at p.323, paragraphs 103-104] *which may include a particular applicant for access under the FOI Act. Likewise the matters discussed* [in *Re "B"* at pp.323-324, paragraphs 105-106] *concerning the confider authorising the disclosure of information previously communicated in confidence, are also relevant here.*

34. To those observations, I only wish to add, consistently with my remarks at paragraphs 21-23 above, that the test inherent in the phrase "communicated in confidence" in s.46(1)(b) requires an authorised decision-maker under the FOI Act to be satisfied that a communication of confidential information has occurred in such a manner, and/or in such circumstances, that a need or desire, on the part of the supplier of the information, for confidential treatment (of the supplier's identity, or information supplied, or both) has been expressly or implicitly conveyed (or must otherwise have been apparent to the recipient) and has been understood and accepted by the recipient, thereby giving rise to an express or implicit mutual understanding that the relevant information would be treated in confidence.

Respondent's evidence

35. Pursuant to s.81 of the FOI Act, the QPS has the onus of establishing that the decision under review was justified, or that I should give a decision adverse to the applicant. The only evidence lodged by the QPS relevant to the application of s.46(1)(b) is contained in the following paragraphs of Inspector Beer's statutory declaration:

> *In relation to all of these matters, numerous persons were interviewed and whilst at no time did I directly indicate to these people that information they supplied to me was confidential, this fact could have been taken to be inferred.*
>
> ...
>
> *I just wish to reiterate that information supplied by persons interviewed was implied or inferred to be of a confidential nature, apart from that which was to be used as evidence in a Magistrates Court summary trial.*
>
> *I am of the opinion that police officers and members of the general public would be reluctant to supply information relating to misconduct or disciplinary breaches on the part of police officers, if their confidentiality was broken and could result in victimisation.*

36. There is no evidence that any of Inspector Beer's sources of information sought, or were given, an express assurance that their identities, and/or the information they supplied, would be treated in confidence. It is therefore necessary to assess the circumstances attending the communication to the QPS of the information remaining in issue, in order to determine whether there existed implicit mutual understandings that the identities of the suppliers of information, and the information they supplied, would be treated in confidence, and, if so, the scope or extent of the understanding of confidence. The assessment must be made according to what could reasonably have been understood and expected, in all the relevant circumstances, including the known purpose for which the information was supplied.

Assessing the relevant circumstances for evidence of an implicit mutual understanding of confidence

37. It appears from my examination of the documents in issue, in the light of Inspector Beer's statutory declaration, that, apart from the initial unsolicited complaint referred to in paragraph 7 above, and a further subsequent unsolicited complaint, the information remaining in issue was supplied by people who had been contacted by Inspector Beer and requested to supply information to assist his investigation. The sources of information must have appreciated, or ought reasonably to have appreciated, that Inspector Beer was seeking

relevant information concerning instances of improper conduct on the part of the applicant, with a view to possible disciplinary action against the applicant.

38. In *Re McEniery* at p.371 (paragraph 50), I set out a non-exhaustive list of factors relevant to an assessment of whether information, relating to the enforcement or administration of the law, had been supplied on the implicit mutual understanding that the identity of the source of the information would be treated in confidence:

> *50. The determination of whether the relevant information was supplied by the informant and received by the respondent on the implicit understanding that the informant's identity would remain confidential (and hence whether the informant qualifies as a confidential source of information for the purposes of s.42(1)(b)) requires a careful evaluation of all the relevant circumstances including,* inter alia*, the nature of the information conveyed, the relationship of the informant to the person informed upon, whether the informant stands in a position analogous to that of an informer*
> *(cf. paragraph 25 above), whether it could reasonably have been understood by the informant and recipient that appropriate action could be taken in respect of the information conveyed while still preserving the confidentiality of its source, whether there is any real (as opposed to fanciful) risk that the informant may be subjected to harassment or other retributive action or could otherwise suffer detriment if the informant's identity were to be disclosed, and any indications of a desire on the part of the informant to keep his or her identity confidential (e.g. a failure or refusal to supply a name and/or address, cf. Re Sinclair, McKenzie's case, cited in paragraph 36 above).*

39. Given the nature of the investigations which Inspector Beer was conducting, I consider that the list of factors set out above is also relevant to the task of determining in the present case, for the purposes of applying s.46(1)(b) of the FOI Act, whether the information supplied to the QPS, and the identities of the suppliers, was information communicated pursuant to an implicit mutual understanding that it would be treated in confidence.

40. There are a number of factors evident in the circumstances of this case that afford support for findings that the information remaining in issue was communicated to the QPS on the implicit mutual understanding that the information, and the identity of the suppliers, was to be treated in confidence. I note firstly that the persons who made unsolicited complaints, and who subsequently assisted Inspector Beer by providing statements, stood in a position analogous to that of an informer. (Otherwise, the sources of information were approached by Inspector Beer and agreed to co-operate with his investigations by providing statements.)

Informers and mere witnesses

41. I use the term 'informer' to mean a person who brings to the attention of an agency responsible for enforcing or administering the law, information concerning illegal or improper conduct by another person or persons. Informers are frequently the subject of hostility and resentment from those informed upon, and the inference can more readily be drawn (though due regard must always be paid to the circumstances of the particular case) that information is communicated by an informer to an agency responsible for enforcing or administering the law, on the basis of an implicit mutual understanding that the agency will ensure that it discloses no information that would identify a person as having been an informer.

42. Informers are frequently not in a position to be used as witnesses at a contested hearing (in respect of charges laid following investigations of the information they supply), because informers frequently supply inadmissible hearsay evidence, the usefulness of which to an investigating agency lies in leading the agency to the sources who can give direct evidence of material facts.
However, it would rarely be possible for a complainant who is the victim of the alleged illegal or improper conduct, to have his or her identity, or particulars of complaint, kept confidential, simply because it would ordinarily be impracticable to conduct a proper investigation on that basis.
Similarly, it may be impracticable for an investigating agency to keep confidential the identities of any material witnesses to an incident of alleged wrongdoing whose identities are known to, or easily ascertainable by, the alleged wrongdoer. It may nevertheless be possible for a material witness, who has also been an informer, to give evidence (in a formal hearing) of material facts observed by the witness, while still protecting the confidentiality of his or her identity as an informer. (Courts apply a rule that a witness may not be asked whether he or she is an informer: *Attorney-General v Briant* (1890) 153 ER 808 at p.815; *R v Demir* [1990] 2 Qd R 433 at p.434.
Courts also apply a rule which excludes evidence that would identify police informers, the only exception being in criminal trials where disclosure of the identity of a police informer is likely to be of real assistance to an accused person in seeking to establish his or her innocence: see, for example, *Re Meissner* (1994) 76 A Crim R 81; *R v Demir* at pp.434-435.)

43. There is evident in our law a general policy of affording the protection of confidentiality to informers so far as possible, in recognition of the risks and burdens which informers assume in furtherance of the public interest in preventing, or detecting and punishing, illegal conduct, and in order to ensure that prospective informers are not inhibited from bringing information about illegal or improper conduct to the attention of law enforcement agencies. I note, in this regard, the following passage from the judgment of the English Court of Appeal in *R v Rankine* [1986] 2 All ER 566 at p.568:

> *For many years it has been well recognised that the detection of crime is assisted by the use of information given to the police by members of the public. Those members may be either professional informers, who give information regularly in the expectation of financial or other reward, or public spirited citizens who wish to see the guilty punished for their offending.*
>
> *It is in the public interest that nothing should be done which is likely to discourage persons of* either class *from coming forward. One thing which above all others would be likely to prevent them from coming forward with information would be the knowledge that their identity may be disclosed in court.*

44. Nevertheless, under our system of law, a person charged with an offence is entitled to contest the charges and require the prosecuting authority to prove its case, ordinarily by the oral testimony of material witnesses. The task of an investigator, be it in respect of criminal offences or breaches of discipline, is to identify material witnesses and establish whether or not they can give relevant and reliable evidence, sufficient to prove charges of wrongdoing, in whatever formal legal proceeding may be required. I note, in this regard, the comments of the New Zealand Court of Appeal in *Tipene v Apperley* [1978] 1 NZLR 761 (per Richardson J, giving the judgment of the Court, at p.767):

> *A member of the public making a statement to the police in the course of a criminal investigation usually expects and is expected to give evidence at the trial if anyone else is charged in respect of the matter and if his evidence is considered by the police to be relevant to the case. Again, it is to be expected*

> *that in accordance with ordinary police procedures reference may be made to him by name and in a broad way to matters referred to in his statement when the police are interviewing other witnesses. He is not an informer whose identity must be kept secret at all costs.*

45. The distinction made in the above-quoted passage has also been recognised and applied by Australian tribunals dealing with exemption provisions in freedom of information legislation.
In *Re Easdown and Director of Public Prosecutions and Ors* (1987) 2 VAR 102, the Victorian Administrative Appeals Tribunal, chaired by Rowlands J (President), considered the application to an internal police report about a particular police investigation (which included reference to information supplied from several witnesses) of s.35(1)(b) of the *Freedom of Information Act 1982* Vic, an exemption provision which roughly corresponds to s.46(1)(b) of the Queensland FOI Act. The Tribunal said (at p.115):

> *We do not believe on the material before us that "the disclosure would be reasonably likely to impair the ability of (the) agency ... to obtain similar information in the future." See* Ryder v Booth *[1985] VR 869.*
>
> *Interviewees, who supplied information, were potential witnesses, as they were likely to realise, at a hearing in a court or before a board or some such similar body. While people may expect that police will not "gossip" about information supplied to them it is unrealistic to believe that those who provide information to police do not think it might ultimately become public through some formal process. We, of course, acknowledge the "informer" exception although this is concerned more with identity than information. The s.31 "law enforcement" exemption will normally protect information in "active" cases.*

46. A similar approach was adopted by the Commonwealth Administrative Appeals Tribunal in *Re Scholes and Australian Federal Police* (1996) 44 ALD 299, when considering the application of s.37(1)(b) of the *Freedom of Information Act 1982* Cth (an exemption provision which corresponds to s.42(1)(b) of the Queensland FOI Act) to witness statements obtained in the course of a police investigation, access to which was sought by the subject of the police investigation. The Tribunal said (at p.315, paragraph 65 and p.317, paragraph 70):

> *We do not doubt that police informers are entitled to anonymity but "police informers" and "prospective police witnesses" are not the same. That is clear from the passage quoted above from the reasons of Lord Diplock in*
> [*D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at p.218]. *His Lordship spoke of police informers and stated that their identity must not be able to be disclosed in a court of law. Thus the informers to whom he was referring were not intended to be witnesses in a court of law, except perhaps in the rare situation where the Crown would seek an order that they give evidence anonymously. The statements* [in issue] *appear to have been made on the understanding that the identity of the maker of the statement was liable to be disclosed in a court of law. They are all formal statements witnessed by Constable Salmon and each carries the following acknowledgment:*
>
> > I hereby acknowledge that this statement is true and correct and
> > I make it in the belief that a person making a false statement in the circumstances shall be liable to the penalties of perjury.

> *That acknowledgment is in the form prescribed by the* Magistrates Court Act 1989 *Vic ... for a statement which the informant intends to tender at a committal proceeding.*
>
> ...
>
> [Counsel for the respondent agency] *claimed that it could not be advanced as a certainty that because persons provided written and oral statements to the police, they would of necessity and inevitably become witnesses in any subsequent criminal prosecutions and so their identities would inevitably be disclosed. That, however, is not the test. Applying the test as explained by Forster J in* [*Department of Health v Jephcott*, cited at paragraph 22 above], *the question seems to be rather whether the statements were made because of an express or implied pledge of confidentiality and the onus is on the respondent to establish that matter on the balance of probabilities. If statements were made in the expectation that the person would be called as a witness in criminal proceedings, that seems to us to indicate that there was no implied pledge of confidentiality.*
> *There was no evidence before us as to any express pledge of confidentiality.*
> *While the authorities ... establish that informers are confidential sources, they also show that, as Cooke P said in* Commissioner of Police v Ombudsman *[1988] 1 NZLR 385 at 393:*
>
> > It is elementary that before trial on indictment the accused is entitled to peruse the depositions taken ... or the written statements of witnesses admitted ...
>
> *If that is so, and it seems to be ... then witness statements intended to be used in a prosecution are not obtained in circumstances such as to show that the makers of the statements were confidential sources.*

Conditional/contingent understandings of confidence

47. I consider that the Tribunal in *Re Scholes* was correct in taking the view that, if a statement was made in the expectation that the person giving the statement would be called as a witness in criminal proceedings, that would be a factor telling against the existence of an implicit mutual understanding that the identity of the source of information, or the information supplied, would be treated in confidence. Certainly, the particular circumstances in *Re Scholes* (where charges against Mr Scholes, requiring proof by the oral testimony of the prosecution witnesses, were withdrawn only on the day appointed for their hearing, and the identities of witnesses claimed to be confidential sources, and the substance of their evidence, had been put to Mr Scholes when he was interviewed by police during their investigation) justified the findings made in that case.

48. However, I consider that cases will occur, where, although a source of information is prepared to give evidence in court if necessary, it is proper for the source, and the law enforcement agency receiving information from the source, to have regard to the need for, or desirability of, protecting the source as far as practicable in the period prior to laying charges against the subject of investigation, or in the event that no charges are ultimately laid, or in the event that, for other reason (e.g., the subject of investigation confesses and pleads guilty), the source's identity and/or evidence are not required to be disclosed (*cf. Re McEniery* at p.364, paragraph 33). Factors of the kind referred to in paragraph 38 above (and especially any vulnerability of a source to intimidation, harassment, recrimination, or threats to a source's livelihood or personal safety) may

be evident, and may warrant a finding that there existed an implicit mutual understanding between a source of information and a law enforcement agency to the effect that the identity of the source, and/or the information supplied by the source, would be treated in confidence so far as practicable, consistent with the use of that information for the purpose of the agency's investigation and the prosecution of any charges stemming from the investigation.

49. Support for the adoption of such an approach, in an appropriate case, can be found in the decision of the Supreme Court of New South Wales in *G v Day* [1982] 1 NSWLR 24. In that case, the Court, exercising jurisdiction in equity to restrain a breach of confidence, granted orders restraining the publication of information that would identify the plaintiff as the person who had given information to two New South Wales law enforcement agencies which had prompted the quashing of the findings of an inquest into the death of Frank Nugan, and an order that a fresh inquest be held. The orders made by the Supreme Court in *G v Day* expressly contemplated that the plaintiff's identity might be disclosed in a future hearing in the coroner's court, but the Supreme Court was prepared to make orders restraining disclosure of the plaintiff's identity, unless and until that occurred (with the Court's orders conditioned accordingly: see p.41 of *G v Day*). (It is notable also that, by the time of the Supreme Court hearing in *G v Day*, it had been established that the information supplied by the plaintiff to law enforcement agencies had been mistaken, although it was honestly believed by the plaintiff. The Court did not regard this factor as disqualifying the plaintiff from seeking enforcement of an equitable obligation to preserve the confidentiality of his identity as the person who supplied the information to the law enforcement agencies.)

50. In finding that equity would afford a remedy to the plaintiff based on breach of confidence, the Supreme Court in *G v Day* had regard in particular to -

- the fact that the plaintiff had sought and been given express assurances that his identity would be treated in confidence (I note that the plaintiff must have appreciated that the information he supplied would become public knowledge if the authorities were prepared to act upon it, as did occur);
- the fact that the plaintiff held legitimate fears for the safety of himself and his family (given the late Frank Nugan's association with underworld figures); and
- the fact that the identity of the plaintiff (as opposed to the nature of the information he supplied, and what occurred in consequence) was in no way a matter of public interest or importance warranting disclosure.

51. While express assurances of confidentiality were sought by, and given to, the plaintiff in *G v Day*, I do not think that the giving of express assurances of confidentiality would be a necessary requirement before a finding could be made, under the less onerous requirements imposed by s.46(1)(b) of the FOI Act (compared to the requirements to found an action in equity for breach of confidence), that there existed a mutual understanding of confidence of the kind described in paragraph 48 above. Provided there are sufficient indications, in the circumstances attending the relevant disclosure of information, to afford a proper basis for the finding, an implicit mutual understanding of confidence, of the kind described in paragraph 48 above, may be found to exist.

Application of relevant principles to the present case

52. In the present case, apart from the persons who made unsolicited complaints, the other persons whose information and/or identities remain in issue were approached by Inspector Beer and agreed to co-operate with his investigations by providing statements. I do not think they stand in a position analogous to that of an informer. Nevertheless, there are factors evident in the relevant

circumstances which afford support for findings that their communications with Inspector Beer were attended by implicit mutual understandings that confidential treatment would be accorded so far as practicable.

53. As I have indicated above, the identities of some of the sources of information have been made known to the applicant by Inspector Beer, during the course of his investigations. (They were sources who would have been known to, or easily ascertainable by, the applicant, once Inspector Beer informed the applicant of the incident(s) being investigated; for example, the persons involved in, or present during, the "Abell incident".) It would now be apparent to the applicant that possible sources of information include other police officers, civilian employees of the QPS, and other citizens of Duaringa.

54. The investigation of alleged misconduct by a police officer is attended with significant difficulties (see, generally, The Fitzgerald Report, Chapter 9). In my opinion, it would ordinarily be understood by both the QPS, and by police officers requested or directed to co-operate with an investigation of alleged misconduct by another police officer, that it would be desirable to accord confidential treatment to information given by a police officer that is adverse to another police officer, unless disclosure was considered necessary for the purposes of the more effective conduct of the investigation, or until disclosure was necessary, according to the requirements of procedural fairness/due process of law, in the event that the investigation proceeded to the stage where disciplinary charges or criminal charges were laid. A police officer who has supplied information may have to continue working with another officer under investigation. The best chance of preserving satisfactory working relationships, in the interests of more effective policing for the benefit of the community, would, in my opinion, ordinarily lie in treating the identity of a police officer informant, and the information provided, in confidence, unless and until it is considered necessary to disclose such information (or part of it) in the interests of the more effective conduct of the investigation, or until disclosure is required by due process of law in the event that the investigation has resulted in the laying of charges. Similar considerations are likely to apply (though due regard must always be paid to the particular circumstances relevant in each case) to civilian employees of the QPS who provide adverse information about a police officer upon being requested or directed to co-operate with an investigation of alleged misconduct by the police officer (or, indeed, who volunteer information concerning alleged police misconduct).

55. In addition, the nature of the complaints made against the applicant (allegations of threats and intimidatory behavior with respect to the use of police powers) lends support, in my view, for a finding that the sources of information approached by Inspector Beer would have desired that their identities, and the information they supplied, be kept confidential from the applicant so far as practicable, and that the QPS would have understood and accepted this.

56. On the other hand, having been made aware of the purpose of, and having agreed to co-operate with, Inspector Beer's investigation, the relevant sources of information must (or ought reasonably to) have understood that, if the investigation proceeded to the stage of laying disciplinary charges or criminal charges against the applicant, and the charges were contested by the applicant, their statements may have to be disclosed to the applicant, and they may be required to give evidence in some kind of formal hearing. An investigator must ultimately be able to confront an alleged wrongdoer with sufficient reliable evidence of the wrongdoing with which he or she is to be charged. I consider that, in broad terms (if not fine detail), the basic elements of procedural fairness/due process in criminal and quasi-criminal cases, are well enough understood in the community at large, and, indeed, are widely accepted as an indispensable protection for the individual (and therefore of potential benefit to every member of the community) against false or mistaken allegations of wrongdoing.

57. In this case, there could not reasonably have been, on the part of the sources of information whose statements or reports remain in issue, an understanding that their identities, and the information they supplied, would be treated in confidence unconditionally and for all time. Rather, the scope or extent of the understanding of confidence must necessarily have been contingent and conditional, the touchstone being the limited purpose for which it was understood, by both supplier and recipient, that the information was communicated. In the absence of any express agreement, or circumstances (for example, threats to the safety, or livelihood, of a source of information) giving rise to an implicit mutual understanding that strict confidentiality was required in some respects (for example, that nothing should be put to the subject of investigation, or other witnesses, that would identify a particular witness), the recipient of the information would have been implicitly authorised to make any further limited disclosure that was necessary to achieve the purpose for which it was understood that the information was communicated.

58. I consider that there are three main kinds of limited disclosure which, in the ordinary case, ought reasonably to be in the contemplation of parties to the communication of information for the purposes of an investigation relating to law enforcement. Unless excluded, or modified in their application, by express agreement or an implicit understanding based on circumstances similar to those referred to in the preceding paragraph, I consider that the following should ordinarily be regarded as implicitly authorised exceptions to any express or implicit mutual understanding that the identity of a source of information, and/or the information provided by the source, are to be treated in confidence so far as practicable (consistent with their use for the purpose for which the information was provided) -

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

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

    (c) where selective disclosure is considered necessary -

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

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

59. With respect to (c) above, I note that the work of law enforcement agencies is, in essence, a service for the benefit of the community, that is funded by taxes or imposts on the community, and that a need for direct accountability for service delivery applies most acutely in the case of complainants, especially victims of crime. The kinds of considerations which I consider warrant a finding that (c) above should ordinarily be regarded as an implicitly authorised exception to a

mutual understanding that the identity of a source of information, and/or the information provided by the source, are to be treated in confidence, appear to have prompted the Queensland Parliament to enact s.15(1) of the *Criminal Offence Victims Act 1995* Qld which provides:

> ***Information about investigation and prosecution of offender***
>
> ***15.(1)*** *A victim of a crime should, on request, be advised by a law enforcement officer of the following—*
>
> *(a) the progress of investigations being conducted about the crime, unless disclosure is likely to jeopardise the investigation;*
>
> *(b) the charges laid for the crime and details of the place and date of hearing of the proceeding for the charge;*
>
> *(c) the name of the person charged;*
>
> *(d) the reasons for anyone's decision not to proceed with the charge or to amend the charge or to accept a plea to a lesser charge;*
>
> *(e) if the charged person is released on bail or otherwise before the proceeding on the charge is finished—the arrangements made for the release, including any condition and any application for variation of the condition that may affect the victim's safety or welfare;*
>
> *(f) the outcome of any proceeding, including appeals.*

60. A "victim" of crime is defined in s.5 of that Act, and is confined to persons who have suffered harm from violence committed against the person in a direct way (plus their dependents or family members, and persons who have suffered harm in intervening to help a victim of violent crime).
Since the commencement of the *Criminal Offence Victims Act 1995*, disclosure of information that is necessary to comply with s.15(1)(a) and (d) of that Act must, in my opinion, ordinarily be an implicitly authorised exception to any understanding that a law enforcement agency is to treat information obtained for the purposes of a law enforcement investigation in confidence.
However, I consider that exception (c) set out in paragraph 58 above should also be recognised as generally applicable in respect of crimes against property, and other complaints alleging criminal conduct that are received and investigated by law enforcement agencies.

61. Although exception (c) is not a factor in the present case, exceptions (a) and (b) set out in paragraph 58 above will be relevant factors in most cases, as they are in the present case.
I consider that (in the absence of express assurances of confidential treatment) the sources of information in the present case ought reasonably to have understood that, although the QPS would endeavour to treat their identities, and the information they supplied, in confidence so far as practicable, the QPS investigator may consider it necessary to disclose their identity, or the information they provided, to another source of information, or even to the applicant, in the interests of the more effective conduct of the investigation. An investigator may consider it necessary or useful to put information obtained from one source to other sources, or even to the subject of investigation, in order, for example, to jog their memories, or to test, or confront them with inconsistencies in, their accounts of relevant events (for an example of this, see *Re Scholes* at pp.318-319, paragraph 73 and pp.330-321, paragraphs 80-81). It may be possible to do this without identifying the source, though in some cases, the identities of witnesses present during a

particular incident would be known to, or easily ascertainable by, the subject of investigation, and in some instances, the investigator may consider it valuable to put the identity of a source to the subject of investigation in order to influence his or her responses to questioning by the investigator. In this regard, I note the passage quoted from *Tipene v Apperley* at paragraph 44 above, and the following comments from the High Court of Australia in *National Companies and Securities Commission v News Corporation Ltd* (1984) 58 ALJR 308 per Mason, Wilson and Dawson JJ (at p.320):

> *It is of the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going.*
> *For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry.*
>
> *Of course, there comes a time in the usual run of cases when the investigator will seek explanations from the suspect himself and for that purpose will disclose the information that appears to require some comment.*

62. This is an area where generalisations are dangerous, and much depends on the particular circumstances of the individual case. In my opinion, an investigator must have a large measure of discretion in this regard. The public interest in effectively investigating, exposing and punishing criminal conduct, or misconduct by police, would outweigh a mere reluctance on the part of an individual to be disclosed as having co-operated with an investigation. On the other hand, indications that a reasonable basis exists for the source's reluctance to be identified, e.g. indications that the subject of investigation may harass, intimidate, or harm the safety of sources of information, would dictate a far more circumspect approach by an investigator.

63. The above analysis is borne out by the course and outcome of Inspector Beer's investigation of the applicant. In respect of one incident, the applicant was charged with criminal offences, which were defended (unsuccessfully), and was subsequently also charged with a breach of discipline, for which a disciplinary penalty was imposed. The QPS has now disclosed the material obtained by Inspector Beer's investigation of that incident, and, in my view, properly so, since it is no longer confidential information *vis-à-vis* the applicant. The applicant is also aware that other incidents were investigated, since certain information concerning other incidents was put to the applicant for response, during the course of Inspector Beer's investigations. Ultimately, no charges were laid against the applicant in respect of any other incidents, so there was no occasion for the applicant to be informed, through the requirements of due legal process, of the information obtained about him by Inspector Beer's investigations.

64. Having regard to the considerations referred to in paragraphs 54 and 55 above, I am satisfied that the matter remaining in issue was supplied to the QPS on the basis of an implicit mutual understanding between the QPS and each source of information, that the QPS would treat the identity of each source of information, and the information supplied by each source, in confidence, unless and until the QPS considered it necessary to selectively disclose such information in the interests of the more effective conduct of its investigation, or, in the event that the applicant was charged with a criminal offence or breach of discipline, the QPS was required to disclose such information in accordance with legal requirements of procedural fairness/due process in criminal or disciplinary cases. In the circumstances of this case, it is possible to look backwards and establish what information has actually been disclosed by the QPS to the applicant, in accordance with the conditions/exceptions affecting the scope of the implicit mutual understanding of

confidence. As I have stated above, some information was put to the applicant in the course of Inspector Beer's investigations, and that information cannot qualify for exemption under s.46(1)(b) (nor s.42(1)(b), s.42(1)(e) or s.40(c)) of the FOI Act. In respect of the balance of the matter in issue, however, the QPS is still able to give effect to the implicit mutual understanding of confidence. In respect of that matter, the second element of the test for *prima facie* exemption under s.46(1)(b) is satisfied.

General observations - caution needed in assessing relevant circumstances for evidence of an implicit mutual understanding of confidence

65. Before leaving this issue, I note the following remarks of Strong J, sitting as a Deputy President of the Victorian Administrative Appeals Tribunal in *Re Corfmat and Victoria Police* (Victorian AAT, No. 1990/13485, Strong J, 27 July 1990, unreported), a case involving the provision of the *Freedom of Information Act 1982* Vic which corresponds to s.42(1)(b) of the Queensland FOI Act (at p.7):

> *Those who provide information to the Police about the unlawful or potentially unlawful conduct of others rarely desire their names to be made known to the offenders. They give the information in the expectation that they will remain anonymous. There are occasions when anonymity cannot be preserved. Some informants become witnesses, though the majority do not.*

66. The first two sentences quoted may generally be true, as an observation on human behavior, but some caution is necessary when assessing whether understandings or obligations of confidence can apply in the context of investigations for the purpose of enforcing or administering the law.
An expectation on the part of a source of information that his or her identity, and information supplied, will be treated in confidence, may not be reasonable or practicable in the circumstances of a particular case: see *Re McEniery* at p.361 (paragraph 27) and *Re McMahon and Department of Consumer Affairs* (1994) 1 QAR 377 at pp.384-385 (paragraphs 23 and 25-26). Thus, a desire or expectation, on the part of a supplier of information to a law enforcement agency, that his or her identity, or information supplied, will be treated in confidence, will not in itself be sufficient to satisfy the requirement that there be a mutual understanding (i.e., one accepted and shared by the recipient agency) as to confidential treatment. The possible scenarios that may arise in investigations for the purpose of enforcing or administering the law are many and varied, and ultimately judgments must be made according to a careful examination of the relevant circumstances in the particular case.

67. I note too that Strong J's observations in *Re Corfmat* (quoted above) relate to the supply by a person to the police of information adverse to another person or persons (i.e., "information ... about the unlawful or potentially unlawful conduct of others"). It may be, for instance, that a statement is obtained from a particular witness who merely confirms that he or she was not in a position to, and did not, observe any improper conduct on the part of the subject of the investigation. There may be no basis on which to find an implicit mutual understanding between the witness and the investigating authority that a statement of that kind was to be kept confidential from the subject of the investigation (see also the first examples given in paragraph 22 above).

68. Moreover, situations may arise where an investigating authority, holding a statement from a witness, may have to give consideration to the scope or extent of an implicit mutual understanding of confidence, having regard to the emergence of circumstances that were not in contemplation at the time the statement was given. Take, as a hypothetical example, the following. An off-duty police officer collides with another driver's vehicle at an intersection, killing the other driver. The

police officer denies fault, and is not breath-tested, or charged with any offence, by police investigating the accident. An officer conducting a subsequent disciplinary investigation obtains a statement from a witness to the effect that the policeman driver was affected by alcohol, and had consumed six stubbies of beer in a period of 90 minutes, prior to leaving a bar some 10 minutes before the accident. It may well be legitimate to find that the witness would not wish to have his identity, or the full detail of his statement, made known to either the policeman driver, or the police who investigated the accident, unless and until that was necessary to support criminal or disciplinary charges laid against any of them (though one expects that the suggestion that the police driver was affected by alcohol would have to be put to the subjects of the investigation, and it may well be proper to put to the driver that he was drinking at a particular location). However, in the event that the widow of the deceased applied for access under the FOI Act to all statements obtained by police that related in any way to the fatal accident, with a view to pursuing a civil action for damages for wrongful death, the witness may have no objection to the disclosure to the widow of his identity as a potential witness, or his statement. In my view, a source of information ought to be contacted to ascertain whether, in respect of a statement or report initially provided in confidence, he or she is prepared to authorise disclosure to an applicant for access, under the FOI Act, who was not in contemplation as a person against whom the initial understanding of confidence was to apply.

Prejudice to the future supply of like information

69. Turning to the third element of the test for *prima facie* exemption under s.46(1)(b) of the FOI Act, I considered the meaning of the phrase "could reasonably be expected to" in *Re "B"* at pp.339-341 (paragraphs 154-160), concluding (at pp.340-341, paragraph 160) that:

> *The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e., expectations for the occurrence of which real and substantial grounds exist.*

70. I also made the following observations in *Re "B"* at p.341 (paragraph 161):

> *161. Where persons are under an obligation to continue to supply such confidential information (e.g. for government employees, as an incident of their employment; or where there is a statutory power to compel the disclosure of the information) or persons must disclose information if they wish to obtain some benefit from the government (or they would otherwise be disadvantaged by withholding information) then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information. In my opinion, the test is not to be applied by reference to whether the particular confider whose confidential information is being considered for disclosure, could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of the sources available or likely to be available to an agency.*

71. As is apparent from the first sentence of the extract quoted above, the third element of the test for *prima facie* exemption under s.46(1)(b) poses difficulties in respect of information provided to Inspector Beer by police officers or civilian employees of the QPS. Police

officers and civilian employees of the QPS are under a statutory duty to report misconduct, and police officers are under a statutory duty to take action in respect of conduct that is a breach of discipline: see s.7.2 of the *Police Service Administration Act 1990* Qld. A police officer can be directed to provide truthful answers to questions by a superior officer, or an authorised officer investigating possible misconduct or a possible breach of discipline (see s.5.7 of the QPS Code of Conduct, issued by the Commissioner of Police pursuant to s.4.9 of the *Police Service Administration Act 1990* Qld), and any failure to comply with such a direction would itself render a police officer subject to disciplinary action (see s.9(c) and (d) of the *Police Service (Discipline) Regulation 1990* Qld). In addition, both police officers and civilian employees of the QPS owe duties of good faith and fidelity to their employer, which would encompass a positive obligation to disclose to their employer any information, acquired in the capacity of employee, which the employer might reasonably require for the better management of its operations: see *Re Shaw and The University of Queensland* (Information Commissioner Qld, Decision No. 95032, 18 December 1995, unreported) at paragraphs 55-56, and the cases there cited.

72. In light of these considerations, I doubt that the third element of the test for *prima facie* exemption under s.46(1)(b) can be satisfied in respect of information provided by police officers, or civilian employees of the QPS, to an inspector investigating possible misconduct, or a possible breach of discipline, by a police officer. There are other difficulties with respect to the application of s.46(1)(b) to information of that kind. To the extent that it consists of matter of a kind mentioned in s.41(1)(a) of the FOI Act, it would be excluded from exemption under s.46(1) by the operation of s.46(2) of the FOI Act (see *Re "B"* at p.292, paragraphs 35-36; the terms of s.41(1)(a) and s.46(2) are set out at paragraph 18 above).
I consider it more appropriate to deal with information of the kind described in this paragraph under the alternative ground of exemption relied upon by the QPS, i.e., s.40(c) of the FOI Act (see paragraphs 92-98 below).

73. In respect of information in issue which was provided to the QPS by sources other than police officers or civilian employees of the QPS, I am satisfied that disclosure of that information, in breach of the implicit mutual understanding of confidence referred to in paragraph 64 above, could reasonably be expected to prejudice the future supply of such information to the QPS. Co-operation by members of the community with investigators involved in law enforcement, through the supply of relevant information, is essential to successful enforcement of the law, but there is no doubt that it can impose burdens on members of the community who co-operate (e.g., ranging from inconvenience and imposition on their time, to anxiety at possible harassment or retributive action). While many quite properly regard it as their civic duty (and something which is ultimately for the benefit of the community) to co-operate with agencies engaged in law enforcement, there are many others who prefer not to get involved. Preserving goodwill and co-operation with members of the community can be a delicate balancing act for law enforcement agencies. While their sources of information will generally accept that disclosure of information they supply, which is adverse to a subject of investigation, may become necessary for reasons referred to in paragraphs 57-61 above, disclosure which is not necessary for those reasons could, in my opinion, be reasonably expected to prejudice the future supply of such information from a substantial number of sources available, or likely to be available, to law enforcement agencies.

74. My findings above mean that a certain amount of the matter in issue (which is detailed in the findings stated at paragraphs 81, 82, 84, 86 and 90 below) satisfies the three elements of the test for *prima facie* exemption under s.46(1)(b) of the FOI Act. That matter will be exempt

unless there exist identifiable public interest considerations favouring its disclosure which are of sufficient weight to warrant a finding that its disclosure would, on balance, be in the public interest.

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

75. At pp. 2-3 and p.6 of his application for external review, the applicant set out some arguments as to why the public interest favours disclosure to him of the documents claimed to be exempt.
Those arguments do not specifically direct themselves to matter of the kind I am now dealing with, or to any specific exemption provisions claimed by the QPS, and I take those submissions to be put on a general basis. The applicant's arguments are:

    (a) There is a public interest and concern in what the applicant described as "*the wanton waste of taxpayer's money* [in tight economic times] *on investigations such as those conducted by the* [QPS] *on departmental and other matters concerning me while stationed at Duaringa*". In this context, the applicant submitted that: "*The public have had a gutful of police and CJC inspired witch-hunts which wreck the reputations of decent, honest people.*"

    (b) The matters in respect of which the applicant was investigated, including the criminal charges preferred against him, were trivial in nature. The applicant submits that the QPS does not wish to disclose the documents claimed to be exempt "*not because they want to protect sources of information or any similar reason, the Police Service does not want to be found out and subject to ridicule*."

    (c) It is in the public interest to disclose "*the questionable investigations carried out by a commissioned officer, who denied me basic legal rights during interviews with me ...*".

    (d) If the matter claimed to be exempt is not disclosed, then it is unlikely that the public interest is being served, nor is the Government's accountability enhanced: *To the contrary where information is exempted for flimsy and incorrect reasons the community may see this action as an attempt to cover-up aspects of investigations by government departments such as the Police Service.*

76. In addition, the applicant could have argued that he has been made aware that Inspector Beer investigated incidents other than the incident in respect of which the applicant faced charges, and that he has reason to believe that the QPS continues to hold records containing allegations adverse to his reputation for the performance of his duties. The applicant could argue that there is a public interest in his having access to information which involves or concerns him to such a degree as to give rise to a justifiable 'need to know' which is more compelling than for other members of the public, and that the public interest in fair treatment of an individual favours the applicant being given the opportunity to see and to answer any allegations that are adverse to him (see
Re Pemberton and The University of Queensland (1994) 2 QAR 293 at pp.368-377, paragraphs 164-193).

77. For its part, in its final submissions, the QPS submitted that disclosure of documents claimed to be exempt would be against the public interest, because of the perceived breach of trust that would occur if information was to be released, and to do so would be detrimental to the future supply of such information. In my view, that submission does no more than restate the public interest consideration telling against disclosure which is inherent in the satisfaction of the test for *prima facie* exemption under s.46(1)(b) of the FOI Act; however, that public interest consideration, when established, is one which, in my view, will ordinarily carry substantial weight.

78. The public interest considerations referred to in paragraph 76 above, and the public interest in enhancing the accountability of the QPS, carry some weight in favour of disclosure, though the main accountability interest that might be served by disclosure of the matter remaining in issue would lie in enabling an assessment of whether the QPS was justified in taking no further action against the applicant, in light of the material obtained through Inspector Beer's investigations.
I should add that, having examined the matter in issue, I do not accept that Inspector Beer's investigations can be fairly described as investigations of trivial incidents, or as a "*wanton waste of taxpayer's money*". In the end result, I am not persuaded that the public interest considerations supporting the applicant's case for disclosure are sufficiently strong to outweigh the public interest consideration favouring non-disclosure which is inherent in the satisfaction of the test for *prima facie* exemption under s.46(1)(b) of the FOI Act. In *Re Byrnes and the Public Trustee of Queensland* (Information Commissioner Qld, Decision No. 96001, 23 February 1996, unreported), I said (at paragraph 23):

> *... If a citizen is reliant on first obtaining access under the FOI Act to information believed to require correction, the citizen has to face the fact that Parliament has seen fit (for the purpose of avoiding prejudice to certain essential public interests) to provide that access may be refused under the FOI Act to information which is exempt matter under the FOI Act. One of those essential public interests lies in ensuring that law enforcement and regulatory authorities do not suffer any unwarranted hindrance to their ability to perform their important functions for the benefit of the wider Queensland community, as a result of any unwarranted inhibition on the supply of information from citizens, on whose co-operation and assistance law enforcement and regulatory authorities frequently depend. The importance which English and Australian law attaches to safeguarding the flow of information needed by law enforcement and regulatory authorities for the effective performance of their functions is discussed in* Re McEniery *at paragraphs 56-64.*

79. I regard considerations of this kind (also referred to in paragraph 73 above) as carrying determinative weight in telling against disclosure of the information in issue which was supplied to the QPS by persons other than police officers or civilian employees of the QPS, and which has not been disclosed to the applicant for the purposes of Inspector Beer's investigations. I find that the information in issue which answers that description is exempt matter under s.46(1)(b) of the FOI Act. I will now relate the findings I have made, so far, to the matter in issue.

Application of findings to the matter in issue

80. Folios 1-6 comprise a report prepared by a police officer, apparently at the request of Inspector Beer. Folios 3-5 of that report were shown to the applicant and his legal representatives during the hearing in the Rockhampton Magistrates Court of the charges laid against the applicant. The QPS agreed, on that basis, to release folios 3-5 to the applicant during the course of this review. The applicant knows that folios 3-5 are part of a longer report, and knows the identity of the author of the report, but does not know the contents of folios 1, 2 and 6. Folios 1, 2 and 6 comprise confidential information which was communicated to the QPS on the basis of an implicit mutual understanding that the information supplied would be treated in confidence, subject to the conditions described in the first sentence of paragraph 64 above. However, having regard to the considerations referred to in paragraph 71 above, I do not think folios 1, 2 and 6 can qualify for exemption

under s.46(1)(b), and parts of them may be excluded by s.46(2) of the FOI Act in any event.
At paragraphs 92-98 below, I have considered the application to folios 1, 2 and 6 of s.40(c) of the FOI Act.

81. Folios 7-10 comprise the initial complaint against the applicant (see paragraph 7 above), and a statement subsequently obtained from that person by Inspector Beer. For the reasons explained above, folios 7-10 satisfy all the requirements for exemption under s.46(1)(b) of the FOI Act, both in respect of the identity of the source of information, and the information supplied, and I find that folios 7-10 are exempt from disclosure to the applicant under s.46(1)(b) of the FOI Act.

82. Folios 11-15 and 87-92 comprise statements obtained by Inspector Beer. For the reasons explained above, those folios satisfy all the requirements for exemption under s.46(1)(b) of the FOI Act, both in respect of the identity of the source of information, and the information supplied, and I find that folios 11-15 and 87-92 are exempt from disclosure to the applicant under s.46(1)(b) of the FOI Act.

83. Folios 79-86 comprise a statement obtained by Inspector Beer from a source of information.
Part of the statement concerns threatening/intimidatory words allegedly spoken by the applicant to the source of information, in the precincts of the Duaringa Police Station. In my opinion, the source of information could not reasonably have understood and expected that it was practicable for Inspector Beer to investigate that incident without identifying the source of information as the person to whom threatening/intimidatory words were allegedly spoken.
As it transpired, the identity of the source of information, and parts of his statement, were put to the applicant by Inspector Beer during the course of his investigations. That information cannot qualify for exemption under s.46(1)(b), nor s.42(1)(b) or s.42(1)(e) of the FOI Act: see paragraph 31 above. I therefore find that the following matter is not exempt from disclosure to the applicant under the FOI Act:

- the first 9 lines of folio 79
- folio 81
- folio 82, except for the last ten lines.

84. I consider that the balance of the information supplied by that source was communicated on the implicit mutual understanding that it would be treated in confidence, subject to the conditions described in the first sentence of paragraph 64 above. For the reasons explained above, the balance of the information supplied by the source satisfies all the requirements for exemption under s.46(1)(b) of the FOI Act, and I find that the following matter is exempt from disclosure to the applicant under s.46(1)(b) of the FOI Act -

- folio 79, except for the first nine lines
- folio 80
- the last ten lines on folio 82
- folios 83-86.

85. Folios 128-132 comprise a statement obtained by Inspector Beer from a source of information on the implicit mutual understanding that the identity of the source, and the information supplied, would be treated in confidence, subject to the conditions described in the first sentence of paragraph 64 above. As it transpired, the identity of that source of information, and parts of her statement, were put to the applicant by Inspector Beer during

the course of his investigations. That information cannot qualify for exemption under s.46(1)(b), nor s.42(1)(b) or s.42(1)(e), of the FOI Act: see paragraph 31 above. I therefore find that the following matter is not exempt from disclosure to the applicant under the FOI Act -

- first ten lines on folio 128
- the last 18 lines on folio 129
- the first ten lines on folio 130.

86. For the reasons explained above, the balance of the information supplied by this source satisfies all the requirements for exemption under s.46(1)(b) of the FOI Act, and I find that the following information is exempt from disclosure to the applicant under s.46(1)(b) of the FOI Act -

- folio 128, except for the first ten lines
- folio 129, except for the last 18 lines
  folio 130, except for the first 10 lines
- folios 131 and 132.

87. Folios 42-44 and 93-127 comprise statements or reports obtained by Inspector Beer from police officers or civilian employees of the QPS. For the reasons explained at paragraph 54 above, I find that those folios comprise information supplied to the QPS on the implicit mutual understanding that both the identities of the sources of information, and the information supplied, would be treated in confidence, subject to the conditions described in the first sentence of paragraph 64 above. The identities of some of those sources, and parts of some statements, were put to the applicant by Inspector Beer during the course of his investigation. That information cannot qualify for exemption under s.46(1)(b), nor s.42(1)(b), s.42(1)(e) or s.40(c) of the FOI Act: see paragraph 31 above. I therefore find that the following matter is not exempt from disclosure to the applicant under the FOI Act -

- the first ten lines on folio 98
- folio 99, except for the last line
- folio 100, except for the first 13 lines
- the first nine lines on folio 101
- the first 13 lines on folio 106
- folio 108, except for the first eight lines
- folios 109 and 110
- folio 122
- folio 123, except for the fifteenth to nineteenth lines
- folio 124
- folio 125, except for the last 20 lines
- folio 126, except for the first two lines and the last two lines.

88. Having regard to the considerations referred to in paragraph 71 above, I do not think that the balance of folios 42-44 and 93-127 can qualify for exemption under s.46(1)(b), and parts of them may be excluded by s.46(2) of the FOI Act. At paragraphs 92-98 below, I have considered the application of s.40(c) of the FOI Act to the remaining parts of folios 42-44 and 93-127.

89. Folios 45-57 and 137 comprise various reports by Inspector Beer to superior officers, on the investigations Inspector Beer had conducted. They refer by name to some of the sources from whom Inspector Beer obtained information, and summarise relevant parts of the information obtained from those sources. They also refer to the applicant's conduct, and information given by the applicant, when he was interviewed by Inspector Beer on several occasions. Inspector Beer's reports have been disclosed to the applicant subject to the deletion of matter claimed to be exempt. Some of the deleted matter comprises information that was put to the applicant by Inspector Beer during the course of his investigations. That information cannot qualify for exemption under s.46(1)(b), nor s.42(1)(b), s.42(1)(e) or s.40(c), of the FOI Act: see paragraph 31 above. Some of the deleted matter comprises information that Inspector Beer records as having been put to him by the applicant. That information cannot qualify for exemption from disclosure to the applicant. I find that the following segments of Inspector Beer's reports are not exempt from disclosure to the applicant under the FOI Act:

- the matter deleted from the fourth line on folio 46
- the sixth, seventh and eighth paragraphs on folio 48
- the last seven words of the fifth paragraph on folio 49
- the matter deleted from the third paragraph on folio 52
- the second full paragraph on folio 53 (beginning with the words "Also attached")
- the matter deleted from the sixth-last paragraph on folio 53
- the fourth-last, fifth-last, eight-last, ninth-last, tenth-last and eleventh-last, lines on folio 56
- the third full paragraph on folio 57 (beginning with the words "According to")
- the last two sentences of the fifth full paragraph on folio 57
- the fifth-last and sixth-last paragraphs on folio 57.

90. I am satisfied that the following segments of the matter deleted from Inspector Beer's reports meet all the requirements for exemption under s.46(1)(b) of the FOI Act (as I have explained them above), and I find that they comprise exempt matter under s.46(1)(b) of the FOI Act -

- the matter deleted from the third paragraph on folio 48
- the fifth-last to the fourteenth-last (inclusive) lines on folio 52
- the seventh-last line on folio 56.

91. The application of s.40(c), s.41(1) and s.42(1)(e) of the FOI Act to other matter deleted from Inspector Beer's reports is considered below.

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

92. The terms of s.40(c) are reproduced at paragraph 18 above. The focus of this exemption provision is on the management or assessment by an agency of the agency's personnel. The exemption will be made out if it is established that disclosure of the matter in issue could reasonably be expected to have a substantial adverse effect on the management by the respondent of its personnel, unless disclosure of the matter in issue would, on balance, be in the public interest. The meaning of the phrase "could reasonably be expected to" is explained at paragraph 69 above. The adjective "substantial" in the phrase "substantial adverse effect" is used, in the context of s.40(c), in the sense of grave, weighty, significant or serious: see
Re Cairns Port Authority and Department of Lands (1994) 1 QAR 663 at pp.724-725 (paragraphs 149-150).

93. Staff disciplinary processes are an aspect of the management or assessment by an agency of its personnel. I have already made findings to the effect that the information in issue supplied to Inspector Beer by police officers or civilian employees of the QPS was communicated on the basis of an implicit mutual understanding that the identities of the suppliers, and information supplied, would be treated in confidence, unless and until it was considered necessary to selectively disclose such information in the interests of the more effective conduct of the investigation, or, in the event that the applicant was charged with a criminal offence or breach of discipline, the QPS was required to disclose such information in accordance with the legal requirements of procedural fairness/due process in criminal or disciplinary cases. Those findings were supported in large measure by consideration of the adverse consequences for the management by the QPS of its personnel, and for effective policing for the benefit of the community, if adverse information of the kind now in issue was not treated in confidence so far as practicable. The potential for generating animosity, destructive of effective working relationships, is obvious. This is particularly so in the case of a superior officer whose position of authority affords opportunities for overt or subtle retaliation against a subordinate officer, or a civilian employee of the QPS, who has given information about suspected misconduct.

94. I note, in this regard, that two major investigations in Queensland which addressed the difficulties attending the reporting of improper conduct within the QPS, or within government agencies generally, both recommended that disclosures of improper conduct be treated in confidence so far as practicable, having regard to the requirements of natural justice: see The Fitzgerald Report, Chapter 9, especially at p.286, and the Electoral and Administrative Review Commission's Report on Protection of Whistleblowers, October 1991, Serial No. 91/R4, at p.125 (paragraph 6.115) and at clause 8 of the recommended Whistleblowers Protection Bill published as Appendix A to the Report (and *cf.* s.55 of the *Whistleblowers Protection Act 1994* Qld).

95. In addition, confidential treatment of adverse information of the kind now under consideration is more likely to promote compliance by police officers, and civilian employees of the QPS, with their statutory duty to report suspected misconduct by police officers (see paragraph 71 above) and to promote full and frank co-operation with investigations of suspected misconduct or breaches of discipline, rather than forcing investigators to resort to their coercive powers. In that regard too, confidential treatment of information of the kind now in issue assists more effective management and assessment by the QPS of its personnel.

96. I have already made findings that the identity of any police officer or civilian employee of the QPS, or any information supplied by them, that was disclosed to the applicant by Inspector Beer during the course of his investigations, cannot qualify for exemption under s.40(c) of the FOI Act: see paragraphs 31, 87 and 89 above. In respect of any other information supplied to Inspector Beer by a police officer, or civilian employee of the QPS, and in respect of the identities of any such persons that were not disclosed to the applicant by Inspector Beer, I am satisfied that disclosure of that information could reasonably be expected to have a substantial adverse effect on the management or assessment by the QPS of its personnel.

97. Section 40(c) of the FOI Act is qualified by a public interest balancing test. The public interest considerations that might support disclosure to the applicant are set out at paragraphs 75-76 above, with those in paragraph 75(d) and paragraph 76 being the only ones of any substance, in my assessment. However, I consider that the public interest consideration favouring non-disclosure, which is inherent in the satisfaction of the test for

prima facie exemption under s.40(c), carries determinative weight in telling against disclosure of the matter now in issue.

98. I find that the following matter is exempt matter under s.40(c) of the FOI Act -

- folios 1, 2 and 6
- folios 42-44
- the last three lines of the second paragraph on folio 45
- the last nine paragraphs on folio 47
- the first, second, fourth, fifth, ninth and tenth paragraphs on folio 48
- folio 49, except for the fifth paragraph
- the first full paragraph on folio 53 (i.e., the paragraph preceding the words "Also attached")
- the last fifteen words of the second paragraph on folio 56
- the third and fourth paragraphs on folio 56
- the sixth-last and seventh-last lines on folio 56
- folios 93-97
- folio 98, except for the first ten lines
- the last line on folio 99 and first thirteen lines on folio 100
- folio 101, except for the first nine lines
- folios 102-105
- folio 106, except for the first thirteen lines
- folio 107
- the first eight lines on folio 108
- folios 111-121
- the last twenty lines on folio 125
- the first two lines and the last two lines on folio 126
- folio 127
- the matter deleted from folio 137
- the tape-recordings of interviews conducted by Inspector Beer with three witnesses in June 1991.

Application of exemption provisions to Inspector Beer's conclusions and recommendations

99. My findings to this point have dealt with all matter still claimed by the QPS to be exempt matter, except for segments of Inspector Beer's reports which summarise his conclusions in respect of the evidence he had obtained and assessed, and which set out his recommendations for further action. The only information in these segments which refers to sources of information, and the information they supplied, comprise references to sources and information that have previously been put to the applicant, either in the course of Inspector Beer's investigations, or through evidence given at the court hearing in respect of the charges laid against the applicant. There could be no adverse effect under s.40(c), or breach of an understanding of confidence under s.46(1)(b) (or s.42(1)(b)), through disclosure of those references. Nor could their disclosure be reasonably expected to have a prejudicial effect of the kind contemplated by s.42(1)(e) of the FOI Act.

100. I am not satisfied that disclosure of those segments of Inspector Beer's reports which set out his conclusions and recommendations, based on his analysis of the information obtained in his investigations, could reasonably be expected to have a substantial adverse effect on the

management or assessment by the QPS of its personnel, within the terms of s.40(c) of the FOI Act. It is possible that different considerations could apply to assessments made in interim reports, in respect of investigations into possible misconduct by a police officer that are still to be completed. However, the matter now under consideration is contained in what Inspector Beer must have regarded (subject to any further direction by superior officers) as final reports on his investigations of different incidents, after the applicant had been given the opportunity to comment on matters which Inspector Beer had considered it appropriate to put to him. Moreover, Inspector Beer must have appreciated that his conclusions and recommendations would be scrutinised by senior officers of the QPS, and must have also appreciated that, if any recommendations for the laying of charges were implemented, and the charges were contested by the applicant, both the charges, and the sufficiency and reliability of the evidence to support them, might be scrutinised by a court or disciplinary appeal body. I do not regard this as a situation where any adverse effect could reasonably be expected, through a diminution in candour and frankness in the expression of future documents of a similar kind, if this matter were to be disclosed (see *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at p.107, paragraphs 133-134). Given the importance of, and the extent of the scrutiny that is ordinarily liable to be applied to, assessments and recommendations of this kind, I do not accept that the quality and thoroughness of similar assessments and recommendations could be materially altered for the worse, by the threat of disclosure under the FOI Act.

101. I note that part of the matter now under consideration comprises Inspector Beer's recommendations concerning the offences with which the applicant was subsequently charged, and which the applicant contested. It is material with which the applicant is generally familiar (though he may not previously have seen the precise form of Inspector Beer's recommendations), and I can see no adverse effect which could reasonably be expected if it were to be disclosed to the applicant. Inspector Beer made other recommendations which do not appear to have been acted upon by the QPS. There may be circumstances where a factor like this may tend to favour non-disclosure, but each case must be judged according to its particular circumstances. I am not satisfied that disclosure to the applicant of those conclusions and recommendations by Inspector Beer which do not appear to have been acted upon by the QPS, could reasonably be expected to have an adverse effect on the management or assessment by the QPS of its personnel. Rather, I consider that disclosure could possibly have a salutary effect, by bringing to the attention of the applicant concerns held by a superior officer in respect of some aspects of the applicant's conduct. I find that the segments of Inspector Beer's reports which set out his conclusions and recommendations do not satisfy the requirements for exemption under s.40(c) of the FOI Act.

102. Those segments of Inspector Beer's reports do fall within the terms of s.41(1)(a) of the FOI Act, since they comprise opinion and recommendations prepared for the purposes of a deliberative process involved in the functions of the QPS, i.e., considering whether or not the applicant should be charged with criminal offences or breaches of discipline. They are therefore excluded from exemption under s.46(1) of the FOI Act by the operation of s.46(2) of the FOI Act (the terms of which are set out at paragraph 18 above), having been prepared by Inspector Beer in his capacity as an officer of the QPS.

103. Those segments were claimed by the QPS, in the decisions under review, to be exempt matter under s.41(1) of the FOI Act, though s.41(1) was not relied upon in the submission lodged by the QPS during the course of this review. However, since I have found that those segments fall within s.41(1)(a) of the FOI Act, I am prepared to consider whether they are

exempt under s.41(1) of the FOI Act, which depends on whether the test imposed by s.41(1)(b) is satisfied, i.e., whether their disclosure would, on balance, be contrary to the public interest. I considered the application of that test at length in *Re Eccleston*, and summarised the test in *Re Trustees of De La Salle Brothers and Queensland Corrective Services Commission* (Information Commissioner Qld, Decision No. 96004, 4 April 1996, unreported) at paragraph 34. I note that the deliberative process to which this matter relates has long since been finalised, as indeed has the formal action which resulted from the deliberative process. In the decisions under review, the only basis given for claiming exemption under s.41(1) was: "*Should documents containing such material be released under the* [FOI] *Act, then persons responsible for addressing themselves to such matters could be substantially inhibited in expressing their views, thereby reducing the efficiency of the Queensland Police Service in its function.*" This is a 'candour and frankness' argument which, for reasons explained at paragraph 100 above, I do not accept as valid when applied to the matter now under consideration. For essentially the same reasons given in paragraphs 100 and 101 above, I am not satisfied that disclosure to the applicant of those segments of Inspector Beer's reports which set out his conclusions and recommendations would be contrary to the public interest in the effective performance by the QPS of its functions, and
I find that they are not exempt from disclosure to the applicant under s.41(1) of the FOI Act.

104. In its written submission, the QPS also claimed this matter to be exempt under s.42(1)(e), but set out no specific arguments explaining how s.42(1)(e) applied to the conclusions and recommendations contained in Inspector Beer's reports (as opposed to the statements obtained during investigations). Even if it be assumed that the tasks of assessing whether evidence obtained in an investigation is sufficient to support the laying of charges, and of recommending whether charges should be laid, constitutes a method or procedure for dealing with a possible contravention of the law, within the terms of s.42(1)(e), I am not satisfied that prejudice to the effectiveness of that method or procedure could reasonably be expected to follow from disclosure of the particular matter now under consideration. The nature and importance of those tasks is such that they are always liable to be subject to careful scrutiny (as explained in paragraph 100 above), and I am not satisfied that they would be performed less effectively if the matter now under consideration were to be disclosed under the FOI Act.

105. I therefore find that the following matter is not exempt from disclosure to the applicant under the FOI Act:

- the sixth paragraph on folio 47
- folios 50 and 51
- the last two paragraphs on folio 53
- folio 54
- folio 57. (I note that I have already found, at paragraph 89 above, that parts of folio 57 are not exempt from disclosure to the applicant because they comprise information that was put to the applicant by Inspector Beer.)

Matter outside the scope of the applicant's FOI access application

106. In item 31 of his FOI access application, the applicant sought access to:

> [31] *Copy of all entries in Inspector Beer's official diary concerning Keith Douglas McCANN.*

In response to this item, the QPS identified folios 142-145 which are extracts from Inspector Beer's official diary. In the copies of those pages to which the applicant has been given access, there are a number of deletions. I have been provided with the full text of the relevant pages of Inspector Beer's official diary, and I am satisfied from my inspection of those pages that all matter which falls within the terms of item 31 of the applicant's FOI access application has been disclosed to the applicant. The matter deleted from folios 142-145 comprises diary entries which do not concern, or relate to, the applicant.

Conclusion

107. For the reasons set out above, I vary the decision under review (identified in paragraph 5 above) by finding that -

(a) the matter in issue, which is identified in the findings stated in paragraphs 81, 82, 84, 86 and 90 above, is exempt matter under s.46(1)(b) of the FOI Act;

(b) the matter in issue, which is identified in the findings stated in paragraph 98 above, is exempt matter under s.40(c) of the FOI Act; and

(c) the matter in issue, which is identified in the findings stated in paragraphs 83, 85, 87, 89 and 105 above, is not exempt from disclosure to the applicant under the FOI Act.

.....
F N ALBIETZ
INFORMATION COMMISSIONER