OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 98004
Application S 101/95

Participants:

ANN PATRICIA HOLT
ERIN ACUSHLA REEVES
Applicants

EDUCATION QUEENSLAND
Respondent

ROSEMARY McNAUGHT
JAN DIERY
LYN MULLER
Third Parties

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - 'reverse FOI' application - matter in issue comprising audiotapes, and written notes, of meeting between school principal and parents concerning teacher behaviour - whether audiotapes, claimed to be the property of one of the parents, are "documents of an agency" as defined in s.7 of the *Freedom of Information Act 1992* Qld, and therefore subject to the application of that Act, while they remain in the physical possession of the respondent - words and phrases: the meaning of "possession", as used in the context of the definition of "document of an agency" in s.7 of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - 'reverse FOI' application - whether information communicated in meeting between school principal and parents was information of a confidential nature that was communicated in confidence - whether the effect of s.99 and s.103 of the *Public Service Management and Employment Regulation 1988* Qld was inconsistent with the existence of an understanding or obligation of confidence - application of s.46(1)(a) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.7, s.21, s.25, s.46(1)(a), s.46(1)(b), s.51(1),s.51(2)(e), s.81
Freedom of Information Act 1982 Cth s.4
Freedom of Information Act 1982 Vic
Public Service Management and Employment Regulation 1988 Qld s.99, s.103
Public Service Regulation 1997 Qld s.15, s.16(2)

DECISION

I set aside the decision under review (which is identified in paragraph 5 of my accompanying reasons for decision). In substitution for it, I decide that—

(a) the audiotapes in issue fall within the definition of "document of an agency" in s.7 of the *Freedom of Information Act 1992* Qld, and are subject to the application of that Act while they remain in the physical possession of the respondent; and

(b) the matter in issue (which is identified in paragraph 13 of my accompanying reasons for decision) is exempt matter under s.46(1)(a) of the *Freedom of Information Act 1992* Qld.

Date of decision: 20 April 1998

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INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. This is a 'reverse-FOI' application by the applicants who object to the respondent's decision to grant the third parties access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to audiotape recordings, and written notes, of a meeting between the applicants and the Principal of Fig Tree Pocket State School ("the School"). The applicants contend that the audiotapes are not the property of the respondent, and so are not "documents of an agency" for the purposes of the FOI Act. They further contend that the meeting was a confidential meeting and that, to the extent that the FOI Act applies to them, the written and taped records of the meeting are exempt matter under s.46(1) of the FOI Act.

2. On 6 February 1995, the Principal of the School, Mr Waldron, held a meeting with three parents of children attending the School - Mrs Holt, Mrs Reeves and Mrs London.
(Mrs London originally was an applicant for external review, but subsequently withdrew from the review. For ease of reference, I will use the word "applicants" to describe all three parents up to the time of Mrs London's withdrawal, and the remaining two parents thereafter.)

3. At the time of the meeting, the third parties were teachers at the School. By letter dated 13 February 1995, the third parties applied to the respondent (then known as the Department of Education, and hereinafter referred to as "the Department") under the FOI Act, for access to audiotape recordings and written notes of the meeting. The third parties stated that they believed that allegations against them were made at the meeting, and that the meeting had been taped, the tapes currently being in the possession of Mr Waldron. Further, the third parties stated that they believed that Mr Waldron had made written notes of the meeting.

4. By letters dated 15 March 1995, the Department consulted with each of the applicants, in accordance with s.51(1) of the FOI Act, to ascertain whether they objected to disclosure of the tapes and notes of the meeting. Each of the applicants objected to disclosure of that material. On 5 April 1995, contrary to the applicants' views, Mr E Spring of the Department decided that the tapes and notes did not comprise exempt matter under the FOI Act, and that access to them should be granted.

5. By letter dated 18 April 1995, Mrs Holt, on behalf of each of the applicants, applied for internal review of Mr Spring's decision. Mr P Parsons of the Department conducted the internal review, and, by letter dated 5 May 1995, informed the applicants that he had decided to affirm Mr Spring's decision.

6. By letter dated 30 May 1995, the applicants applied to me for review, under Part 5 of the FOI Act, of Mr Parsons' decision. The applicants asserted that the tapes belonged to one of them (Mrs Holt), that the meeting had been taped at their instigation, and that the tapes had been loaned to Mr Waldron subsequent to the meeting, to allow him to review and expand upon the written notes he had made, but on the condition that he return the tapes. The applicants enclosed statutory declarations by each of them, attesting to the matters summarised in the preceding sentence. They also enclosed copies of letters sent to the Principal, Mr Waldron, and to Mr Parsons, by a firm of solicitors retained by Mrs Holt, demanding the return of the audiotapes which were asserted to be the property of Mrs Holt. The applicants disputed that the tapes were "documents of an agency" within the meaning of s.7 of the FOI Act. They also asserted that they had been expressly promised confidential treatment of the information conveyed to the Principal.

External review process

7. I obtained copies of the matter in issue from the Department, and a copy of a statutory declaration by Mr Waldron dated 28 April 1995. On 3 August 1995, I wrote to the third parties to inform them of the review. Each of them applied for, and was granted, status as a participant in the review.

8. On 22 August 1995, Mrs London attended at my office to give a statement to one of my investigative officers, concerning the meeting with Mr Waldron, the taping of that meeting, and what occurred with the audiotapes thereafter. The statement was typed and forwarded to Mrs London for execution. Mrs London was advised that once her statement was finalised, it would be forwarded to the other two applicants, Mrs Holt and Mrs Reeves, and that, in the event that they were in agreement with the contents of Mrs London's statement, I would not require them to provide separate statements.

9. However, Mrs London did not sign and return her statement, and some time later, she indicated to my office that she wished to withdraw her application for external review. The Deputy Information Commissioner then contacted the other two applicants, Mrs Holt and Mrs Reeves, to ascertain whether they wished to continue to object to disclosure of the tapes and notes. Both advised that they wished to continue with their objections.

10. By letter dated 7 February 1997, I wrote to the applicants (now Mrs Holt and Mrs Reeves) to advise them of the preliminary views which I had formed with respect to the disclosure of the tapes and notes. In the event that they disagreed with my preliminary views, I invited the applicants to lodge submissions and/or evidence in support of their contentions. The applicants did not respond, nor did they reply to a further letter from my Office, which requested a response by no later than 12 March 1997.

11. By letter dated 18 April 1997, the Department was invited to lodge a written submission and/or evidence in support of its decision that the matter in issue was not exempt under s.46(1) of the FOI Act, and a number of issues were raised for the Department's consideration.
The Department provided a response dated 20 May 1997, together with a statutory declaration by Mr Waldron dated 16 May 1997, and a statutory declaration by Ms Joyce Gray dated 14 May 1997. Ms Gray was the officer responsible for carrying out, on behalf of the Department, a formal investigation into the dispute at the School. Copies of that material were forwarded to the third parties, who were invited to respond. Messrs Hill & Taylor, solicitors, responded on behalf of the third parties with a written submission dated
27 June 1997. That submission acknowledged that the third parties were not in a position to submit any evidence on the key issues for my determination, and indicated that the third parties were prepared to acquiesce in the Department's submissions dated 20 May 1997. The solicitors for the third parties took the opportunity to address submissions on issues of general principle said to be relevant to this case.

12. Copies of the Department's submission and the third parties' submission were then forwarded to the applicants, and a copy of the third parties' submission was forwarded to the Department.

Matter in issue

13. The matter in issue in this external review consists of the following:

- Mr Waldron's notes of a meeting which the applicants attended at his office on 6 February 1995; and

- two audiotapes which record parts of the discussion which took place at the meeting.

14. The audiotapes reveal that the meeting was, for the most part, a general discussion of perceived problems at the School, largely revolving around behaviours of unnamed teachers.
The aim of the applicants was to seek an explanation from the Principal of the actions he would take to resolve those problems. The approach of the Principal was to suggest general strategies which might be adopted without singling out any teacher. During the latter part of the tapes, some references are made to specific instances of teacher behaviour. It is likely that a person with a reasonable knowledge of events occurring at the School at the relevant time, could discern the identities of teachers involved in those instances.

Issues for determination

15. Two issues have been raised for my consideration:

- whether the audiotapes are "documents of an agency" as defined in s.7 of the FOI Act, and hence subject to the application of the FOI Act; and

- whether the tapes, and Mr Waldron's notes, comprise exempt matter under s.46(1) of the FOI Act.

Are the audiotapes "documents of an agency"?

16. In my letter to the applicants containing my preliminary views, I advised them that the outcome of my decision with respect to the audiotapes would make no difference to the status of the eight pages of notes which comprise Mr Waldron's record of the meeting. The notes are clearly documents of an agency. Even if I were to determine that the tapes are not documents of an agency, the notes of the meeting would remain in issue.

17. On the evidentiary material available to me, there are significant gaps, and areas of inconsistency, regarding the ownership of the tapes and the circumstances under which they came into the possession of the Department. The evidentiary material available to me consists of:

- statutory declarations by Mr Rodney John Waldron dated 28 April 1995 and 16 May 1997
- a statutory declaration by Ms Joyce Gray dated 14 May 1997
- a statutory declaration by Ann Patricia Holt dated 31 May 1995
- a statutory declaration by Erin Acushla Reeves dated 31 May 1995
- a statutory declaration by Laura London dated 31 May 1995
- a draft statement by Laura London (unsigned, and undated) prepared by a member of my staff during an interview with Ms London
- letter of demand from Thynne and Macartney, Solicitors (acting on behalf of Mrs Holt), to Mr Waldron, dated 16 May 1995.

18. The state of the evidence is such that the Department frankly admitted, in its written submission dated 20 May 1997, that it could not be sure whether the two audiotapes in its possession, which it has identified as falling within the terms of the relevant FOI access application (and were then being held by the Department's Freedom of Information and Judicial Review Unit), were the original tapes owned by Mrs Holt, or copies made by the Department. If it were necessary for the purposes of my review to determine the question of legal ownership of the two audiotapes in the possession of the Department, I would have found it necessary to convene an oral hearing to assess the reliability of the recall of various witnesses, and test aspects of their evidence. However, I do not consider it necessary to resolve that issue, because, if I proceed on the assumption that the material lodged on behalf of the applicants is correct, I consider that the audiotapes are still "documents of an agency" (i.e., the Department) and subject to the application of the FOI Act, for so long as they remain in the physical possession of the Department. That issue turns on the correct interpretation of the term "document of an agency", which I have explained below. However, I should briefly refer to what is material in the evidence with respect to the issues I am obliged to determine in this review.

19. The applicants and Mr Waldron agree that the audiotapes used to record their meeting on 6 February 1995 were supplied by one of the applicants (the applicants say that the tapes were the property of Mrs Holt), and were taken away by the applicants after the meeting. Mrs Holt asserts that on 7 February 1995, Mr Waldron requested that he be allowed to borrow the tapes, and that on 8 February 1995 Mr Waldron came to Mrs Holt's home and took away the tapes on the express understanding that they would be returned as soon as possible. The letter of demand dated 16 May 1995 from Mrs Holt's solicitors to Mr Waldron states: "Our client instructs us that the tape recording in question ... is her property and that the tapes were lent to you for the purposes of copying/and or general access for subsequent verification." Thus, it appears that Mr Waldron was authorised to make copies of the tapes for his administrative purposes. However, Mr Waldron does not say that he made a copy of those tapes, nor what became of the ones borrowed from Mrs Holt. (Mr Waldron seems to believe that the original tapes remained in the possession of Mrs Holt, and that Mrs Holt made copies of them which came into the possession of the Department.) Ms Gray says that she was given what she understood to be a copy of an original tape held by Mrs Holt, and that she (Ms Gray) made no further copies.

20. Accepting Mrs Holt's account of events, at the time of lodgment of the relevant FOI access application (13 February 1995), the audiotapes she had loaned to Mr Waldron were (and apparently still remain) documents in the possession of the Department, having been received in the Department when they came into the possession of Mr Waldron in his official capacity

as an officer of the Department. (It appears that they subsequently came into the possession of Ms Gray in her official capacity as an officer of the Department, and that they are now in the possession of the Department's Freedom of Information and Judicial Review Unit.) On that basis, the audiotapes were (and remain) documents of an agency (i.e., the Department) which are subject to the application of the FOI Act, in accordance with the definition of the term "*document of an agency*" in s.7 of the FOI Act:

> *"**document of an agency**" or "**document of the agency**" means a document in the possession or under the control of an agency, or the agency concerned, whether created or received in the agency, and includes—*
>
> *(a) a document to which the agency is entitled to access; and*
>
> *(b) a document in the possession or under the control of an officer of the agency in the officer's official capacity;*

21. I consider that the word "possession" in the above definition is properly to be construed as meaning physical possession, rather than legal possession (i.e., possession based on legal ownership of property in a document). I note that a contrary view was expressed by Jones J (President) of the Victorian Administrative Appeals Tribunal in *Re Birrell and Victorian Economic Development Corporation* (1989) 3 VAR 358 at pp.376-377, where Jones J, interpreting the word "possession" in the corresponding definition in the *Freedom of Information Act 1982* Vic (the Victorian FOI Act), said that: "... a situation could arise where an agency has mere custody of documents that would not amount to possession and therefore the documents would not be subject to the FOI Act...". Jones J was construing a definition of "document of an agency" which (unlike the corresponding definition in s.7 of the Queensland FOI Act) did not include the words "or [a document] under the control of an agency" and "a document to which the agency is entitled to access". It is clear from the full context of his decision that Jones J was concerned to establish that an agency could not defeat the application of the FOI Act merely by parting with physical possession of documents. By interpreting "possession" as meaning "...legal or constructive possession: that is the right and power to deal with the document in question", Jones J closed the door on that avenue for potential avoidance of the application of the Victorian FOI Act. A necessary incident of his interpretation, however, was that documents in the physical possession, but not the legal possession, of an agency were not subject to the application of the Victorian FOI Act.

22. However, I consider that an interpretation which excludes, from the ambit of the word "possession", documents of which an agency merely has custody, or physical possession without legal possession, is too difficult to reconcile with the presence in the relevant definition of the words "whether ... received in the agency", which, according to their natural and ordinary meaning, are apt to include documents that are merely in the physical possession of an agency. In my view, mere physical possession of documents by an agency is sufficient to make them "documents of an agency" for the purposes of the FOI Act. I consider that the interpretation (and supporting analysis) of the word "possession" in the definition of "document of an agency" in s.4 of the *Freedom of Information Act 1982* Cth (the Commonwealth FOI Act) given by Mr Bayne (Senior Member) of the Commonwealth Administrative Appeals Tribunal in *Re Sullivan and Department of Industry, Science and Technology* (1996) 23 AAR 59, at pp.66-69, is more logically compelling than that adopted in *Re Birrell*. Given that the 'mischief' which Jones J was concerned to avoid in *Re Birrell* has already been excluded by the presence of the words "or [a document] under the control of an agency" and "a document to which the agency is entitled to access" in the definition of "document of an agency" in s.7 of the Queensland FOI Act, I consider that the interpretation adopted in *Re Sullivan* is to be preferred, and should be followed,

in construing the word

"possession" in the definition of "document of an agency" in s.7 of the Queensland FOI Act. In *Re Sullivan*, the Tribunal held that it was not appropriate to draw a distinction between situations where an agency merely has custody of a document, and where it has legal possession. In the definition of "document of an agency", the word "possession" means physical possession.

23. Applying that analysis to the documents in issue, it is clear that (a) the tapes are in the physical possession of the Department and (b) the tapes were received by Mr Waldron (an officer of the Department) in the performance of his official duties as Principal of the School. It is my view that, regardless of who owns the tapes, they are presently "documents of an agency" within the meaning of s.7 of the FOI Act, and they will be subject to the application of the FOI Act for so long as they remain in the possession of the Department.

24. The interpretation which I have endorsed may create problems of a practical nature for FOI administrators in some (probably comparatively rare) instances in which the documents subject to a valid FOI access application include documents, legally owned by a private citizen or corporation, which are in the temporary custody of an agency which is subject to the application of the FOI Act. An authorised FOI decision-maker may have to take into account the prospects of the documents being returned to their legal owners on request, or in the ordinary course of an agency's dealing with documents of that kind (e.g., commercial agreements lodged with the Office of State Revenue for assessment and payment of duty, and thereafter returned to the lodging party: see *Re Myers and Queensland Treasury* (1995) 2 QAR 470 at pp.482-483, paragraphs 51-52) or the prospects of the legal owners exercising their rights to reclaim physical possession of the documents, prior to the time at which a decision on access is required to be given, or prior to the time at which access is to be given in accordance with an agency decision to grant access. Nevertheless, if the documents are still in the physical possession of the relevant agency at those times, then I consider that the documents must be dealt with in accordance with the provisions of the FOI Act. The contingency I have referred to may have to be allowed for, for example, in advice given to the applicants about the granting of access and arrangements for obtaining access. (I do not mean to suggest that every owner of a document in the temporary custody of a government agency is likely to require its return on learning that it has been the subject of an FOI access application. If the document has no particular sensitivity for its owner, there is not likely to be any objection to disclosure to an interested member of the public.)

25. I do not consider that the right of access to documents of an agency conferred by s.21 of the FOI Act was intended to interfere, or should be construed as interfering, with *bona fide* property rights of a private citizen or corporation in a document that has been placed in the temporary custody of a government agency (*cf.* D C Pearce and R S Geddes, Statutory Interpretation in Australia, 3rd ed. 1988, at pp.102-103). Thus, for example, I do not consider that an agency is required to withhold a document from its lawful owner (assuming the lawful owner has given notice requiring the return of the document) merely for the purpose of permitting an applicant for access under the FOI Act to obtain access to the document.
However, if an agency is not satisfied that legal ownership of a document, which is subject to a valid access application under the FOI Act, vests in a private citizen or corporation purporting to require the return of the document (or, indeed, if an agency is not satisfied that the legal owner of a document has a present entitlement to possession as against the agency, for example, where the agency has a legal entitlement to retain custody of documents owned by others while the agency undertakes certain functions), then I consider that the agency should not part with possession of the document, as to do so may defeat the "legally enforceable right" of access to documents of an agency (including documents in the physical possession of an agency) which Parliament has seen fit to confer on citizens under s.21 of the FOI Act.

26. Thus, if, in the present case, the Department had been satisfied that Mrs Holt was the legal owner of the audiotapes in its possession, I consider that it should have returned them to Mrs Holt on receipt of her demand for their return. That is a legal issue (dependent on the application of principles of property law) which, in theory, is quite distinct from the application of the FOI Act. The fact that the third parties had requested access to the audiotapes under the FOI Act would not, in my opinion, have afforded sufficient justification for denying or interfering with Mrs Holt's legitimate property rights. However, since the Department was not satisfied, after making relevant inquiries, whether the audiotapes in its possession were those owned by Mrs Holt or copies owned by the Department, I consider that it was proper for it to retain possession of the tapes to which the third parties had, *prima facie*, a legally enforceable right of access by virtue of the fact that the tapes were in the physical possession of the Department at the time that the third parties lodged the relevant FOI access application, and the fact that the Department had decided (subject to review by the Information Commissioner) that the tapes were not exempt from disclosure to the third parties.

27. It was open to Mrs Holt to commence legal proceedings to prove her ownership of the audiotapes, and if she was able to satisfy a court of her ownership, the Department would have been obliged to return the tapes to her on demand or on receipt of a court order. Mrs Holt had sufficient time to pursue that option while the Department was restrained from giving the third parties access to the audiotapes by the operation of s.51(2)(e) of the FOI Act, i.e., for so long as it took for the applicants' 'reverse FOI' applications to be finalised. If, however, I had decided in this case to affirm the Department's decision that the audiotapes were not exempt from disclosure to the third parties, and the audiotapes remained in the possession of the Department as at the date of my decision (Mrs Holt having failed to enforce her asserted right to possession of the tapes as their legal owner), then I consider that the third parties would have had a legally enforceable right of access to the audiotapes in accordance with s.21 of the FOI Act, for so long as the audiotapes remained in the possession of the Department.

28. I note that in this case, Mrs Holt's claim to ownership of the audiotapes apparently rests on the claim that she purchased the blank audiotapes used to record the discussion at the meeting of 6 February 1995, and later supplied the tapes to Mr Waldron only by way of temporary loan. Ordinarily, people who forward documents to government agencies, irrespective of whether they purchased the blank paper, blank tape or other material of record, do so on the basis that property in the document passes to the recipient agency which is to retain and use the document for its administrative purposes. I do not believe Mrs Holt has any legitimate claim to legal ownership of the information recorded on the audiotapes. (Whether she has any entitlement in equity to restrain the Department from disclosing the information in breach of an obligation of confidence owed to her by the Department is a separate issue.) If the Department, for its administrative purposes, had wished to make copies of the tapes on its own blank audiotapes, I do not think there was any impediment to its doing so (see paragraph 19 above). If it had done so prior to receipt of the third parties' relevant FOI access application, the Department's own copies would have been subject to that access application, and presumably the return to Mrs Holt of the audiotapes she claims to own would not have concerned the third parties, or affected their quest for access to a record of the discussions at the meeting of 6 February 1995.

29. I find that, regardless of the question of ownership of the audiotapes in issue, both the tapes, and Mr Waldron's notes, of the meeting on 6 February 1995 are "documents of an agency", which are subject to the application of the FOI Act. I am required, therefore, to determine whether or not they are exempt from disclosure to the third parties, as asserted by the applicants.

Application of s.46(1)(a)

30. The applicants claim that the matter in issue is exempt under s.46(1) of the FOI Act. I note that, under s.81 of the FOI Act, the ultimate legal onus is on the Department to justify its decision that the matter in issue is not exempt from disclosure to the third parties (although, this being a 'reverse FOI' application, there is also a practical onus on the applicants to ensure that there is sufficient material before me from which I can be satisfied that each element of the exemption provisions they rely upon is established: see *Re Pope and Queensland Health* (1994) 1 QAR 616 at pp.621-622, paragraph 17). The applicants appear to rely on both s.46(1)(a) and (b) in claiming exemption, but I do not find it necessary to consider the application of s.46(1)(b). Section 46(1)(a) of the FOI Act provides:

> ***46.(1)*** *Matter is exempt if—*
>
> *(a) its disclosure would found an action for breach of confidence; …*

31. I discussed the requirements for exemption under s.46(1)(a) in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279. There clearly was no contractual obligation of confidence between the applicants and Mr Waldron. The issue then is whether the circumstances in which information was communicated to Mr Waldron by the applicants at the meeting on 6 February 1995 gave rise to an equitable obligation of confidence binding Mr Waldron and the Department not to disclose that information to the third parties, without the authorisation of the applicants. In such a case, the test for exemption is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency faced with an application, under s.25 of the FOI Act, for access to the information in issue. It is my view that there are identifiable plaintiffs (the applicants) who would have standing to bring an action for breach of confidence. In *Re "B"*, I explained that there are five cumulative criteria which must be established to found an action in equity for breach of confidence:

(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"; i.e., the information must not be trivial or useless information and it must possess a degree of secrecy sufficient for it to be the subject of an obligation of conscience, arising from the circumstances in or through which the information was communicated or obtained (see *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).

32. I will deal with each of these requirements in turn.

Specific identification of the confidential information for which protection is sought

33. I am satisfied that criterion (a) is established, in that it is possible to specifically identify the information in issue.

The "necessary quality of confidence"

34. Both Mr Spring and Mr Parsons of the Department determined, in their respective decisions, that the matter in issue no longer retained the necessary quality of confidence. They found that the various topics discussed at the meeting had become known to a number of persons, and that the information therefore no longer possessed a degree of secrecy sufficient for it to be the subject of an obligation of confidence. On the evidentiary material available to me, I consider that those findings were mistaken.

35. The meeting between the applicants and Mr Waldron followed an earlier meeting between parents and an Acting Principal of the School in December 1994, at which complaints against teachers were raised. It is clear that teachers became aware of the identities of some parents who attended the earlier meeting, and some of the detail of the matters discussed. Following the earlier meeting, two of the applicants received letters from a firm of solicitors acting on behalf of certain teachers, in which defamation proceedings against the parents were threatened. This may explain why the applicants were concerned, at the outset of the subsequent meeting with Mr Waldron on 6 February 1995, to obtain express assurances of confidential treatment for information conveyed.

36. Shortly after the applicants' meeting with Mr Waldron on 6 February 1995, Ms Gray was appointed to conduct a formal investigation on behalf of the Department. On the basis of information supplied to my staff during initial inquiries with Ms Gray, it appeared that the fact that the nature of some complaints against teachers had become known to the teachers, did not necessarily indicate that the details of the information conveyed by the applicants at the meeting of 6 February 1995 had been disclosed to the third parties. I therefore requested that the Department provide me with information as to the course and outcome of the investigations conducted into the dispute at the School, and any information as to whether the specific details of the applicants' meeting with Mr Waldron were passed on to teachers, including the third parties.

37. In response, the Department supplied me with statutory declarations by Mr Waldron and Ms Gray. In his statutory declaration dated 16 May 1997, Mr Waldron stated:

> *I maintain that the 6 February 1995 meeting, at the time, had a high quality of confidence and that it was to deal with issues or actions and not personalities.*
> *Every effort was made to (a) ensure teachers' names weren't stated, and (b) that the level of confidence be maintained so that a solution to the situation remained possible.*
>
> ...
>
> *Any information was not passed on by me because there was no action directly attributed to any teacher. Every effort was made to ensure teachers were not named.*
>
> ...

My belief is that the meeting had a high degree of confidentiality and for me that confidentiality remains. Issues raised at the meeting may have been restated at other venues but to assume they were restated would possibly incur a breach of the original confidentiality. Once the investigation started the situation was out of my control, but personally, the meeting's discourse remained confidential. I cannot comment on the effects of subsequent events as the conduct of the investigation took the matter out of my control.

38. In her statutory declaration dated 14 May 1997, Ms Gray gave the following account of relevant aspects of the investigation and its conduct:

> *1. I was appointed, in 1995, to the role of investigation officer required to undertake the investigation of issues raised by parents against three teachers and the principal of Fig Tree Pocket State School.*
>
> *2. The investigation was conducted according to procedure outlined in the Public Sector Management Standard for Discipline. Of particular note in this investigation, was the application of an aspect of the Standard which permitted the withholding of information and the preparation of evidence in summary form where there may be a threat to the wellbeing of a witness. (Section 4.2.3 Pg. 29 PSM Standard for Discipline). This section of the Standard was put into effect because of overt threats to the parents that the employees would, after the investigation, take legal action against them.*
>
> *3. The relevant section of the Standard was put into effect through a process devised with* [legal advice]. *Through this process, both initial allegations of parents, and the evidence of parents to the inquiry, were "generalised". While the employees were aware of the nature of the allegations and could respond to them, particular allegations, and particular items of evidence, were not linked to particular parents.*
>
> *4. Shortly after the investigation was initiated, I was provided with an audiotape which, it was explained recorded a meeting between the principal of the school and some parents. I understand the meeting was held shortly before the formal investigation was initiated.*
>
> *5. In the role of investigating officer, I listened to the content of the tape at a stage of the investigation when allegations had already been "generalised". (It is of note that allegations were made by a group significantly larger than those who have been publicly associated with the investigation).*
>
> *6. The content of the tape contains specific allegations against teachers. As far as I can recall, no teacher was named. The information on the tape reiterated in broad terms that which was received through the investigative process. Thus the allegations on the tape were perceived to be involved in the already generalised allegations which were presented to the employees for response.*
>
> *...*
>
> *8. I did not share the contents of the tape with the teachers concerned. The contents of the tape were dealt with in the manner described in 6 above. In this way, the teachers had an opportunity to respond to allegations it contained.*

39. The significance of this evidence is that the information contained in the documents in issue has not been disclosed by Mr Waldron, or Ms Gray, to the third parties or others. Ms Gray listened to the tapes after she had already formulated "generalised" allegations against the Departmental officers subject to her investigation, based on the concerns expressed by a group of parents significantly larger than just the applicants. Ms Gray considered that the substance of the specific concerns discussed on the tapes was subsumed within, or adequately covered by, the "generalised" allegations already formulated to be put to the subjects of Ms Gray's investigation. Ms Gray therefore saw no need to put the specific concerns, and details of discussion, recorded on the tapes to the subjects of her investigation.

40. The third parties are aware of "generalised" allegations which adequately convey the substance of the concerns discussed on the audiotapes, and know that those "generalised" allegations reflect the concerns of a large group of parents. (In contrast, disclosure of the documents in issue would tie specific concerns to the applicants.) There is nothing before me to suggest that the contents of the tapes themselves, or Mr Waldron's notes of the meeting, have been made known to the third parties. In the circumstances, I consider that the matter in issue retains the "necessary quality of confidence", and criterion (b) set out in paragraph 31 above is satisfied.

Receipt of information in such circumstances as to import an obligation of confidence

41. In his initial decision on behalf of the Department, Mr Spring accepted that all of the participants in the meeting of 6 February 1995 understood that the information conveyed in the meeting was to be treated in confidence:

> *I considered that the meeting took place in circumstances of mutual confidence. The information was provided by the* [applicants] *under assurances that no teacher would have access to the contents of the conversation. It was also the expressed wish of the* [applicants] *(agreed to by the Principal) that no teacher would be singled out and blamed for any particular behaviour, and the* [applicants] *asserted that they never mentioned any teacher by name. ...*
>
> *... I agree that there was an initial mutual understanding of confidentiality.*

42. However, Mr Spring considered that the mutual understanding of confidentiality could not survive the application of the disclosure requirements in s.46 and s.65 of the *Public Service Management and Employment Regulation 1988*, and the requirements of natural justice. He found that criterion (c) set out in paragraph 31 above was not established.

43. The internal review decision-maker considered that statements in Mr Waldron's statutory declaration dated 28 April 1995 negated the existence of an equitable obligation of confidence.
I cannot see any statements in that statutory declaration which warranted that conclusion, and the statements in Mr Waldron's later statutory declaration dated 16 May 1997 (see paragraph 37 above) indicate that there was an express mutual understanding on the part of all the participants in the meeting on 6 February 1995 that the information discussed was to be treated in confidence.
I note also that each of the brief statutory declarations provided by the applicants describes the meeting with Mr Waldron as a "pre-arranged, confidential meeting". I consider that the available evidence supports those parts of Mr Spring's findings which are reproduced in paragraph 41 above.

44. As I stated in *Re "B"* (at paragraphs 92-93), a relevant consideration in determining whether the circumstances relating to the communication of confidential information to a government agency are such as to impose an equitable obligation of confidence on the recipient, is the use to which the government agency must reasonably be expected to put the information in the discharge of

its functions. It appears that at the time of the meeting Mr Waldron considered

he would be able to deal with the concerns raised by the parents by general strategies aimed at all teaching staff, without the need to pass on any details of what was discussed at the meeting. In that sense, I consider that it was reasonable for both Mr Waldron and the parents to understand that the meeting was conducted on a confidential basis.

45. From the evidence of Ms Gray as to the part which the audiotapes played in the conduct of her investigation, and the manner in which procedural fairness was afforded to the subjects of her investigation, I am satisfied that procedural fairness did not require disclosure of the audiotapes to the third parties, and was not a factor telling against recognition and enforcement by equity of the express mutual agreement, between the participants in the meeting of 6 February 1995, that the information provided by the applicants would be treated in confidence.

46. In his initial decision on behalf of the Department, Mr Spring regarded s.46 and s.65 of the *Public Service Management and Employment Regulation 1988* Qld (the PSME Regulation) as telling against the existence of, or perhaps overriding, an equitable obligation of confidence. Section 46 and s.65 of the PSME Regulation were renumbered in a subsequent reprint as s.99 and s.103, respectively. At the time of the meeting on 6 February 1995 (until they were superseded on 5 July 1997 by s.15 and s.16 of the *Public Service Regulation 1997* Qld), those provisions were in the following terms:

> ***Reports to be noted by officers***
>
> ***99.(1)*** *A report, item of correspondence or other document concerning the performance of an officer which could reasonably be considered to be detrimental to the interests of that officer, shall not be placed on any official files or records relating to that officer unless the officer has initialled the document and has been provided with—*
>
> *(a) a copy of the document; and*
>
> *(b) the opportunity to respond in writing to the contents of the document within 14 days of receipt of the copy.*
>
> ***(2)*** *When an officer responds in writing, the response shall also be placed on the official file or record.*
>
> ***(3)*** *Where an officer refuses to initial a document, it may nevertheless be placed on the file or record but the refusal shall be noted.*
>
> ***Access to officer's file***
>
> ***103.(1)*** *At a time and place convenient to the department, an officer shall be permitted to peruse any departmental file or record held on the officer.*
>
> ***(2)*** *The officer shall not be entitled to remove from that file or record any papers contained in it but shall be entitled to obtain a copy of it.*

47. I am satisfied, on the basis of my examination of the matter in issue and Mr Waldron's evidence, that Mr Waldron and the applicants went to some pains to ensure that no teacher was named in their discussion, and that behaviours rather than individuals were discussed, so that there was no obligation on Mr Waldron to disclose his records of the discussion to any particular teacher(s). I am satisfied that Mr Waldron had no intention of placing his notes of the discussion, or the

audiotapes if he had retained them, on any official files or records relating to a particular teacher or teachers, and that he did not do so. In response to my inquiry, the Department has confirmed that the third parties were not given access to the matter in issue pursuant to s.99 or s.103 of the PSME Regulation. As I have mentioned, Ms Gray stated in her statutory declaration that, during the course of her formal investigation, the third parties were provided with generalised, written allegations by parents and were given the opportunity to respond to those allegations. Ms Gray considered that disclosure of copies of the matter in issue to the third parties was not required for the purposes of her investigation.

48. In my view, the correct analysis of what occurred is that an equitable obligation of confidence binding Mr Waldron, and through him the Department, not to disclose the matter in issue without the authorisation of the applicants, came into existence with the express agreement for confidential treatment of the discussions at the meeting of 6 February 1995. No disclosure has yet occurred which is inconsistent with the continued existence of that obligation of confidence.

49. It is well established that an obligation of confidence, whether equitable or contractual, can be overridden by compulsion of law, in particular by a statutory provision compelling disclosure of information: see, for example, *Smorgon v ANZ, FCT v Smorgon* (1976) 134 CLR 475 at pp.486-490. The existence of a provision like s.99 of the PSME Regulation could arguably forestall the recognition and enforcement of an equitable obligation of confidence in respect of information that would be (or would inevitably become) subject to disclosure pursuant to an obligation imposed by statute or delegated legislation. However, for the reasons indicated at the commencement of paragraph 47 above, I do not consider that that was the case here.

50. Section 99 and s.103 of the PSME Regulation required the interpretation and application of some rather vague terms such as "official files or records relating to the officer" and "departmental file or record held on the officer". Moreover, under s.99 of the PSME Regulation, the obligation to disclose adverse information to an officer arose only at the point prior to placement of the adverse information on any official files or records relating to the officer. Disclosure under s.103 of the PSME Regulation was required only when an officer elected to exercise the entitlement conferred by s.103. An equitable obligation of confidence binding the Department not to disclose certain information may subsist until such time as it is overridden by the application of a provision in a statute or delegated legislation obliging disclosure. Unless and until the equitable obligation has been overridden in that way, it must still be given effect to in the application of s.46(1)(a) of the FOI Act.

51. Section 15 and s.16(2) of the *Public Service Regulation 1997* Qld, which came into force on 5 July 1997, have their own vagaries, but, generally speaking, they respectively re-state the obligation previously imposed on employing agencies by s.99 of the PSME Regulation, and the entitlement previously conferred on employees by s.103 of the PSME Regulation, in less qualified terms:

> ***Particular documents to be noted by employee before being placed on departmental records.***
>
> ***15.(1)*** *The employing authority must ensure that a report, correspondence item or any other document about a public service employee's performance that could reasonably be considered to be detrimental to the employee's interests, is not placed on a departmental record unless—*
>
> *(a) the employee has initialled the document or, if the employee refuses to initial it, the refusal is noted on the record; and*

(b) the employee has been given—

(i) a copy of the document; and
(ii) the opportunity to respond in writing to its contents within 14 days after receiving the copy.

***(2)** The employing authority must ensure that the employee's written response is placed on the record.*

***(3)** This section applies subject to section 10(5).*

Access to employee's record

***16(1)** ...*

***(2)** A public service employee may, at a time and place convenient to the relevant department—*

(a) inspect any departmental record about the employee; and

(b) take extracts from, or obtain a copy of details in, the record.

***(3)** The employee must not remove anything from the record.*

52. Section 16(2) of the *Public Service Regulation* would embrace any departmental record about a particular employee, regardless of when the record came into existence. The only potentially difficult aspect of its interpretation that might arise in some instances is whether a particular document requested by a public service employee is a departmental record about the employee (*cf. Re Price and Surveyors Board of Qld* (Information Commissioner Qld, Decision No. 97017, 27 October 1997, unreported) at paragraphs 26-29). However, s.16(2) of the *Public Service Regulation* is still a provision which only takes effect if and when an employee elects to exercise the entitlement which it confers. Thus, as explained at paragraph 50 above, the mere existence of s.16(2) of the *Public Service Regulation* should not ordinarily affect the recognition, in the application of s.46(1)(a) of the FOI Act, of an existing obligation of confidence.

53. An issue of interpretation similar to that described in the preceding paragraph could arise in respect of the words "about a public service employee's performance" in s.15(1) of the *Public Service Regulation*. There could also be instances where the precise ambit of the word "performance" becomes a material issue in the interpretation and application of s.15(1). I note, however, that s.15(1) no longer requires that a relevant document be about to be placed on "official files or records relating to that officer", but only on "a departmental record", before the obligation to make disclosure to the relevant employee arises. In my opinion, this wording significantly enlarges the circumstances in which s.15 of the *Public Service Regulation* arguably forestalls the recognition and enforcement of an equitable obligation of confidence (notwithstanding any express assurance of confidential treatment that might have been given to a confider by the recipient of information, on behalf of an agency which is subject to the application of the *Public Service Regulation*) capable of binding an agency in respect of information that would be or inevitably become subject to disclosure under s.15 of the *Public Service Regulation*. Indeed, it is arguable that it is now impossible for an agency subject to the application of the *Public Service Regulation* to receive information about an employee's performance, that could reasonably be considered to be detrimental to the employee's interests, on the basis of any agreement or understanding that it would be treated in confidence as against the employee.

54. Section 15 of the *Public Service Regulation* would not apply so as to now require the Department to disclose the documents in issue (assuming they could properly be regarded as "about a public service employee's performance" and "could reasonably be considered to be detrimental to the employee's interests") since they had already been placed on a Departmental record prior to 5 July 1997 (though apparently not on an official file or record relating to a particular officer or officers, so as to attract the application, prior to 5 July 1997, of s.99 of the PSME Regulation).

55. On the basis of the material before me, including the contents of the matter in issue, I consider that there was an express mutual understanding among those present at the meeting of 6 February 1995, that information conveyed in the meeting would be kept confidential. The meeting was intended to address general concerns held by the parents. It is clear that Mr Waldron sought to adopt a broad approach to the issues raised, by addressing general issues of teacher behaviour rather than singling out individual teachers or complaints. I consider that it was reasonable for Mr Waldron to believe that he could address the concerns raised at the meeting by way of implementing general initiatives with teaching staff, without the need to disclose to individual teaching staff the details of what occurred at the meeting. It is true that some references were made to particular situations from which individual teachers could be identified by persons with knowledge of those situations, but in my view, those instances were used as illustrations of general problems, rather than being specific complaints about individual teachers, which the parents sought to have recorded or investigated.

56. I find that the matter in issue was communicated in such circumstances as to fix Mr Waldron and the Department with an equitable obligation of conscience not to disclose the matter in issue to the third parties, without the consent of the applicants. I am not satisfied that anything has subsequently occurred that would prevent the continued recognition and enforcement in equity of that obligation of confidence. I find that criterion (c) set out in paragraph 31 above is satisfied.

Actual or threatened misuse of confidential information

57. As the applicants continue to object to disclosure of the matter in issue, I find that criterion (d) set out in paragraph 31 above is satisfied and that disclosure of the matter in issue to the third parties would constitute a misuse, or unauthorised use, of the matter in issue.

Detriment to the confider

58. Turning to the final requirement of s.46(1)(a) - that detriment is likely to be occasioned to the applicants if the matter in issue were to be disclosed - I stated at paragraph 111 of *Re "B"* that such detriment is fairly easily established:

> *In particular, it is not necessary to establish that threatened disclosure will cause detriment in a pecuniary sense: detriment can be as ephemeral as embarrassment... a loss of privacy or fear... and indirect detriment, for example, that confidential information may gravely injure some relation or friend.*"

I find that criterion (e) set out in paragraph 31 is also satisfied.

59. Since I am satisfied that all the criteria necessary to found an action in equity for breach of confidence are established, I find that the matter in issue is exempt matter under s.46(1)(a) of the FOI Act.

Conclusion

60. For the foregoing reasons, I set aside the decision under review. In substitution for it, I decide that—

(a) the audiotapes in issue fall within the definition of "document of an agency" in s.7 of the FOI Act, and are subject to the application of the FOI Act while they remain in the physical possession of the Department; and

(b) the matter in issue is exempt matter under s.46(1)(a) of the FOI Act.

.....
F N ALBIETZ
INFORMATION COMMISSIONER