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OFFICE OF THE INFORMATION COMMISSIONER

Your ref.
Our ref. S 64/95

1 December 1997

Mr W J R Mentink
[*address deleted*]

Dear Mr Mentink

RE: APPLICATION FOR EXTERNAL REVIEW OF DECISION MADE UNDER THE *FREEDOM OF INFORMATION ACT 1992* QLD

Applicant:	**Mr W J R Mentink**
Agency/Minister:	**Queensland Corrective Services Commission**
Decision-Maker:	**Mr N McAllister**
Date of Decision:	**18 January 1995**
Type of Decision:	**Internal review - confirming refusal of access to certain documents**

… [*Paras 1-3 (Introductory paragraphs) deleted*]

REASONS FOR DECISION

Background

4. By application dated 18 October 1994, the applicant sought access from the Queensland Corrective Services Commission (the QCSC) to:

> *All documents relating to me contained in*
> *1. Detention File*
> *2. Professional Management File*
> *held by the Corrective Services Commission.*

5. By letter dated 20 December 1994, the QCSC's FOI Co-ordinator, Ms P Cabaniuk, conveyed her decision to give the applicant full access to his Detention file, and to most of the documents on his Professional Management file. Ms Cabaniuk decided that some 17 pages on the latter file were exempt matter under s.41(1), s.42(1)(b), s.42(1)(e) or s.46(1)(b) of the FOI Act.

6. By letter dated 30 December 1994 (received by the QCSC on 5 January 1995), the applicant sought internal review of Ms Cabaniuk's decision. That review was conducted by Mr N McAllister who, by decision dated 18 January 1995, determined to grant the applicant access to some further documents, but decided that pages 145-148, 150-153 and 170 of the applicant's Professional Management File were exempt matter under s.42(1)(b), s.42(1)(e) or s.46(1)(b) of the FOI Act.

7. By letter dated 15 March 1995, the applicant applied to me for external review, under Part 5 of the FOI Act, of Mr McAllister's decision.

External review process

8. Copies of the documents in issue were obtained and examined.

9. By letter dated 3 May 1995, I informed the QCSC of my preliminary views in respect of some of the documents in issue, and invited the QCSC to lodge evidence and/or written submissions in support of its case.

10. By letters dated 25 May 1995, I wrote to the persons whom I believed should be consulted in accordance with s.74(1)(b) of the FOI Act and indicated my preliminary views to them. Each of the persons replied to me expressing their vehement objection to the disclosure to the applicant of documents which had originated from them, and which they asserted had been communicated in confidence. Two of them initially applied to be participants in the review, but subsequently withdrew as participants, stating that they believed the QCSC would adequately present a case in this review which took account of their interests and concerns. Indeed, the QCSC subsequently lodged formal evidence from one of those persons, Mr T. W. Austin.

11. By letter dated 15 November 1995, the QCSC informed me that, after considering the preliminary views conveyed in my letter dated 3 May 1995, it was prepared to give the applicant access to pages 150, 152-153 and 170. I authorised the QCSC to give the applicant access to those pages, which are no longer in issue in this review.

12. The Crown Solicitor lodged a written submission on behalf of the QCSC, supported by a statutory declaration of Mr Terence William Austin, and subsequently lodged a supplementary written submission, together with a second statutory declaration by Mr Austin. By letter dated 24 June 1996, copies of those written submissions (edited so as to comply with s.76(2) and s.87 of the FOI Act, which prohibit the disclosure during the course of a review of matter which an agency has decided is exempt matter), and (for like reasons) a summary of Mr Austin's evidence, were forwarded to the applicant, who was invited to lodge evidence and written submissions in support of his case in this review. The applicant lodged a lengthy written submission dated 8 August 1996, and an affidavit by himself, sworn 11 August 1996.

13. After considering the material lodged by the applicant, and views conveyed by the Deputy Information Commissioner in a letter to the QCSC dated 11 September 1996, the Crown Solicitor, on behalf of the QCSC, lodged a submission in reply on 14 October 1996. While contesting all other arguments raised on behalf of the applicant, that submission conceded that certain matter contained in pages 145-147 did not have the 'necessary quality of

confidence' to qualify for exemption under s.46(1)(a) or s.46(1)(b) of the FOI Act, because it was information already known to the applicant. In accordance with that concession (which, in my view, was correctly made), I find that the matter which was not highlighted on the copy of pages 145-147 forwarded to the QCSC as an attachment to the Deputy Information Commissioner's letter to the QCSC dated 11 September 1996, is not exempt from disclosure to the applicant under the FOI Act. The QCSC should arrange to give the applicant access to that matter, if it has not already done so.

14. By letter dated 13 November 1996, the applicant lodged a submission in reply to the respondent's submission dated 14 October 1996. I should note that, in that letter, the applicant accepted advice from this office (based on inquiries made by my staff) that a 'sufficiency of search' issue raised by the applicant was not within my jurisdiction in the current review because the particular documents he was seeking were contained on his SOTP (Sexual Offenders Treatment Program) file, and not on either of the files the subject of his FOI access application dated 18 October 1994.

Matter remaining in issue

15. Thus, the matter which remains in issue in this review is as follows:

(a) Pages 145-147

Pages 145-147 comprise a letter dated 28 March 1994 to the then Attorney-General from Mr Austin, the Principal of the Gordonvale State High School, and another individual. The applicant is aware that the QCSC has possession of a letter of that date from Mr Austin, since it is mentioned in a statement of reasons for decision, dated 25 January 1995, given under s.32 of the *Judicial Review Act 1991* Qld by Mr B Lingard, General Manager of the Moreton Correctional Centre, in respect of a decision not to grant the applicant a reduction in security classification from medium to low. Apart from the matter referred to in paragraph 13 above, the balance of the matter in pages 145-147 is claimed by the QCSC to be exempt matter under s.46(1)(a) and s.46(1)(b) of the FOI Act.

(b) Page 148

Page 148 comprises a letter from Mr D Wells, the then Minister for Justice, Attorney-General and Minister for the Arts, to Mr P Braddy, the then Minister for Police and Minister for Corrective Services. The QCSC agreed to release page 148 to the applicant, subject to the deletion of some matter which identifies the co-author of folios 145-147, and which is claimed by the QCSC to be exempt matter under s.46(1)(a) and s.46(1)(b) of the FOI Act.

(c) Page 151

Page 151 comprises a letter dated 15 July 1994 to the General Manager of the Moreton Correctional Centre from the family (hereinafter referred to as the "concerned family") of a youth in respect of whom the applicant was convicted of committing sexual offences. The QCSC agreed to give the applicant access to the first paragraph of page 151, but it claims that the balance of the document is exempt matter under s.44(1) of the FOI Act.

Page 151: application of s.44(1) of the FOI Act

16. Section 44(1) and s.44(2) of the FOI Act provide:

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

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

18. In my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227), I identified the various provisions of the FOI Act which employ the term "personal affairs", and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) as it appears in the FOI Act (see pp.256-267, paragraphs 79-114, of *Re Stewart*). In particular, I said that information concerns the "personal affairs of a person" if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:

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

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

20. I am satisfied from my examination of the matter remaining in issue in page 151 that it can only properly be characterised as information concerning the personal affairs of the members of the concerned family, which is inextricably interwoven with information concerning the personal affairs of the applicant. I analysed the considerations applicable to matter which concerns "shared personal affairs" in my reasons for decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp. 343-345, paragraphs 172-178. All of that analysis is relevant for present purposes, but I will confine myself to reproducing what I said at paragraph 176 of *Re "B"*:

176. *Thus, if matter relates to information concerning the personal affairs of another person as well as the personal affairs of the applicant for access, then the s.44(2) exception to the s.44(1) exemption does not apply. The problem here arises where the information concerning the personal affairs of the applicant is inextricably interwoven with information concerning the personal affairs of another person. The problem does not arise where some document contains discrete segments of matter concerning the personal affairs of the applicant, and discrete segments of matter concerning the personal affairs of another person, for in those circumstances:*

(a) the former will fall within the s.44(2) exception;
(b) the latter will be exempt under s.44(1) (unless the countervailing public interest test applies to negate the prima facie ground of exemption); and
(c) s.32 of the FOI Act can be applied to allow the applicant to have access to the information concerning the applicant's personal affairs, by the provision of a copy of the document from which the exempt matter has been deleted.

Where, however, the segment of matter in issue is comprised of information concerning the personal affairs of the applicant which is inextricably interwoven with information concerning the personal affairs of another person, then:

(a) severance in accordance with s.32 is not practicable;
(b) the s.44(2) exception does not apply; and
(c) the matter in issue is prima facie exempt from disclosure to the applicant according to the terms of s.44(1), subject to the application of the countervailing public interest test contained within s.44(1).

(I should pause at this point to observe that I am analysing the situation according to a strict application of the exemption provisions, which I am bound to do by virtue of s.88(2) of the FOI Act. At the primary decision-making stage, and on internal review, an agency or Minister has the benefit of the discretions reserved by s.28(1) and s.14(b) of the FOI Act, which allow access to be given to matter even if it is technically exempt matter. Where it is clear by reason of the relationship or interaction between the applicant and the other person that the information concerning the personal affairs of the other person is such that it would be known to the applicant in any event or that its disclosure to the applicant would not be likely to be objected to by the other person, then it would appear to serve no useful purpose to exercise the discretion to grant or withhold access to exempt matter otherwise than in favour of disclosure to the applicant. This is particularly so if the other person is contacted, pursuant to s.51 or otherwise, and raises no objection to release of the information, either generally or to the particular applicant for access.)

21. Applying those principles to the matter remaining in issue, I find that—

(a) severance, in accordance with s.32 of the FOI Act, of information which merely concerns the personal affairs of the applicant, is not practicable;
(b) hence, the s.44(2) exception does not apply; and
(c) the matter in issue is *prima facie* exempt from disclosure to the applicant according to the terms of s.44(1), subject to the application of the public interest balancing test which is incorporated in s.44(1) of the FOI Act.

22. In the application of the public interest balancing test (as to the general approach to be adopted in that exercise, see *Re Brack and Queensland Corrective Services Commission* (1994) 1 QAR 414 at pp.423-424, paragraphs 43-44), the applicant is entitled to whatever assistance can be obtained from s.6 of the FOI Act, which provides:

> ***6.*** *If an application for access to a document is made under this Act, the fact that the document contains matter relating to the personal affairs of the applicant is an element to be taken into account in deciding -*
>
> *(a) whether it is in the public interest to grant access to the applicant; and*
>
> *(b) the effect that the disclosure of the matter might have.*

23. I also consider that there is a public interest in a prisoner having access to documents relevant to his or her incarceration and security classification (see *Re Brack* at p.425, paragraph 45). Similarly, there is a public interest in an individual being afforded access to the substance of allegations adverse to that individual with a view to enabling that individual to present his or her case in respect of the allegations made. I note, however, that it is apparent on the material before me (and conceded in paragraphs 174 and 175 of the applicant's written submission dated 8 August 1996) that the substance of the information in issue on page 151, which is adverse to the applicant, has already been disclosed to the applicant by QCSC officers in the course of taking action in respect of the concerns expressed in page 151. In my opinion, this means that the second public interest consideration referred to in this paragraph does not carry any substantial weight in favour of disclosure to the applicant, in the particular circumstances of this case.

24. In his written submission dated 8 August 1996, the applicant has argued to the contrary, asserting that the extent of the disclosure that has been made to him diminishes the weight of the privacy interest to be protected, at least so far as disclosure to the applicant is concerned. However, the consequences of disclosure of information under the FOI Act are, with few exceptions, to be evaluated as if disclosure were to any person (or, as is sometimes said, to 'the world at large'), there being no restriction (apart from any imposed by the general law) on the use or further dissemination, by an applicant for access, of information obtained under the FOI Act. Thus, for example, in the present case, the concerned family must be taken to have implicitly authorised the disclosure to the applicant of the substance of their complaint, as it would have been impractical for QCSC officers to take action in respect of their complaint without doing so. However, the concerned family has made it clear that they would regard it as a gross invasion of their privacy (with respect to their identities and the nature of their complaint) for a copy of page 151 to be given to the applicant under the FOI Act, with no restriction on its further use or dissemination by the applicant.

25. The nature of the privacy interest weighing against disclosure of the information in page 151 about the personal affairs of the concerned family is, in my opinion, a very strong one. There is a very strong public interest in protecting the privacy of victims of crime and their families, especially in circumstances where the victim was a minor and the crime was of a sexual nature. The public policy considerations favouring protection of privacy in such circumstances are strongly entrenched in our law, and reflected in legislation such as the *Criminal Law (Sexual Offences) Act 1978* Qld.

26. I am not satisfied that any of the public interest considerations referred to above, or raised by the applicant in his written submissions, are sufficiently strong, either individually or in aggregate, to outweigh the public interest in protecting the privacy of the information about the personal affairs of the concerned family which remains in issue on page 151. I am unable to find that disclosure to the applicant of the matter remaining in issue on page 151 would, on balance, be in the public interest. I must therefore find that the matter remaining in issue on page 151 is exempt matter under s.44(1) of the FOI Act.

Pages 145-147 and page 148: application of s.46(1)(a) of the FOI Act

27. I will deal with these two documents together, as the same provisions of the FOI Act are relied upon in respect of each document, and the issue of confidentiality of identity, which is the only issue raised in respect of the matter in issue on page 148, is also raised in respect of pages 145-147.

28. Section 46 of the FOI Act provides:

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

29. Section 41(1) of the FOI Act provides:

> ***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.*

Consideration of s.46(2)

30. At p.292 (paragraph 35) of my reasons for decision in *Re "B"*, I explained that s.46(2) is generally the logical starting point for the application of s.46 of the FOI Act:

> *35. FOI administrators who approach the application of s.46 should direct their attention at the outset to s.46(2) which has the effect of excluding a substantial amount of information generated within government from the potential sphere of operation of the s.46(1)(a) and s.46(1)(b) exemptions. Subsection 46(2) provides in effect that the grounds of exemption in s.46(1)(a) and s.46(1)(b) are not available in respect of matter of a kind mentioned in s.41(1)(a) (which deals with matter relating to the deliberative processes of government) unless the disclosure of matter of a kind mentioned in s.41(1)(a) would found an action for breach of confidence owed to a person or body outside of the State of Queensland, an agency (as defined for the purposes of the FOI Act), or any official thereof, in his or her capacity as such an official. Section 46(2) refers not to matter of a kind that would be exempt under s.41(1), but to matter of a kind mentioned in s.41(1)(a). The material that could fall within the terms of s.41(1)(a) is quite extensive (see* Re Eccleston *at paragraphs 27-31) and can include for instance, material of a kind that is mentioned in s.41(2) (a provision which prescribes that certain kinds of matter likely to fall within s.41(1)(a) are not eligible for exemption under s.41(1) itself).*

31. The breadth of what might be encompassed in the phrase "deliberative processes involved in the functions of government" in s.41(1)(a) of the FOI Act was examined in my reasons for decision in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60, in particular at pp.70-71, paragraphs 27-31. Although he is, necessarily, without the benefit of seeing the matter in issue in pages 145-147, the applicant has submitted that it must comprise information of a kind mentioned in s.41(1)(a) of the FOI Act. The QCSC, on the other hand, has submitted that it is clear from the terms of the document itself that it does not answer the description in s.41(1)(a), but is properly to be characterised as a complaint by concerned citizens in relation to a decision already made, by the courts exercising a judicial function.

32. I doubt that the matter remaining in issue in pages 145-147 is matter of a kind mentioned in s.41(1)(a) of the FOI Act. It is clear on the material before me that there was no government deliberative process in train or in contemplation, in the course of which, or for the purposes of which, the matter in issue on pages 145-147 was obtained, prepared or recorded, at least not by anyone acting in an official capacity on behalf of government. It appears that a number of people wished to express their outrage/concern/indignation at the decision of the Queensland Court of Appeal (and some of the stated reasons for it) to reduce the sentence initially imposed on the applicant upon his conviction. They sought an audience with the then Attorney-General, and were asked by members of the Attorney-General's staff to put their concerns in writing beforehand, as a basis for discussion at the meeting. Although a senior representative of the government agreed to meet representatives of the concerned citizens to hear their views, those views were not solicited for the purposes of any government deliberative process.

33. No doubt much unsolicited opinion/advice *et cetera* is received by government without any deliberative process being set in train because of its receipt. I doubt that the supply of unsolicited opinion/advice *et cetera* to government, with the desire or intention (on the part of the supplier) of initiating a government deliberative process, is sufficient to characterise the unsolicited opinion/advice *et cetera* as having been prepared for the purposes of the deliberative processes involved in the functions of government. On the other hand, some unsolicited opinion/advice *et cetera* received by government may prompt, or subsequently be taken into account in, a deliberative process involved in the functions of government. It is a difficult question as to whether, in those circumstances, the opinion/advice *et cetera* can be properly characterised (*ex post facto*, as it were) as having been prepared for the purposes of a deliberative process involved in the functions of government.

34. In the present case, there is no need for me to express a considered view on that issue because of the decision I have reached on the application of s.46(2)(a)(iii) of the FOI Act. In that regard, the applicant has submitted (at p.6 of his written submission dated 8 August 1996) that the matter in issue in pages 145-147 was written by Mr Austin in his capacity as an officer of an agency, *viz*, the Principal of Gordonvale State High School:

> *In his role as Principal of the Gordonvale State High School he accepted information from individuals in the local community and chose to act on that information having seen some need for collective and representative action based on his perspective of the problem. The concerns involved only students at the school and their families, and arose from the behaviour of a teacher under his jurisdiction ….*

(The applicant is aware that the letter comprised in pages 145-147 was co-authored by another person, and Mr Austin. The applicant suspects that the co-author was the Deputy Principal of Gordonvale State High School. Since the identity of the co-author is claimed to be exempt matter, I cannot disclose it in these reasons for decision (see s.87 of the FOI Act). I merely observe that, if the co-author were the Deputy Principal, the comments which follow about Mr Austin would apply equally to the Deputy Principal. And if the co-author were not an officer of an agency, there would be no basis for s.46(2) to operate so as to exclude the application of s.46(1)(a) of the FOI Act.)

35. I do not doubt that Mr Austin had a role to play, in his official capacity, in the investigation of the applicant's improper behaviour, and in dealing with its consequences and effects on the school community. However, I do not accept that any communication made by Mr Austin,

that touched on the applicant's criminal charges and their aftermath, was necessarily made in Mr Austin's capacity as an officer of the Department of Education. Outside of his performance of the duties required of him in his office as Principal of Gordonvale State High School, Mr Austin retained all the rights of a citizen in a representative democracy, including the right to approach one of the citizens' elected representatives to raise matters of concern.

36. Some of the difficulties raised by the application of s.46(2)(a)(iii) of the FOI Act are illustrated in *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at pp.332-338. On the question of the proper interpretation of s.46(2)(a)(iii), I said in *Re Pemberton* (at p.333, paragraph 71):

> *The phrase "a person in the capacity of …an officer of an agency" was clearly, in my opinion, intended to distinguish acts done by a person who is an officer of an agency (as that word is defined in s.8 of the FOI Act), in his or her capacity as such an officer (i.e., acts done for and on behalf of the person's employing agency, in the course of performing his or her duties of office) from acts done by the person in other capacities, e.g., in a purely private or personal capacity.*

37. The fact that Mr Austin forwarded the letter in issue on the letterhead of Gordonvale State High School, and described himself in the signature block as Principal, tends to support the applicant's contention (set out in paragraph 34 above). However, I am satisfied from my examination of the contents of the letter that it was not forwarded for and on behalf of Mr Austin's employing agency, the Department of Education, in the course of performance of Mr Austin's duties of office. I consider that the making of representations of the kind contained in folios 145-147 could not have formed any part of Mr Austin's duties of office as Principal of Gordonvale State High School. The use of official letterhead, and the reference to his position as Principal, may have been intended by Mr Austin to indicate that he was a person of some standing in the local community, or to indicate the capacity in which he acquired relevant knowledge of the applicant's case, but the nature of the concerns and representations put in the letter are such that they must have been put in the capacity of a concerned private citizen, or at least in some capacity other than that of an officer discharging his duties of employment for and on behalf of the Department of Education.

38. Thus, whether or not the matter remaining in issue in pages 145-147 is matter of a kind mentioned in s.41(1)(a) of the FOI Act, I am satisfied that s.46(2) does not operate so as to exclude the application of s.46(1)(a) of the FOI Act, since, if disclosure of the matter in issue would found an action for breach of confidence, it would be a confidence owed to persons other than persons in the capacity of officers of an agency.

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

39. In *Re "B"*, I considered in detail the elements which must be established in order for matter to qualify for exemption under s.46(1)(a) or s.46(1)(b) of the FOI Act. The test for exemption under s.46(1)(a) is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency or minister faced with an application, under s.25 of the FOI Act, for access to the information in issue (see *Re "B"* at pp. 296-7, paragraph 44). In this case there are two identifiable plaintiffs, namely, Mr Austin, and the co-author of pages 145-147.

40. To found an action in equity for breach of confidence, there are five cumulative criteria which must be satisfied:

    (a) it must be possible to specifically identify the information in issue, in order to establish that it is secret, rather than generally available information (see *Re "B"* at pp.303-304, paragraphs 60-63);

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

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

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

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

Criterion (a)

41. With respect to criterion (a), I am satisfied that the information claimed to be confidential can be specifically identified. It consists of the contents of pages 145-147 (apart from the matter which is no longer in issue because the QCSC has conceded that it is not confidential information *vis-à-vis* the applicant: see paragraph 13 above), the identity of the co-author of pages 145-147, and identifying references to that co-author which appear in folio 148.

Criterion (b)

42. In relation to criterion (b), I note that, in his statement of reasons under the *Judicial Review Act* (see paragraph 15 above), the General Manager of the Moreton Correctional Centre listed pages 145-147 amongst the material taken into account in making his decision, as follows:

> *Correspondence dated 28 March 1994 from Mr T W Austin, Principal of Gordonvale State High School, regarding concerns involving Mr Mentink's attempts to maintain contact with his victims.*

43. The applicant also has knowledge of the following statement, in a memorandum dated 20 September 1994 concerning the applicant, which was written by Mr Kevin Corcoran, Director, Custodial Corrections, to the General Manager, Moreton Correctional Centre:

> *I bring to your attention the specific concerns raised by Management of Gordonvale State High School, with regard to inmate Mentink's persistence in maintaining unwanted contact with his victims and their families.*

44. After considering the applicant's written submissions and reviewing the other material available to me, I am satisfied that the two passages quoted above represent the extent of the knowledge which the applicant has of the contents of the matter remaining in issue in pages 145-147. The applicant is thus aware that concerns were raised about the applicant attempting to maintain contact with "his victims and their families". He does not know the nature or detail of the concerns raised. It is clear from my examination of pages 145-147 that, in the context of the letter as a whole, those concerns constituted a merely subsidiary issue - they were addressed in one sub-paragraph of four lines on page 146, and one paragraph of four and a half lines on page 145.

45. In light of the information concerning the content of page 145-147 which has already been disclosed to the applicant, I find that the following segments of matter are not confidential information *vis-à-vis* the applicant, and hence cannot qualify for exemption under s.46(1)(a) or s.46(1)(b) of the FOI Act:

- the first sentence of sub-paragraph 5d on page 146; and
- the first two sentences of the second paragraph on page 145.

46. I find that the balance of the matter remaining in issue on pages 145-147, including the identity of the co-author (which is also in issue on page 148), comprises information that is not known to the applicant and has the requisite degree of secrecy/inaccessibility, such that criterion (b) set out in paragraph 40 above is satisfied.

47. With respect to paragraph 55 of the applicant's written submissions dated 8 August 1996, I am satisfied that the further disclosure of pages 145-147 which has occurred since they were initially forwarded to the Attorney-General has been for limited purposes of an official nature, and there has certainly not been disclosure to a degree which would warrant a finding that the matter in issue in pages 145-147 has lost its quality of confidence.

Criterion (c)

48. The application of criterion (c) (set out in paragraph 40 above) turns on an evaluation of the whole of the relevant circumstances attending the communication of the matter in issue, including (but not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and the circumstances relating to its communication such as those referred to by a Full Court of the Federal Court of Australia in *Smith Kline and French Laboratories (Aust) Limited and Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at pp.302-303: see *Re "B"* at p.316 and pp.314-316; paragraphs 84 and 82.

49. I accept the evidence of Mr Austin (which the applicant is not in a position to contradict) that express assurances were given by staff of the then Attorney-General that the letter (pages 145-147) they requested in preparation for the meeting with the then Attorney-General, and representations made at that meeting, would be treated in confidence. Even if there were no evidence of express assurances of confidence, I consider that the nature and sensitivity of the information communicated, and the circumstances attending its communication, were such as to warrant a finding that there must have been an implicit mutual understanding that the information communicated was to be treated in confidence. In particular, I am satisfied that it would have been understood by the Minister and his staff that any information received from citizens that could be perceived as detrimental to the interests of a convicted criminal was to

be treated in confidence and with the utmost circumspection, having regard to the potential for a convicted criminal to seek to pursue retributive action. (I do not mean those remarks to reflect on the applicant personally, I merely mean to convey that confidential treatment to minimise that risk/potential would be understood as necessary, as a matter of course, without attempting to assess whether a particular convicted criminal was or was not likely to seek to pursue retributive action). There would, in my view, be a necessary or implicit exception to the understanding that confidential treatment was required, but that would arise only in circumstances where, if action were to be taken on the concerns initially communicated in confidence, the general law (for example, the common law requirements of procedural fairness) required disclosure of certain information to the convicted criminal (*c.f. Re McCann and Queensland Police Service* (Information Commissioner Qld, Decision No. 97010, 10 July 1997, unreported) at paragraphs 57-58).

50. In his written submissions, the applicant has relied heavily on that exception, and on my decision in *Re Coventry and Cairns City Council* (Information Commissioner Qld, Decision No. 96003, 3 April 1996, unreported). In *Re Coventry*, the letter in issue had been provided in confidence with the clear aim, on the part of the provider, of prompting action to terminate Mr Coventry's employment. Moreover, it was clear on the evidence before me in *Re Coventry* that the action subsequently taken to terminate Mr Coventry's employment was based, at least in part, on the information contained in the letter in issue. In those circumstances, I found that equity would not have restrained the disclosure to Mr Coventry of the substance of the adverse information in the letter in issue, since it could not have been an unconscionable use by the respondent agency of the letter in issue to do with it what the common law requirements of procedural fairness clearly required (i.e., disclosure of the substance of the letter to Mr Coventry, to give him an opportunity to answer it, before taking action to terminate his employment).

51. The circumstances of the present case are materially different from *Re Coventry*. The obvious purpose of the authors of pages 145-147 was to seek to persuade the then Attorney-General to appeal against the decision of the Queensland Court of Appeal reducing the applicant's sentence. That did not occur, and therefore the applicant has suffered no detriment from the representations made in pages 145-147. Even if the then Attorney-General had been persuaded to commence legal proceedings to seek special leave to appeal to the High Court of Australia against the reduction of the applicant's sentence, the applicant would have been accorded full procedural fairness in the court proceedings, and the views expressed in pages 145-147 would have been irrelevant to the legal issues dealt with in any such court proceedings.

52. In my view, it would be rare indeed for the Crown to seek special leave to appeal to the High Court of Australia against an appellate court decision on a sentencing matter (though it is understandable that Mr Austin may not have appreciated this). I doubt therefore that that course of action was given much, if any, serious consideration. But either of the possible outcomes referred to in the preceding paragraph posed no difficulty or legal impediment to compliance with the express assurances of confidential treatment that were given to Mr Austin.

53. Having regard to all the relevant circumstances attending the communication of pages 145-147 to the then Attorney-General, I am satisfied that the Attorney-General and his staff became bound by an equitable obligation of confidence, which extended to any other

government officers or agencies to whom or to which pages 145-147 were disclosed for limited purposes of an official nature, but subject to the necessary/implicit exception stated in the last sentence of paragraph 49 above.

54. It is possible that the authors of pages 145-147 had a subsidiary purpose of initiating action by relevant authorities to prevent the applicant's attempts to maintain contact with his victims and their families. I tend to the view that if that had been their purpose, they would have written direct to the General Manager of the relevant prison, or the QCSC, or the Minister for Corrective Services. As I construe their letter comprised in pages 145-147, the reference to the applicant's attempts to maintain contact with "his victims and their families" was merely one factor which the authors wished to draw to the Attorney-General's attention as evidence to support their concerns at the reduction in the applicant's sentence. Nevertheless, the then Attorney-General appears to have regarded it as one matter on which some action could be taken, and it is clear from the non-exempt parts of page 148 that he forwarded a copy of pages 145-147 to the Minister for Corrective Services with the comment that: "… the Corrective Services Commission may be interested to have on file this information supplied concerning the post-conviction behaviour of a prisoner in your custody."

55. The QCSC, of course, has no responsibility for the investigation or prosecution of persons in respect of offences committed before they entered prison, or for the consideration, or conduct, of court appeals against a sentence imposed on a prisoner. The QCSC does have responsibility for the behaviour of prisoners in its custody, and their rehabilitation (including such matters as remissions and parole). The only information in pages 145-147 which is relevant to the QCSC's responsibilities is that which I identified in paragraph 44 above. It is the only information which refers to the applicant's post-conviction behaviour, and it is the only information which has been referred to in decisions made by QCSC officers which have been adverse to the applicant's interests.

56. On the material before me, it appears that the applicant has been informed of the substance of the information taken into account in making a decision adverse to his interests. However, in his statement of reasons under the *Judicial Review Act* (see paragraph 15 above), the General Manager of Moreton Correction Centre clearly stated that he had taken into account, in deciding not to reduce the applicant's security classification, the concerns stated in pages 145-147 involving the applicant's attempts to maintain contact with his victims. Those specific concerns do not appear to have been disclosed to the applicant, and, consistently with the approach taken in *Re Coventry* (see paragraph 50 above), once those specific concerns were taken into account in a decision adverse to the applicant's interests, I consider that the exception referred to in the last sentence of paragraph 49 above became operative, and equity would no longer enforce an obligation of confidence, as against the applicant, in respect of the specific concerns stated in pages 145-147 which were taken into account by the General-Manager of Moreton Correctional Centre in deciding not to reduce the applicant's security classification.

57. Therefore, I find that the following segments of the matter in issue no longer qualify for exemption under s.46(1)(a) or s.46(1)(b) (since the same necessary/implicit exception would apply equally to an express or implicit mutual understanding of confidence that fell short of the status of an enforceable equitable obligation of confidence: see *Re McCann* at paragraph 58) of the FOI Act—

- the second sentence of sub-paragraph 5d on page 146; and
- the last eighteen words (commencing from "…it is …") in the second paragraph on page 145.

58. I am satisfied that the balance of the matter remaining in issue on pages 145-147 was communicated in such circumstances as to fix the recipients of it (including the QCSC) with an equitable obligation of confidence, and hence that criterion (c) set out in paragraph 40 above is satisfied.

59. I note that my approach in arriving at these findings is consistent with the principles stated by Jenkinson J of the Federal Court of Australia in *Siddha Yoga Foundation Ltd v Strang and Department of Immigration and Ethnic Affairs* (Fed Ct of Aust, No. VG6 of 1995, Jenkinson J, 27 October 1995, unreported), a case which involved the application of the exemption provision in the *Freedom of Information Act 1982* Cth which corresponds to s.46(1)(a) of the Queensland FOI Act. Jenkinson J was hearing an appeal against a decision of the Commonwealth Administrative Appeals Tribunal in *Re Clare Strang and Anor and Department of Immigration and Ethnic Affairs, and Siddah Yoga Foundation* (1994) 36 ALD 449, in which an error of law was said to be evident in the following passage from the Tribunal's reasons for decision (at paragraph 81):

> *... it may be information relevant to the grant or refusal of a visa to enter Australia in which case, I am satisfied, there is no obligation of confidence because, as stated by Ms Skultety in her submission, the public interest and the responsibilities of a government require that the precise nature of relevant allegations be conveyed to a person likely to be affected by a decision so that he can answer them… . An obligation of confidence in those circumstances would inhibit or interfere with the Department's discharge of its statutory responsibilities.*

60. On appeal to the Federal Court, Jenkinson J. held that it was an error of law for the Tribunal to hold that no obligation of confidence of any kind can be imposed on the recipient of information imparted and received in the knowledge that disclosure of the information may in certain circumstances be required by law. The document in issue in that case was an unsolicited letter which stated that its object was to persuade the Minister to refuse Mr Nityananda entry into Australia. Jenkinson J. said (at p.8):

> *I accept the submission of the applicant that* [paragraph 81 of the Tribunal decision - quoted above] *demonstrates a failure by the Tribunal to appreciate the possible legal consequences of supplying information for a particular limited purpose. Plainly, the use of the document, and the information it contained, for that purpose might require that the document be disclosed to Mr Nityanasda and to representatives of his and to the public in the course of any public administrative or judicial review of a decision concerning his application to enter this country. <u>The scope of the obligation of confidence for which the applicant contended could not extend to inhibit disclosure of the document in those circumstances.</u>...[T]he question for the Tribunal's consideration therefore was what, if any, obligation of confidence the circumstances had imported which interdicted disclosure for a purpose <u>unconnected</u> with the administration of the law governing entry by Mr Nityananda into this country.* (my underlining).

61. I also find that criterion (c) is satisfied in respect of those identifying references to the co-author of pages 145-147 which appear in pages 145-147, and which comprise the matter remaining in issue on page 148. The decision of Yeldham J of the Supreme Court of New

South Wales in *G v Day* [1982] 1 NSWLR 24, is authority for the proposition that although a person's identity is ordinarily not information which is confidential in quality, the connection of a person's identity with the imparting of confidential information can itself be secret information capable of protection in equity (see paragraph 137 of my decision in *Re "B"*). Yeldham J said (at pp.35-6):

> *... passages in the speeches of their Lordships* [in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171] *support the view that the principles of equity which protect confidentiality should extend not only to the information imparted but also, where appropriate, to the identity of the person imparting it where the disclosure of that identity (as in the present case) would be a matter of substantial concern to the informant - see especially pp.218, per Lord Diplock; 228, 229, per Lord Hailsham of St Marylebone and 232, per Lord Simon of Glaisdale.*
>
> *... if a person is likely to suffer prejudice from the disclosure of his name, if no sound reasons of public interest or public policy exist why such disclosure should take place, and if he has obtained assurances of confidence in relation to his identity before imparting his information, I find no reason in principle why his identity should not be treated as confidential information in the same way as the material which he provides to the authorities.*

62. I am satisfied that the circumstances attending the communication of pages 145-147 to the then Attorney-General (as discussed at paragraphs 49-53 above) were such as to give rise to an equitable obligation of confidence that extended to the identities of the authors of pages 145-147. Mr Austin's identity as one author is no longer confidential (see paragraph 15 above), but there is no reason why the obligation of confidence which attached to the identity of the co-author should not continue to be respected. Disclosure of identity would still be to the detriment of the co-author in a not insubstantial way.

Criterion (d)

63. I have noted in paragraph 10 above that Mr Austin, and the co-author of pages 145-147, have informed me of their continued objection to the disclosure to the applicant of pages 145-147, and of the identity of the latter. Hence, I am satisfied that criterion (d) (set out in paragraph 40 above) is satisfied in respect of the matter remaining in issue on pages 145-147 and page 148.

Criterion (e)

64. I am also satisfied that detriment of one or more of the kinds referred to in paragraph 111 of *Re "B"* is likely to be occasioned to Mr Austin and his co-author if the matter remaining in issue on pages 145-147, and page 148, were to be disclosed.

65. The five criteria necessary to found an action in equity for breach of confidence are satisfied, and I therefore find that the matter remaining in issue on pages 145-147 and page 148 is exempt matter under s.46(1)(a) of the FOI Act.

66. I should note , finally, that the applicant's submissions (at pp.17-20 of his written submissions dated 8 August 1996) in which he seeks to invoke defences to an equitable action for breach of confidence are misconceived in legal terms (and perhaps also reflect mistaken assumptions

about the content of the matter in issue), and do not disclose any reasonable basis for a defence to an action for breach of confidence, in respect of the particular confidential information remaining in issue.

67. In light of my findings above, it is unnecessary for me to consider the application of s.46(1)(b) of the FOI Act.

DECISION

68. I vary the decision under review, in so far as it concerns pages 145-147, 148 and 151 of the applicant's Professional Management File, by finding that:

(a) apart from the first paragraph of the body of the letter, page 151 is exempt matter under s.44(1) of the FOI Act;

(b) in respect of page 148, the last 9 words of the first paragraph, and the last 17 words of the fourth paragraph, are exempt matter under s.46(1)(a) of the FOI Act; and

(c) in respect of pages 145-147, the matter identified in the findings stated in paragraphs 13, 45 and 57 above is not exempt from disclosure to the applicant under the FOI Act, but the balance of the matter contained in pages 145-147 is exempt matter under s.46(1)(a) of the FOI Act.

69. This finalises application for review No. S 64/95. I will forward a copy of this letter to the QCSC so that it can give effect to my decision.

Yours faithfully

[*original signed by*]

F N ALBIETZ
INFORMATION COMMISSIONER