OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 97013
Application S 208/93

Participants:

CHRISTOPHER REID GRIFFITH
Applicant

QUEENSLAND POLICE SERVICE
Respondent

JEFFREY GORDON THORPE
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to internal investigation of alleged misconduct by an officer of the Queensland Police Service - information contained in documents already made known to applicant through official sources - whether disclosure could reasonably be expected to have a substantial adverse effect on the management or assessment by the respondent of its personnel - application of s.40(c) of the *Freedom of Information Act 1992* Qld - whether matter in issue is deliberative process matter or merely procedural or administrative matter, or merely factual matter - whether disclosure would be contrary to the public interest - application of s.41 of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - whether disclosure of matter in issue could reasonably be expected to enable the existence or identity of a confidential source of information to be ascertained - application of s.42(1)(b) of the *Freedom of Information Act 1992* Qld - whether disclosure could reasonably be expected to prejudice the effectiveness of a method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law - application of s.42(1)(e) of the *Freedom of Information Act 1992* Qld - whether matter in issue was communicated in confidence - whether disclosure could reasonably be expected to prejudice the future supply of like information - application of s.46(1)(b) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - whether the matter in issue concerns the personal affairs of the subject of the police internal investigation - whether information concerning wrongdoing in an employment context constitutes information concerning the personal affairs of a public sector employee - application of s.44(1) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.40(c), s.40(d), s.41(1), s.41(1)(a), s.41(2)(b), s.42(1)(b), s.42(1)(e), s.42(4), s.44(1), s.46(1)(b), s.47(1)(a), s.49
Freedom of Information Act 1982 Cth s.36(1)(a)
Freedom of Information Act 1982 Vic s.33(1)

Criminal Justice Act 1989 Qld

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Cairns Port Authority and Department of Lands, Re (1994) 1 QAR 663
Cannon and Australian Quality Egg Farms Limited, Re (1994) 1 QAR 491
Dyki and Federal Commissioner of Taxation, Re (1990) 22 ALD 124
Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (1993) 1 QAR 60
Kahn and Australian Federal Police, Re (1985) 7 ALN N190
"NHL" and The University of Queensland, Re (Information Commissioner Qld, Decision No. 97001, 14 February 1997, unreported)
McCann and Queensland Police Service, Re (Information Commissioner Qld, Decision No. 97010, 10 July 1997, unreported)
McEniery and Medical Board of Queensland, Re (1994) 1 QAR 349
Murphy and Queensland Treasury & Ors, Re (Information Commissioner Qld, Decision No. 95023, 19 September 1995, unreported)
Pemberton and The University of Queensland, Re (1994) 2 QAR 293
Pope and Queensland Health, Re (1994) 1 QAR 616
Shaw and The University of Queensland, Re (Information Commissioner Qld, Decision No. 95032, 18 December 1995, unreported)
State of Queensland v Albietz [1996] 1 Qd R 215
Stewart and Department of Transport, Re (1993) 1 QAR 227
Trustees of the De La Salle Brothers and Queensland Corrective Services Commission, Re (Information Commissioner Qld, Decision No. 96004, 4 April 1996, unreported)
University of Melbourne v Robinson [1993] 2 VR 177
Waterford and Department of Treasury (No. 2), Re (1984) 5 ALD 588
Wong and Department of Immigration and Ethnic Affairs, Re (1984) 2 AAR 208

DECISION

I vary the decision under review (being the decision dated 17 September 1993 made on behalf of the respondent by Chief Superintendent D A Smith) with respect to the matter remaining in issue on folios 1-11 and 16, in that I find that none of the matter remaining in issue is exempt matter under the *Freedom of Information Act 1992* Qld.

Date of decision: 15 August 1997

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INFORMATION COMMISSIONER

TABLE OF CONTENTS

Page

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse him access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to a number of documents relating to disciplinary proceedings taken against the third party as an officer of the Queensland Police Service (the QPS). The applicant is a journalist who has written a number of newspaper articles concerning both the incident which gave rise to the disciplinary proceedings, and the handling of the disciplinary proceedings by the QPS. The QPS contends that the matter remaining in issue is exempt matter under s.40(c), s.41(1), s.42(1)(b), s.42(1)(e), s.44(1) and s.46(1)(b) of the FOI Act.

2. In November 1991, an altercation took place between a youth and the third party (who was at that time working at the Juvenile Aid Bureau of the QPS). The incident took place in the offices of the Juvenile Aid Bureau. The incident was reported to the Criminal Justice Commission (the CJC) which subsequently referred the matter to the QPS, recommending disciplinary action and directing attention to the option of dismissal as an appropriate sanction. Disciplinary proceedings were commenced within the QPS. The matter was heard by then Deputy Commissioner J P O'Sullivan, and a sanction of dismissal was imposed, but that sanction was suspended on the condition that the third party perform 200 hours of community service. (The information in this paragraph has already been made available to Mr Griffith by the QPS, or through a CJC media release: see, for example, paragraphs 21 and 22 below).

3. By application dated 12 January 1993, Mr Griffith applied to the QPS for access, under the FOI Act, to documents relating to the incident and subsequent disciplinary proceedings.

After consultation with the QPS, Mr Griffith refined the terms of his FOI access application by a letter to the QPS dated 8 July 1993, seeking access to:

> *(a) Documents relating to the determination of the disciplinary proceedings against Thorpe and the decision and findings of the disciplinary process.*
>
> *(b) Memorandum re the disciplinary process decision and the determination and implementation of that decision, including memorandum generated by officers Blizzard, Comrie and O'Sullivan in their roles at that time.*
>
> *(c) Documents re Thorpe's completion of the disciplinary process.*

4. The initial decision on behalf of the QPS was made by Superintendent J B Doyle and conveyed to Mr Griffith by letter dated 10 August 1993. Superintendent Doyle identified 25 folios as falling within the terms of Mr Griffith's FOI access application. He decided that all of those folios comprised exempt matter under s.40(c), s.42(1)(b) and s.44(1) of the FOI Act. Mr Griffith then applied, by letter dated 8 September 1993, for internal review of Superintendent Doyle's decision: see s.52 of the FOI Act.

5. The internal review decision was made by Chief Superintendent D A Smith who, on 17 September 1993, decided that all 25 folios were exempt matter under the three provisions relied upon by Superintendent Doyle, and also under s.46(1)(b) of the FOI Act. By letter dated 14 November 1993, Mr Griffith made application to me for external review, under Part 5 of the FOI Act, of Chief Superintendent Smith's decision.

External review process

6. The documents in issue were obtained and examined. I consulted with Detective Senior Constable Thorpe, who applied to be a participant in this external review, in accordance with s.78 of the FOI Act. While I granted Detective Senior Constable Thorpe the right to be a participant in this review, he has, for the most part, relied upon the submissions of the QPS in support of his opposition to disclosure of the matter in issue. I also consulted the CJC in relation to correspondence between the CJC and the QPS, but the CJC did not apply to become a participant in this external review.

7. During the course of the review, the extent of the documents and matter in issue has been narrowed through consultation and negotiation with the participants. Mr Griffith has indicated that he does not seek access to folios 17-25 (which merely contain details of the performance by the third party of his community service obligations). Nor does he seek access to the name of the youth (which has already been made public) or to matter which would identify the person who made the initial complaint in relation to the incident.
Accordingly, the matter referred to in the preceding two sentences is no longer in issue in this review. Mr Griffith has, with the agreement of the QPS and the third party, been granted access to folios 12-15, subject to the deletion of matter which would identify the complainant. This means that the matter remaining in issue comprises folios 1-11 and 16 (except for the names of the complainant and of the youth).

8. In the course of any police internal investigation, there are likely to be many documents created, including —

- documents created during the investigation process, such as statements of witnesses and copies of documentary evidence;
- summaries of evidence, comments and recommendations made by investigating officers;
- records of the hearing and notes of the officer charged with making a decision in relation to allegations;
- formal notices of hearing and of the outcome of proceedings; and
- routine administrative documents ancillary to the process, making arrangements for the hearing, notifying relevant persons of the outcome and arranging for, and confirming completion of, any sanction imposed.

9. Mr Griffith has not sought access to any evidentiary or investigative material relevant to the disciplinary proceedings involving the third party, or to details of the hearing beyond its final outcome. Rather, he has sought access to documents about the disciplinary process itself and whether the third party has completed his community service obligation. The matter in issue in this external review therefore falls within the last two categories described above. It consists of formal notices and routine administrative interchanges. Folios 1-11 and 16 comprise:

- a notice from the Deputy Commissioner to the third party advising that a charge of misconduct was to be considered, and advising when the Deputy Commissioner would consider the matter;
- memoranda to QPS staff arranging for the third party to be notified of the hearing and to appear at the hearing;
- a memorandum indicating that the third party had been notified and would appear;
- notifications to the third party, QPS staff and the CJC in relation to the finding of the Deputy Commissioner and the sanction imposed;
- an acknowledgment from the CJC that it had received that information; and
- a notification to the third party regarding completion of his community service obligations.

10. I invited both the QPS and the third party to provide submissions and/or evidence in support of their contentions that the matter in issue is exempt matter under the FOI Act. I have not received any separate submission from the third party, but the QPS has made lengthy submissions in support of its claims for exemption. I provided a copy of the QPS submission, dated 18 August 1995, to Mr Griffith, who made a submission in reply. Copies of that reply were provided to the QPS and the third party. The QPS subsequently provided a lengthy final submission which expanded on a number of earlier points, and further claimed that the documents in issue are exempt matter under s.41(1) and s.42(1)(e) of the FOI Act. The submission also attached a statutory declaration, dated 1 November 1996, by Chief Superintendent Patrick Joseph Doonan, the officer in charge of the QPS Professional Standards Unit.

11. I note that the final submission of the QPS was adapted from a QPS submission in another external review currently before me, involving documents relating to other QPS disciplinary proceedings. In that other external review, the documents in issue span the full range of the five categories I identified at paragraph 8 above, including evidentiary and investigative documents. Much of what is said in this adapted final submission is not strictly relevant to the particular matter in issue in this external review. Nevertheless, I have carefully

examined all the material presented to me for the purposes of this external review (including all QPS submissions and the reasons for decision given in Superintendent Doyle's initial decision and in Chief Superintendent Smith's internal review decision) and will comment further upon it, as necessary, in my consideration of each of the exemption provisions. I did not find it necessary to seek comment from Mr Griffith on the final QPS submission.

Relevant provisions of the FOI Act

12. The following provisions of the FOI Act have been relied upon in the QPS submissions:

> ***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; …*
>
> ***41.(1)*** *Matter is exempt matter if its disclosure—*
>
> *(a) would disclose—*
>
> *(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or*
>
> *(ii) a consultation or deliberation that has taken place;*
>
> *in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and*
>
> *(b) would, on balance, be contrary to the public interest.*
>
> ***(2)*** *Matter is not exempt under subsection (1) if it merely consists of—*
>
> …
>
> *(b) factual or statistical matter; …*
>
> ***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); …*
>
> ***44.(1)*** *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*
>
> ***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.*

13. I will consider each of these exemption provisions in turn.

Application of s.40(c)

14. I have previously discussed the application of s.40(c) of the FOI Act in my decisions in *Re Pemberton and The University of Queensland* (1994) 2 QAR 293, *Re Murphy and Queensland Treasury & Ors* (Information Commissioner Qld, Decision No. 95023, 19 September 1995, unreported), *Re Shaw and The University of Queensland* (Information Commissioner Qld, Decision No. 95032, 18 December 1995, unreported), and *Re McCann and Queensland Police Service* (Information Commissioner Qld, Decision No. 97010, 10 July 1997, unreported). 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 or assessment by the respondent of its personnel, unless disclosure of the matter in issue would, on balance, be in the public interest.

15. The correct approach to the application of the phrase "could reasonably be expected to" is explained in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at p.515 (paragraphs 62-63). The test embodied in that phrase calls 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.

16. If I am satisfied that any adverse effects could reasonably be expected to follow from disclosure of the documents in issue, I must then determine whether those adverse effects, either individually or in aggregate, constitute a substantial adverse effect on the management or assessment by the QPS of its personnel. For reasons explained in *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 (at pp.724-725, paragraphs 148-150), I consider that, where the Queensland Parliament has employed the phrase "substantial adverse effect" in s.40(c), s.40(d), s.47(1)(a) and s.49 of the FOI Act, it must have intended

the adjective "substantial" to be used in the sense of grave, weighty, significant or serious. In *Re Dyki and Federal Commissioner of Taxation* (1990) 22 ALD 124, Deputy President Gerber of the Commonwealth AAT remarked (at p.129, paragraph 21) that: "*The onus of establishing a substantial adverse effect is a heavy one ...* ".

17. If I find that disclosure of the whole or any part of the matter in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by the QPS of its personnel, I must then consider whether disclosure of that matter would nevertheless, on balance, be in the public interest.

The QPS submission

18. In its final submission, the QPS accepted that the approach described above to the interpretation of the terms "could reasonably be expected to" and "substantial adverse effect" is correct. The QPS contends that the criteria for *prima facie* exemption are satisfied in this case. The QPS case for establishment of adverse effects in the context of s.40(c) is identified in the following passage from its final submission (authored by Chief Superintendent Smith):

> *As an officer who has served within both the Police Services of Victoria and Queensland since 1972, and as an officer intimately involved in the Fitzgerald Inquiry and the reform process, I can personally attest to the need for this exemption to be upheld if the free and frank provision of information necessary for the efficacious functioning of the Police Service's disciplinary processes* [sic]. *To adopt the tests outlined in* Re Pemberton, *I would submit that to release documents related to an internal disciplinary matter to a "non-involved third party" would result in the future diminution of the efficacy of the disciplinary process as there would be:*
>
> - *A resultant loss of candour from other officers and the subject officer involved in the discipline process.*
> - *Officers may well be reluctant to give candid information in the future.*
> - *The potential for retaliation and disruption to the officers involved is very real as has been disclosed in numerous inquiries into policing, but in particular in the Fitzgerald and Wood Commissions of Inquiry.*

19. It is apparent from the discussion of the public interest test in the QPS submission, that there is concern that disclosure of information about individual disciplinary proceedings may lead to a reduction in the morale of officers and the esteem in which officers are held by the public, thus giving rise to problems in the management of particular personnel. Although these have not been specifically stated to be possible adverse effects for the purposes of s.40(c), I will consider them in my reasons for decision.

What has already been disclosed

20. I have already indicated that much of the matter remaining in issue in this external review can be described as merely administrative matter. The great bulk of this matter is of a routine kind that would doubtless be present on the file created for any disciplinary proceeding. The only matter specific to disciplinary proceedings against the third party which appears in the documents in issue is:

- brief descriptions of the nature of the charge of misconduct against the third party;
- the time and place for hearing of the charge;
- the third party's identity as the person dealt with;
- the finding and the sanction imposed; and
- the amount of community service and the type of organisation at which the third party was to carry it out.

21. By letter dated 28 January 1993, Commissioner O'Sullivan provided the following information to Mr Griffith:

> *I refer to your facsimile transmission received on Sunday 24 January 1993. In that letter you request information concerning various aspects of the Disciplinary Action concerning Detective Senior Constable Jeffrey Thorpe. As you are aware, the matter was initially investigated by the Criminal Justice Commission which noted that a child concerned in this matter was not prepared to travel to Queensland to give evidence in any criminal proceedings. The Criminal Justice Commission therefore referred the matter to the Commissioner of the Police Service with a recommendation that Disciplinary Proceedings be preferred against the officer involved.*
>
> *I advise that Disciplinary Proceedings were, in fact, commenced against the officer concerned and I refer to the following matters:*
>
> *1. The Police officer concerned received the sanction of dismissal, however this penalty was suspended on the condition that he perform 200 hours of Community Service pursuant to Regulation 12 of the Police Service (Disciplinary) Regulations of 1990;*
>
> *2. The officer concerned was removed immediately from the Juvenile Aid Bureau after the incident;*
>
> *3. The officer concerned was dismissed, but this sanction was suspended on condition of the completion of 200 hours of Community Service by the officer concerned, taking into account all of the relevant circumstances, including the officer's previous record;*
>
> *4. I take this opportunity to point out to you that disciplinary matters at the time were dealt with by both Deputy Commissioners.*

22. The incident has also been the subject of a CJC media release dated 1 February 1993, which stated:

> *CJC Chairman Rob O'Regan today rejected claims that the Commission's investigation of an assault on a youth by a police officer with the Juvenile Aid Bureau was "merciless and ruthless" and that the investigation had found no evidence to substantiate a charge.*
>
> *"The investigation was conducted in an entirely routine and appropriate manner with all parties to the complaint being interviewed as would be the case if police themselves were investigating an assault allegation.*

> *"The Commission was satisfied there was clear and sufficient evidence that an assault had occurred. In normal circumstances the case would have proceeded to the criminal courts or the Misconduct Tribunals but for the unwillingness of the victim to return to Brisbane to give evidence.*
>
> *"In those circumstances the Commission was left with no option but to refer the matter back to the police for disciplinary action. The Commission directed attention to the option of dismissal as an appropriate sanction.*
>
> *"However, I reiterate that under the Act the Commission appears to have no power to supervise the exercise of disciplinary functions within the Police Service.*
>
> *"I discussed the matter with the Commissioner late last week and put it to him that it was important that the public did not get the impression that he is soft on police who misbehave," Mr O'Regan said.*

23. I also note that a number of newspaper articles have been published in which Mr Griffith discussed information relating to the incident, and in which the youth was named, and in one case, photographed.

Findings on the application of s.40(c)

24. Some of the factors which the QPS has raised in its written submissions are capable of being relevant considerations in an appropriate case (see, for example, *Re McCann* at paragraphs 92-97). However, almost all of the information in issue which deals with the specifics of the disciplinary proceeding, has already been provided to Mr Griffith, and, through the CJC media release and Mr Griffith's articles, to the public at large. Perhaps the only matter which has not been disclosed to Mr Griffith to date is the name of the organisation at which the third party undertook community service (and I do not consider that disclosure of that information could reasonably be expected to have an adverse effect on the management or assessment by the QPS of its personnel, let alone a substantial adverse effect).

25. Disclosure of the matter in issue will not reveal the identity of the complainant or of any person who has provided information to the QPS in relation to the disciplinary proceedings. It will not disclose the substance of any information provided in relation to the disciplinary proceedings. Apart from the bare substance of the finding of then Deputy Commissioner O'Sullivan, it will reveal nothing about the investigation or hearing of the matter beyond administrative detail. It is already public knowledge that the third party has been subject to a disciplinary charge, and that a sanction has been imposed.

26. Annexure A to the statutory declaration of Patrick Joseph Doonan comprises Chapter 18 of the QPS Human Resource Management Manual, which chapter is entitled "Discipline". This chapter (which, together with Chief Superintendent Doonan's statutory declaration and the QPS's written submissions, have been forwarded to Mr Griffith during the course of this review) sets out, in more than 100 pages, the detailed procedures to be followed in relation to QPS disciplinary matters. There is certainly nothing unusual about the disciplinary proceedings exemplified in the documents in issue which would suggest to me that any prejudice can arise to those procedures by disclosure of the routine administrative parts of

the documents in issue, which do not contain information referring specifically to the proceedings against the third party.

27. Given the routine nature of the matter remaining in issue, and the fact that almost all of the specific information relating to the disciplinary proceeding which is contained in the matter remaining in issue has been released into the public domain (i.e., through disclosure to a journalist with no reservation or restriction on further publication of the details disclosed, and through a CJC press release: see paragraphs 21 and 22 above), I do not consider that it could reasonably be expected that disclosure of the matter in issue under the FOI Act would have any adverse effect on the management or assessment by the QPS of its personnel. The public, and staff of the QPS, are well aware that from time to time disciplinary matters concerning QPS personnel will be made public by the QPS or the CJC, in order to fulfil the accountability requirements of the two organisations to the public of Queensland or to comply with statutory requirements. That is what has happened in the present case. Both the Commissioner of the QPS, and the CJC, considered it proper to release information concerning this particular disciplinary process into the public domain.

28. In places, the QPS's written submissions seem to suggest that a blanket of confidentiality should be thrown over all internal disciplinary matters, as disclosure to a "non-involved third party" such as Mr Griffith would significantly prejudice the efficacy of the system of internal police discipline. However, an extreme position of that kind is, in my view, unrealistic and impractical. For example, there is generally nothing to prevent a person who has made a complaint against police, and is dissatisfied with the outcome, from taking his or her side of the story to a journalist. If a journalist considers that the matter may warrant further investigation, and public scrutiny/comment, the QPS or the CJC may justifiably consider that it is proper to disclose information about the disciplinary process and its outcome, in order to ensure that accurate and balanced information is placed on the public record, and to preserve public confidence in the integrity of the systems established for police discipline.

29. In the present case, it is no longer possible to find a reasonable basis for expecting that disclosure, under the FOI Act, of the matter remaining in issue could have an adverse effect on the management or assessment by the QPS of its personnel. The substance of the information is already in the public arena. I am not satisfied that disclosure of the matter remaining in issue could reasonably be expected to have any adverse effect on the management or assessment by the QPS of its personnel, let alone a substantial adverse effect. It is unnecessary, therefore, for me to consider the application of the public interest balancing test incorporated in s.40(c).

30. I find that the matter remaining in issue is not exempt matter under s.40(c) of the FOI Act.

Application of s.41(1)

31. A detailed analysis of s.41 of the FOI Act can be found in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.66-72, where, at p.68 (paragraphs 21-22) I said:

> *21. Thus, for matter in a document to fall within s.41(1), there must be a positive answer to two questions:*

> *(a) would disclosure of the matter disclose any opinion, advice, or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, (in either case) in the course of, or for the purposes of, the deliberative processes involved in the functions of government? and*
>
> *(b) would disclosure, on balance, be contrary to the public interest?*
>
> *22. The fact that a document falls within s.41(1)(a) (ie., that it is a deliberative process document) carries no presumption that its disclosure would be contrary to the public interest. ...*

32. An applicant for access is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; an applicant is entitled to access unless an agency can establish that disclosure of the relevant deliberative process matter would be contrary to the public interest. In *Re Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (Information Commissioner Qld, Decision No. 96004, 4 April 1996, unreported), at paragraph 34, I said:

> *The correct approach to the application of s.41(1)(b) of the FOI Act was analysed at length in my reasons for decision in* Re Eccleston, *where I indicated (see p.110; paragraph 140) that an agency or Minister seeking to rely on s.41(1) needs to establish that specific and tangible harm to an identifiable public interest (or interests) would result from disclosure of the particular deliberative process matter in issue. It must further be established that the harm is of sufficient gravity that, when weighed against competing public interest considerations which favour disclosure of the matter in issue, it would nevertheless be proper to find that disclosure of the matter in issue would, on balance, be contrary to the public interest.*

33. The QPS contends that all of the matter remaining in issue is exempt under s.41(1) of the FOI Act. I consider that none of the matter remaining in issue is exempt under s.41(1), either because it does not fall within the terms of s.41(1)(a), or because it is excluded by the operation of s.41(2)(b) of the FOI Act.

34. At pp.70-71 (paragraphs 28-29) of my decision in *Re Eccleston*, I concurred with the following passage from the decision of the Commonwealth Administrative Appeals Tribunal in *Re Waterford and Department of Treasury (No. 2)* (1984) 5 ALD 588 at p.606; 1 AAR 1 at pp.19-20:

> *Furthermore, however imprecise the dividing line may first appear to be in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of an agency. A document which, for example, discloses no more than a step in the procedures by which an agency handles a request under the FOI Act is not a document to which s.36(1)(a)* [i.e., the provision of the *Freedom of Information Act 1982* Cth which is equivalent to s.41(1)(a) of the Queensland FOI Act] *applies.*

35. In my view, most, if not all, of the matter remaining in issue is to be properly characterised as matter dealing with purely procedural or administrative processes, such as notification of

a hearing date, instructions to the third party to attend at the office of the Deputy Commissioner of the QPS at a certain time, confirmation that the third party had been advised of the hearing, *et cetera*. Such matter does not fall within the terms of s.41(1)(a) of the FOI Act. Moreover, large segments of the matter in issue consist merely of factual matter, which is excluded from exemption under s.41(1) by s.41(2)(b) of the FOI Act.

36. Even if, contrary to my views, any of the matter remaining in issue were to be characterised as matter falling within the terms of s.41(1)(a), and not excluded by s.41(2)(b), I do not consider that disclosure of any of the matter remaining in issue would be contrary to the public interest. As I have noted above, under s.41(1) it is for the QPS to establish that there are public interest considerations weighing against disclosure. Given the extent of publication regarding the disciplinary proceeding (described at paragraphs 21-23 above), I do not consider that any of the general public interest arguments raised in the QPS submissions are applicable in this case. I find that none of the matter in issue is exempt matter under s.41(1) of the FOI Act.

Application of s.42(1)(b)

37. In *Re McEniery and Medical Board of Queensland* (1994) 1 QAR 349 at pp.356-357 (paragraph 16), I identified the following requirements which must be satisfied in order to establish that matter is exempt under s.42(1)(b) of the FOI Act:

> (a) there must exist a confidential source of information;
> (b) the information which the confidential source has supplied (or is intended to supply) must relate to the enforcement or administration of the law; and
> (c) disclosure of the matter in issue could reasonably be expected to—
> (i) enable the existence of a confidential source of information to be ascertained; or
> (ii) enable the identity of the confidential source of information to be ascertained.

38. A "confidential source of information", for the purposes of s.42(1)(b), is a person who supplies information on the understanding, express or implied, that his or her identity will remain confidential: see *Re McEniery* at p.358 (paragraphs 20-21).

39. This exemption provision is clearly not applicable to any of the matter remaining in issue. I have indicated above that Mr Griffith has informed me that he does not seek access to the name of the complainant. It is not in issue in this external review. The QPS has not indicated any particular matter which it considers is exempt under this provision, merely claiming it applies to all of the documents in issue. As there is no matter in issue, the disclosure of which could reasonably be expected to enable the existence or identity of a confidential source of information to be ascertained, this claim for exemption must fail. I find that none of the matter remaining in issue is exempt matter under s.42(1)(b) of the FOI Act.

Application of s.42(1)(e)

40. The focus of s.42(1)(e) is on 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. Section 42(4) provides that a reference to a contravention or possible contravention of the law includes a reference to misconduct or official misconduct, or possible misconduct or official misconduct, within the meaning of the *Criminal Justice Act 1989* Qld. The QPS has

again made submissions in general terms suggesting that in police discipline files there may be details which, if revealed, would make known methods or procedures used for investigating allegations of breach of discipline. However, in the matter remaining in issue, there is no information the disclosure of which could reasonably be expected to cause prejudice of the kind contemplated by the terms of s.42(1)(e) of the FOI Act.

41. Disclosure of the matter in issue will reveal nothing new with regard to the methods and procedures adopted by the QPS to deal with allegations of misconduct. The only procedures evidenced by the documents in issue are routine procedures relating to notification of charges, notification of a hearing date, notification of the outcome of the hearing, and follow-up in relation to performance of the disciplinary sanction imposed. Disclosure of such procedures cannot reasonably be expected to prejudice their effectiveness. I find that the matter remaining in issue is not exempt matter under s.42(1)(e) of the FOI Act.

Application of s.44(1)

42. The QPS contends that all of the matter in issue is exempt matter under s.44(1) of the FOI Act as it concerns the third party's personal affairs. The QPS submits that:

> *The claim for exemption is being pursued for the following reasons. To date, it appears to be clear that the term "personal affairs" does not include the work performance of an individual employed in an agency. This submission proceeds on the premise that work performance is related to the efficiency and effectiveness of an agency and is not related to allegations of disciplinary lapses and misconduct that renders an officer liable to an internal investigation and the possibility of disciplinary action. The former is related to the performance of the agency as an agency and the latter relates to the individual's personal affairs whilst an employee within the agency. The wrongdoer is not acting as an agent of the agency because they are acting outside the required standards expected by the agency. In effect, they are acting* ultra vires *the agency.*
>
> *I have regard to the decision in* Re Rees and Queensland Generation Corporation (trading as Austa Electric) [Information Commissioner Qld, Decision No. 96010, 14 June 1996, unreported] *which reinforced earlier rulings concerning the expression "personal affairs". With respect to those views of the Information Commissioner, I submit that the expression personal affairs can still include the disciplinary matters the subject of this application and my claim for exemption.*
>
> *In the Information Commissioner's views at paragraphs 15 and 16 of the above decision, the phrase "personal affairs" has a well accepted core meaning which includes:*
>
> - *affairs relating to family and marital relationships;*
> - *health or ill-health;*
> - *relationships with and emotional ties with other people; and*
> - *domestic responsibilities or financial obligations.*
>
> *Whilst there is an acceptance that the management of employee related performance is "... ordinarily not those of the employee but those of the*

> *government Department or agency [Queensland Police Service] on behalf of which the employee performs his or her duties of employment" (see* Rees *at para. 16), I would submit that the decisions can be distinguished in the case of disciplinary matters.*
>
> *I would also submit that the decision of the Supreme Court of New South Wales, Court of Appeal, in* Commissioner of Police v The District Court of New South Wales and Another (1993) 31 NSWLR 606] *which was decided on similar sentiments to those expressed in the decisions of the Information Commissioner referred to above, can also be distinguished in this case.*
>
> *The Information Commissioner in* Re Stewart *held, at paragraph 80, that:*
>
> > [T]he mention of a person's name in police records (or in agency records of a comparable nature) in association with some possible wrong doing ... is the personal affairs of the person the subject of the allegation.
>
> *The documentation contains allegations of wrongdoing. At this stage I would like to draw a distinction between those allegations of wrongdoing which have been tested in court and those which have not. In either case I consider that such allegations whether proven or not are* prima facie *the "personal affairs" of the person the subject of that allegation. The distinction which I have drawn is relevant when considering public interest considerations favouring disclosure of the otherwise exempt material.*

43. I do not accept that there is such a clear-cut distinction as the one sought to be made in the above passage between information concerning the performance of a public servant's duties of office (which the QPS accepts is not information concerning the public servant's personal affairs) and information concerning a disciplinary breach or misconduct by a public servant, which is claimed to be information concerning that public servant's personal affairs (apparently on the basis that conduct involving a disciplinary breach or misconduct would not have been conduct authorised by the employer).

44. In attempting to justify this distinction, the QPS has relied upon the following passage from my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227 at p.257 (paragraph 80):

> *Some further examples of matters which have been held in decided cases to fall within the meaning of the phrase "personal affairs of a person", and which I consider to have been correctly decided for the reasons given by the relevant tribunal in each case are as follows …:*
>
> …
>
> - *the mention of a person's name in police records (or in agency records of a comparable nature) in association with some possible wrongdoing:* Re Wong and Department of Immigration and Ethnic Affairs *(1984) 2 AAR 208*; Re Kahn and Australian Federal Police *(1985) 7 ALN N190.*

…

45. It appears that the QPS has read more into this passage than I intended it to convey, and it is necessary for me to make some clarifying remarks. Firstly, I note that the above-quoted passage appeared in a segment of *Re Stewart* bearing the sub-heading "Matters which clearly fall within the meaning of the phrase 'personal affairs of a person' ". In the next segment of *Re Stewart*, bearing the sub-heading "Matters which clearly fall outside the meaning of the phrase 'personal affairs of a person' ", I referred to a number of authorities and made the following remarks (at p.259, paragraph 85):

> *In the particular context of government employees, it would be inimical to the attainment of one of the major objects of FOI legislation (i.e., enhancing government's accountability and keeping the community informed of government's operations) if disclosure of records relating merely to the performance by a public servant of his or her duties could be resisted on the basis that they related to the public servant's personal affairs.*

46. *Re Wong* and *Re Kahn* were cases in which the names of ordinary members of the public were mentioned in agency records of a law enforcement nature, in connection with some possible wrongdoing. Neither was a case concerned with the mention of the name of a public servant in association with some possible wrongdoing committed in the course of performing his or her duties of office. That different considerations might apply in the latter situation should have been apparent from the fact that information concerning the employment affairs of public servants was a category of information singled out for special attention in *Re Stewart* (at pp.258-259 and pp.261-264).

47. In the later case of *Re Pope and Queensland Health* (1994) 1 QAR 616, after reviewing relevant authorities (at pp.658-660), I expressed the following conclusion (at p.660, paragraph 116):

> *Based on the authorities to which I have referred, I consider that it should now be accepted in Queensland that information which merely concerns the performance by a government employee of his or her employment duties (i.e., which does not stray into the realm of personal affairs in the manner contemplated in the* Dyrenfurth *case) is ordinarily incapable of being properly characterised as information concerning the employee's "personal affairs" for the purposes of the FOI Act.*

The general approach evident in this passage was endorsed by de Jersey J of the Supreme Court of Queensland in *State of Queensland v Albietz* [1996] 1 Qd R 215 at pp.221-222.

48. In reviewing relevant authorities in *Re Pope*, I had specifically endorsed the following observations, concerning s.33(1) (the personal affairs exemption) of the *Freedom of Information Act 1982* Vic, made by Eames J of the Supreme Court of Victoria in *University of Melbourne v Robinson* [1993] 2 VR 177 at p.187:

> *The reference to the* "personal affairs of any person" *suggests to me that a distinction has been drawn by the legislature between those aspects of an individual's life which might be said to be of a private character and those* <u>*relating to or arising from*</u> *any position, office or public activity with which the person occupies his or her time.* (emphasis added)

49. I do not think that there is any doubt that the matter remaining in issue relates to or arises from the third party's employment as a police officer. However, in *Re Stewart* (at pp.261-264), I acknowledged that employment-related matters provide many instances of information that inhabits the rather substantial 'grey area' at the boundaries of what is encompassed within the phrase "personal affairs of a person" (and relevant variations thereof) as used in the context of the FOI Act. In *Re Stewart* (at p.261, paragraph 92), I said that there is a relevant distinction to be drawn in respect of matters that relate to an employee as an individual, rather than an employee as an agent or representative of the employer, and that some matters in the former category may fall within the meaning of the phrase "personal affairs". Where misconduct in employment becomes an issue, that 'grey area' between "personal affairs" and employment affairs (discussed in *Re Stewart* at pp. 261-264) is encountered: see *Re "NHL" and The University of Queensland* (Information Commissioner Queensland, Decision No. 97001, 14 February 1997, unreported) at paragraph 29.

50. I do not accept that information concerns the personal affairs of a QPS officer merely because it relates to disciplinary action taken against the officer by the QPS. In a particular case, it may be that the conduct of a QPS officer bears no relationship to the performance or misperformance of his or her duties as a QPS officer, but can be said to concern the private aspects of his or her life, and thus to concern his or her personal affairs. However, where a disciplinary proceeding relates to conduct which occurred while an officer was on duty, and in the performance of his or her duties of employment, information relating to the incident and subsequent disciplinary proceedings cannot generally be said to concern the personal affairs of the officer.

51. I consider that conduct of a public sector employee which occurs in the course of performing his or her employment duties is properly to be characterised as part of the employee's employment affairs rather than his or her personal affairs, even in respect of conduct alleged or proven to involve misconduct or a breach of discipline. For example, I consider that a police officer who arrests and interrogates a suspect is performing his or her duties of employment, and if that conduct is alleged or proven to have involved excessive force and therefore to have involved misconduct or a breach of discipline, I consider that the conduct nevertheless remains part of the police officer's employment affairs, not his or her personal affairs.

52. Conduct which occurs in the workplace or through opportunities presented by a person's employment duties, but does not occur in the course of actually performing employment duties, raises more difficult questions of characterisation. For example, a person who engages in conduct amounting to sexual harassment, even though it occurs in the workplace, is not actually performing his or her duties of employment when engaged in such conduct. In a case which involved the difficult question of characterising conduct of that kind, I decided that an individual's sexual conduct, and relations with others, had a sufficiently strong element of the personal about it, that it was properly to be characterised as concerning the individual's "personal affairs": see *Re "NHL"* at paragraph 29. Other kinds of misconduct that take advantage of opportunities presented by a person's employment duties, but do not involve the actual performance of employment duties, also involve difficult questions of characterisation: for example, an employee who for personal gain (e.g., selling of information to a private investigator) conducts unauthorised computer searches to obtain personal information about others from his agency's information databases. Arguments could be mounted either way as to whether conduct of this kind should be properly characterised as part of the employee's personal affairs or employment affairs, though I tend to favour the latter.

53. Of course, the disciplinary process itself is an incident of the employment relationship, and an employee's involvement in the disciplinary process must, in my opinion, be properly characterised as an aspect of his or her employment affairs, rather than his or her personal affairs. However, there would remain an issue as to whether mention of the employee's name in connection with some alleged or possible (but still unproven) wrongdoing is properly to be characterised as information concerning the employee's personal affairs. In my opinion, it cannot ordinarily be characterised in that way where the impugned conduct occurred in the course of the performance by the employee of his or her duties of employment.

54. Turning to the matter in issue in this external review, the CJC media release (see paragraph 22 above) indicates that the allegation investigated was that the third party had assaulted a youth. The incident took place at the offices of the Juvenile Aid Bureau at a time when the third party was on duty. All of the documents in issue were created as a part of the police disciplinary procedures to which the third party was subject as an incident of his employment as a QPS officer. In my view, the allegation of misconduct dealt with in this case is properly to be characterised as information concerning the employment affairs of the third party, rather than as information concerning his personal affairs.

55. If I were wrong in that regard, it would still be necessary to consider the application of the public interest balancing test incorporated in s.44(1). The fact that the third party has been charged and penalised for misconduct in relation to the incident has already been made public, as has the sanction he received. The fact that particular information has become a matter of public record significantly diminishes the weight to be accorded to the public interest in protecting an individual's privacy with respect to that information, even though the information may satisfy the test for *prima facie* exemption under s.44(1) of the FOI Act. On the other hand, disclosure of the matter remaining in issue would further the public interest in understanding police disciplinary processes and in the accountability of the QPS with respect to disciplinary processes. If it were necessary, I would be minded to find that disclosure of the matter remaining in issue would, on balance, be in the public interest, and hence that the matter remaining in issue is not exempt under s. 44(1).

56. However, I find that the matter in issue is not exempt matter under s.44(1) of the FOI Act, because it cannot be properly characterised as information concerning personal affairs.

Application of s.46(1)(b)

57. In *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, I considered in detail the elements which must be established in order for matter to satisfy the test for *prima facie* exemption under s.46(1)(b) of the FOI Act (at pp.337-341, paragraphs 144-161):

    (a) the matter in issue must consist of information of a confidential nature (i.e., which has the requisite degree of relative secrecy or inaccessibility: see *Re "B"* at pp.337-338, paragraph 148; and at pp.304-310, paragraphs 64-73);

    (b) that information must have been communicated in confidence (which means that there must have been a mutual understanding, express or implied, between the supplier and the recipient of the information that the information was to be treated in confidence: see *Re "B"* at pp.338-9, paragraphs 149-152; see also *Re McCann* at paragraphs 21-23 and 34); and

(c) it must be the case that disclosure of the information could reasonably be expected to prejudice the future supply of such information. (As to the meaning of the phrase "could reasonably be expected to", see paragraph 15 above.) The test for this element 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 sources available, or likely to be available, to an agency: see *Re "B"* at p.341, paragraph 161).

58. If these three elements are satisfied, the application of the public interest balancing test incorporated in s.46(1)(b) must then be considered.

59. As was the case with its claim under s.42(1)(b), the QPS submission does not identify any matter to which s.46(1)(b) is claimed to apply. All of the matter in issue was communicated by QPS or CJC officers acting in the course of their duties while preparing for the hearing of the disciplinary charge, or dealing with enforcement of the sanction. There is no evidence before me which would suggest, and nothing in the circumstances attending those routine exchanges of information from which I could reasonably infer, that the matter was communicated in confidence. None of the information in the matter in issue was communicated to the QPS by the third party. The documents comprise routine communications, so far as disciplinary proceedings are concerned. Moreover, I do not consider that disclosure of the documents in issue could reasonably be expected to prejudice the future supply of like information. I find that the matter remaining in issue is not exempt matter under s.46(1)(b) of the FOI Act.

Conclusion

60. For the foregoing reasons, I vary the decision under review with respect to the matter remaining in issue on folios 1-11 and 16, in that I find that none of the matter remaining in issue is exempt matter under the FOI Act.

.....
F N ALBIETZ
INFORMATION COMMISSIONER